SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 8, 2013

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

217

CA 12-00964

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND MARTOCHE, JJ.

TODD R. GREENERT, PLAINTIFF,

V ORDER

SALES ASSOCIATES OF WNY, LLC, ET AL.,
DEFENDANTS.

SALES ASSOCIATES OF WNY, LLC,
THIRD-PARTY PLAINTIFF-APPELLANT,

V

EDWARD H. DAVIS, JR., KATERI M. DAVIS
AND JEFFREY PILGER,
THIRD-PARTY DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

WALSH ROBERTS & GRACE, BUFFALO (KEITH N. BOND OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS EDWARD H. DAVIS, JR. AND KATERI M. DAVIS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 3, 2011. The order, among other things, granted the motion of third-party defendants Edward H. Davis, Jr. and Kateri M. Davis for summary judgment dismissing the third-party complaint of third-party plaintiff Sales Associates of WNY, LLC, against them.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on October 16, 2013,

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

All concur except MARTOCHE, J., who is not participating.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

218

CA 12-00966

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND MARTOCHE, JJ.

TODD R. GREENERT, PLAINTIFF-RESPONDENT,

V ORDER

SALES ASSOCIATES OF WNY, LLC, THE BARDEN & ROBESON CORP., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR DEFENDANT-APPELLANT THE BARDEN & ROBESON CORP.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-APPELLANT SALES ASSOCIATES OF WNY, LLC.

CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 16, 2012. The order granted plaintiff's motion for partial summary judgment on the issue of liability against defendants Sales Associates of WNY, LLC and The Barden & Robeson Corp.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on October 16, 2013,

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

All concur except MARTOCHE, J., who is not participating.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

219

CA 12-00967

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND MARTOCHE, JJ.

TODD R. GREENERT, PLAINTIFF,

V ORDER

SALES ASSOCIATES OF WNY, LLC,
DEFENDANT-APPELLANT,
JEFFREY EZZO, INDIVIDUALLY AND DOING
BUSINESS AS NEIGHBOR JEFF CONSTRUCTION,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS,
(APPEAL NO. 3.)

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD P. PLOCHOCKI, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered March 9, 2012. The order granted the motion of defendant Jeffrey Ezzo, individually and doing business as Neighbor Jeff Construction for summary judgment dismissing the complaint and all cross claims against him.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on October 16, 2013,

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

All concur except MARTOCHE, J., who is not participating.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

857

CA 13-00319

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

PREFERRED MUTUAL INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN DONNELLY, ET AL., DEFENDANTS,
AND ROBERT JACKSON, DEFENDANT-APPELLANT.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (JOSEPH M. SCHNITTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered November 14, 2012. The judgment, inter alia, granted the motion of plaintiff insofar as it sought summary judgment declaring that plaintiff has no duty to defend or indemnify its insured, defendant John Donnelly, in a personal injury action commenced by defendant Robert Jackson against Donnelly and others.

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

Memorandum: Contrary to the contention of defendant Robert Jackson, Supreme Court properly granted plaintiff's motion insofar as it sought summary judgment declaring that plaintiff has no duty to defend or indemnify its insured, defendant John Donnelly, in a personal injury action brought by Jackson against, inter alia, Donnelly. From June 1995 until December 1995, Jackson lived in a home owned by Donnelly, who had obtained a landlord's insurance policy from plaintiff. The policy was renewable each year during the three-year period from June 1993 through June 1996. It is undisputed that, when the policy was initially written, it did not contain any exclusion of coverage for bodily injury sustained as a result of lead poisoning. That exclusion was added to the policy when it was renewed in June 1994. The exclusion provided, in relevant part, that plaintiff would "not pay for loss resulting directly or indirectly from *bodily injury* . . . resulting from inhalation or ingestion of dust, chips or other residues of lead or lead based materials adorning the interior or exterior of the covered building(s)."

We conclude that plaintiff met its initial burden of establishing

that the lead exclusion was properly added to the policy and that notice of the lead exclusion amendment was provided to Donnelly. Contrary to Jackson's contention, plaintiff submitted evidence in admissible form to support its motion. Although many of the documents appended to the attorney affirmation were not in admissible form (*see KOI Med. Acupuncture v State Farm Ins. Co.*, 16 Misc 3d 1135[A], 2007 NY Slip Op 51705[U], *2; *see generally* CPLR 4518 [a]), we conclude that the affidavit from plaintiff's Office Services Supervisor was sufficient to lay a proper foundation for the business records attached thereto (*see* CPLR 4518 [a]; *cf. Unifund CCR Partners v Youngman*, 89 AD3d 1377, 1378, *lv denied* 19 NY3d 803; *Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1330-1331; *see generally People v Kennedy*, 68 NY2d 569, 579-580).

With respect to the substance of the attachments, we conclude that the documents established as a matter of law that the lead exclusion was properly added to Donnelly's insurance policy and that Donnelly was notified of that amendment. Although plaintiff did not submit evidence that the notice of the amendment was mailed to Donnelly and Donnelly could not recall receiving the notice, plaintiff submitted evidence in admissible form "of a standard office practice or procedure designed to ensure that items are properly addressed and mailed," thereby giving rise to a presumption that Donnelly received the notice (*Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680; *see Nocella v Fort Dearborn Life Ins. Co. of N.Y.*, 99 AD3d 877, 878). Contrary to the contention of Jackson, the evidence submitted by plaintiff established that the "office practice [was] geared so as to ensure the likelihood that [the] notice[s of amendment] . . . [were] always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830; *see Badio v Liberty Mut. Fire Ins. Co.*, 12 AD3d 229, 229-230; *cf. Hospital for Joint Diseases v Nationwide Mut. Ins. Co.*, 284 AD2d 374, 375). Specifically, the evidence established the procedure used by plaintiff for generating notices whenever an insurance policy was amended, and the documentary evidence established that a notice was generated for Donnelly's policy during the year in which the lead exclusion was added to the policy. In addition, plaintiff submitted evidence that it placed the notices in envelopes with windows so that the address on the notice was the one used for mailing. The envelopes were then delivered to the mail room, where they were sealed and the appropriate postage was added. Thereafter, the mail was hand delivered to the post office that was located adjacent to plaintiff's parking lot.

While we agree with the dissent that there was no evidence submitted of a practice to ensure that the number of envelopes delivered to the mail room corresponded to the number of envelopes delivered to the post office (*see Clark v Columbian Mut. Life Ins. Co.*, 221 AD2d 227, 228-229; *Matter of Lumbermens Mut. Cas. Co. [Collins]*, 135 AD2d 373, 375; *cf. Matter of State-Wide Ins. Co. v Simmons*, 201 AD2d 655, 656), we do not deem the absence of such evidence fatal to plaintiff's motion in light of the detailed description of all of the other office practices geared toward ensuring the likelihood that the notices were always properly addressed and mailed (*cf. Hospital for Joint Diseases*, 284 AD2d at

375; *L.Z.R. Raphaely Galleries v Lumbermens Mut. Cas. Co.*, 191 AD2d 680, 681-682; *Lumbermens Mut. Cas. Co.*, 135 AD2d at 374-375). Additionally, "[a]s long as there is adequate [evidence from] one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing" (*Lumbermens Mut. Cas. Co.*, 135 AD2d at 375). Here, plaintiff submitted evidence from someone with personal knowledge concerning the specific procedures used by plaintiff to ensure that the addresses on the envelopes were accurate and concerning the "office procedures relating to the delivery of mail to the post office" (*id.*). In opposition to the motion, Jackson failed to raise a triable issue of fact "that [the] routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (*Nassau Ins. Co.*, 46 NY2d at 830).

Contrary to Jackson's further contention, the lead exclusion does not violate public policy. As noted by both this Court and the Court of Appeals, "[t]here is no statutory requirement for the full panoply of coverages known as homeowner's insurance and hence 'no prohibition against such insurers limiting their contractual liability' " (*Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 295, quoting *Suba v State Farm Fire & Cas. Co.*, 114 AD2d 280, 284, *lv denied* 67 NY2d 610, *appeal dismissed* 68 NY2d 665). Thus, the mere fact that a landlord is required to keep his or her property in a habitable condition pursuant to Real Property Law § 235-b " 'cannot be construed as a holding that public policy requires the responsible party to be covered by insurance or that an insurance company cannot exclude liability for that particular [condition]' " (*Suba*, 114 AD2d at 284). We further conclude that the lead exclusion is not inconsistent with state and local building code provisions or with other provisions of the insurance policy, each of which requires landlords to use a protective coating of paint to guard against deterioration (*see e.g.* State Uniform Fire Prevention and Building Code §§ 1242.5, 1242.7; City of Utica Code § 210). While such provisions require the use of paint, they do not require the use of lead-based paint, and thus they are not inconsistent with the policy's lead exclusion.

Contrary to the contention of Jackson, the terms of the lead exclusion are not ambiguous and should be enforced. Generally, "[i]nsurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122; *see Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708). "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652). We agree with plaintiff that the lead exclusion is stated in clear and unmistakable language and is not subject to any other reasonable interpretation. While Jackson contends that the use of the word "adorn" in the lead exclusion limits its application to decorative paint such as murals and frescos, we reject that contention. According to the clear and unmistakable language of the insurance policy, the lead-based paint at issue adorned the interior of the

residence.

Finally, we conclude that plaintiff neither waived its right to assert the lead exclusion nor is estopped from asserting that exclusion. "Waiver is an intentional relinquishment of a known right and should not be lightly presumed" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968). Although plaintiff settled a prior lawsuit involving Jackson's sibling, that settlement was executed before this action was commenced and involved a child who lived at the residence on different dates. We thus conclude that there is "no evidence from which a clear manifestation of intent by [plaintiff] to relinquish the protection of the contractual [exclusion] could be reasonably inferred" (*id.*; *see Matter of Progressive Northeastern Ins. Co. [Heath]*, 41 AD3d 1321, 1322). We have reviewed Jackson's remaining contentions concerning estoppel and conclude that they are without merit.

All concur except CARNI and WHALEN, JJ., who dissent and vote to modify in accordance with the following Memorandum: Defendant Robert Jackson appeals from a judgment that granted plaintiff's motion for, inter alia, summary judgment declaring that plaintiff had no duty to defend or indemnify its insured, defendant John Donnelly, in a personal injury action brought by Jackson against Donnelly and others. As relevant to this appeal, the judgment also denied Jackson's cross motion for, inter alia, summary judgment declaring that plaintiff is obligated to defend and indemnify Donnelly in the underlying action.

We respectfully disagree with the majority's conclusion that Supreme Court properly granted plaintiff's motion insofar as it sought summary judgment because plaintiff met its burden of establishing as a matter of law that Donnelly was notified that a lead exclusion was added to his insurance policy. As the majority notes, a presumption that Donnelly received notice of the lead exclusion is created if plaintiff presents evidence that its "office practice [was] geared so as to ensure the likelihood that [the] notice[s] . . . [were] always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830; *see Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680; *Abuhamra v New York Mut. Underwriters*, 170 AD2d 1003, 1003). Although we agree with the majority that plaintiff presented evidence of its procedure to ensure that notices were properly compiled and addressed, we disagree that the evidence submitted by plaintiff established that it had a standard office procedure to ensure that notices were always properly mailed. Plaintiff submitted the affidavit of its former Office Services Supervisor, in which the supervisor stated that, after the disclosure notices and policy amendments were compiled, the documents were inserted into a "window envelope" that was to be mailed to the insured and the insured's agent. The next business day, the envelopes would be taken to the mail room, after which a mail room employee would add postage, seal the envelopes, and take them to the post office.

Plaintiff offered no evidence regarding how it ensured that all of the envelopes that should have been mailed were delivered to the mail room or how it ensured that all of the envelopes that were

delivered to the mail room were, in fact, mailed. There was no showing, for example, that mail room employees checked the number of envelopes to be mailed against a mailing list or internal report to ensure "that the total number of envelopes matched the number of names on the mailing list" (*Clark v Columbian Mut. Life Ins. Co.*, 221 AD2d 227, 229 [internal quotation marks omitted]; *see L.Z.R. Raphaely Galleries v Lumbermens Mut. Cas. Co.*, 191 AD2d 680, 681-682; *Matter of Lumbermens Mut. Cas. Co. [Collins]*, 135 AD2d 373, 375; *cf. Badio v Liberty Mut. Fire Ins. Co.*, 12 AD3d 229, 230; *Matter of State-Wide Ins. Co. v Simmons*, 201 AD2d 655, 656). Without evidence that plaintiff took any measures to ensure that all of the notices were in fact mailed, we conclude that plaintiff's submissions were insufficient to establish as a matter of law that its standard office procedures were "geared so as to ensure the likelihood that a notice of [amendment] is always properly . . . mailed" (*Nassau Ins. Co.*, 46 NY2d at 830). We respectfully disagree with the majority's conclusion that the absence of evidence of such internal verification procedures is not fatal to plaintiff's motion insofar as it sought summary judgment. The presumption of receipt arises only if plaintiff's office practice ensured that the notices were "always properly addressed *and* mailed" (*id.* [emphasis added]). Thus, we conclude that plaintiff's evidence was insufficient to give rise to the presumption of receipt and that the court therefore erred in granting plaintiff's motion insofar as it sought summary judgment. Consequently, we would modify the judgment by denying plaintiff's motion insofar as it sought summary judgment declaring that plaintiff had no duty to defend or indemnify Donnelly in the underlying action.

We otherwise agree with the analysis of the majority, and we further conclude that Jackson failed to meet his initial burden on that part of his cross motion seeking summary judgment declaring that plaintiff is obligated to defend and indemnify Donnelly in the underlying action. We thus conclude that the court properly denied that part of the cross motion.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

877

CA 12-02384

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

JEROME BURGESS, II AND JUSTIN RELIFORD,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MALCOLM MEYER AND PETER MONACELLI,
DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 23, 2012. The order, inter alia, denied those parts of the cross motion of plaintiffs for partial summary judgment on the issue of liability, for an order taking judicial notice of certain statutes and regulations and for dismissal of certain affirmative defenses asserted by defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiffs' cross motion in part and dismissing the 3rd, 15th, 17th, and 29th affirmative defenses, dismissing the 13th affirmative defense insofar as it alleges that plaintiffs failed to mitigate their damages prior to the time that they could be held responsible for their actions, and conforming the order to the decision by providing that the 27th affirmative defense is withdrawn, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they allegedly sustained as a result of their exposure to lead paint as children while living in premises owned by defendants. We reject plaintiffs' contention that Supreme Court erred in denying that part of their cross motion seeking an order taking judicial notice of 42 USC § 4851, Public Health Law § 1370 *et seq.*, Real Property Law § 235-b, 10 NYCRR part 67, and the New York State Department of Health guidelines for the removal of lead paint hazards. Contrary to plaintiffs' contention, those statutes, regulations, and guidelines do not establish as a matter of law that defendants had notice of a dangerous condition or that defendants are liable. Rather, the factors set forth in *Chapman v Silber* (97 NY2d 9, 20-21) "remain the bases for determining whether . . . [defendants] knew or

should have known of the existence of a hazardous lead paint condition and thus may be held liable in a lead paint case" (*Watson v Priore*, 104 AD3d 1304, 1305; *see Pagan v Rafter*, 107 AD3d 1505, 1507). We reject plaintiffs' further contention that the court erred in denying that part of their cross motion seeking partial summary judgment on the issue of liability. Plaintiffs' own submissions raised an issue of fact whether defendants had notice of a hazardous lead paint condition, and plaintiffs thus failed to establish as a matter of law that defendants are liable (*see Chapman*, 97 NY2d at 15; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We conclude, however, that the court erred in denying that part of plaintiffs' cross motion seeking to dismiss defendants' 3rd and 29th affirmative defenses, which allege, inter alia, culpable conduct on the part of plaintiffs' parents, because those defenses sound in negligent parental supervision (*see Sykes v Roth*, 101 AD3d 1673, 1674; *M.F. v Delaney*, 37 AD3d 1103, 1105; *Christopher M. v Pyle*, 34 AD3d 1286, 1287). Insofar as defendants' 29th affirmative defense also alleges plaintiffs' ratification of, consent to, or acquiescence in defendants' alleged acts or omissions, that defense should have been dismissed because plaintiffs were non sui juris as a matter of law (*see Van Wert v Randall*, 100 AD3d 1079, 1081; *M.F.*, 37 AD3d at 1104-1105). We further conclude that the court should have dismissed the 13th affirmative defense insofar as it "allege[s] that plaintiff[s] failed to mitigate [their] damages prior to the time that [they] could be held responsible for [their] actions" (*Watson*, 104 AD3d at 1306; *see Sykes*, 101 AD3d at 1674; *Cunningham v Anderson*, 85 AD3d 1370, 1372, *lv dismissed in part and denied in part* 17 NY3d 948). The court also should have dismissed the 15th and 17th affirmative defenses, which alleged, inter alia, that plaintiffs' parents created or exacerbated the hazardous lead paint condition, because those defenses have no merit inasmuch as there is no factual support for them in the record (*see* CPLR 3211 [b]; *cf. Connelly v Warner*, 248 AD2d 941, 943). We therefore modify the order accordingly. We reject plaintiffs' contentions with respect to the remaining affirmative defenses.

Finally, we note that, although defendants voluntarily withdrew their 27th affirmative defense, the court in its order denied that part of plaintiffs' cross motion seeking to dismiss that defense. The court's written decision, however, properly reflects that defendants had withdrawn that defense voluntarily. "Where, as here, there is a conflict between an order and a decision, the decision controls" (*Wilson v Colosimo*, 101 AD3d 1765, 1766 [internal quotation marks omitted]). We therefore further modify the order accordingly.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

910

CA 12-01497

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

PHILLIP DEL NERO, PLAINTIFF-APPELLANT,

V ORDER

MARK COLVIN, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (ROBERT K. WEILER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (KEVIN R. VAN DUSER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered March 14, 2012. The order, among other things, granted the motion of defendant for summary judgment dismissing the second amended complaint.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

911

CA 12-01639

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

PHILLIP DEL NERO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK COLVIN, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (ROBERT K. WEILER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (KEVIN R. VAN DUSER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered June 21, 2012. The order granted the motion of plaintiff for leave to reargue, and upon reargument, the court adhered to its original order entered March 14, 2012.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion except insofar as it sought summary judgment dismissing the seventh cause of action and reinstating the second amended complaint to that extent and vacating the third and fourth ordering paragraphs, and by granting that part of plaintiff's cross motion with respect to the fifth cause of action, and as modified the order is affirmed without costs.

Memorandum: The parties are financial planners who previously were associated with Ameriprise Financial Services, Inc. (Ameriprise). After Ameriprise advised plaintiff that his franchise was being terminated effective June 30, 2009, the parties entered into an "agreement for purchase and sale of practice" (Agreement), whereby defendant would purchase plaintiff's book of business for $511,000, to be paid at a rate of $7,000 per month over a 73-month period. The Agreement contained a one-year covenant not to compete stating that, if plaintiff, his sister, his mother, "or anyone associated with these individuals solicits the clients covered under this Agreement, then, at the sole discretion of [defendant], as liquidated damages, all future payments from the date of any such contact under the terms of this Agreement will be considered paid in full and no future payments will be made." Defendant made two payments under the Agreement, but then refused to make additional payments on the ground that plaintiff or his relatives had violated the covenant not to compete. Plaintiff commenced this action seeking, inter alia, damages for breach of contract in the amount of the balance due under the Agreement and a

determination that the liquidated damages provision was an unenforceable penalty. Defendant asserted a counterclaim for breach of contract and sought, among other relief, liquidated damages as well as "direct, incidental and/or consequential damages."

Plaintiff appeals from an order in which Supreme Court, upon granting plaintiff's motion for leave to reargue, adhered to its prior decision denying plaintiff's cross motion for summary judgment and granting defendant's motion for summary judgment dismissing the second amended complaint and for summary judgment on his counterclaim "solely to the extent that defendant . . . is discharged from any obligations under the contract." The order further provided that defendant is not entitled to any damages on his counterclaim "over and above liquidated damages."

We conclude that the court erred in granting defendant's motion except for that part seeking summary judgment dismissing the second amended complaint with respect to the seventh cause of action, which sought damages for unjust enrichment. In support of the motion, defendant contended, inter alia, that the covenant not to compete was reasonable and encompassed plaintiff's actions. In order to establish his entitlement to summary judgment in this case, involving the interpretation of a contract, defendant had "the burden of establishing that the construction [he] favors is the only construction which can fairly be placed thereon" (*Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923 [internal quotation marks omitted]; *see Morales v Asarese Matters Community Ctr.* [appeal No. 2], 103 AD3d 1262, 1263-1264, *lv dismissed* 21 NY3d 1033; *Kibler v Gillard Constr., Inc.*, 53 AD3d 1040, 1042). We conclude, however, that the covenant not to compete is ambiguous concerning the scope of the activity that is prohibited, e.g., whether the covenant not to compete prohibits plaintiff from providing his former clients with tax and business advice. Inasmuch as defendant failed to meet his burden with respect to the scope of prohibited activity and thus whether plaintiff engaged in prohibited conduct, " 'the intent of the parties must be determined by evidence outside the contract,' rendering summary judgment at this juncture inappropriate" (*Suburban Tool & Die Co., Inc. v Century Mold Co., Inc.*, 78 AD3d 1530, 1531). With respect to the seventh cause of action, i.e., the quasi contract cause of action, however, we note that "the existence of a valid contract . . . generally precludes recovery in quasi contract for events arising out of the same subject matter" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23). Here, the Agreement governs the sale of the practice, and thus the court properly granted that part of defendant's motion. Consequently, we modify the order by denying defendant's motion except insofar as it sought summary judgment dismissing the seventh cause of action, and we vacate the third ordering paragraph, which granted in part defendant's motion for summary judgment with respect to the counterclaim.

We also agree with plaintiff with respect to defendant's counterclaim that the liquidated damages clause is an unenforceable penalty. Liquidated damages are enforceable only to the extent that they constitute " 'an estimate, made by the parties at the time they

enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement' " (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380). Typically, a liquidated damages clause is enforceable if the stipulated amount of damages "bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation" (*Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425; *see G3-Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37, 41). However, if the clause provides for damages " 'plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced' " (*JMD Holding Corp.*, 4 NY3d at 380).

Here, although the amount of actual damages is incapable of precise estimation, the amount of liquidated damages was grossly disproportionate to the probable loss and was designed to penalize plaintiff for his interference with the Agreement, as well as the interference of others with the Agreement. Moreover, the liquidated damages clause here eliminates the balance due under the Agreement based on minor breaches of the covenant not to compete such that it is an "unconscionable penalty and should not be enforced" (*Clubb v ANC Heating & A.C.*, 251 AD2d 956, 958). We therefore further modify the order by vacating the fourth ordering paragraph, which in effect determined that the liquidated damages provision is enforceable. We instead conclude that, in the event that it is determined that there was a breach of contract, the extent of the damages arising therefrom should likewise be determined by the trier of fact.

Finally, we note that the court properly determined in its decision that the covenant not to compete was unreasonable insofar as it purported to bind "independent third parties," i.e., plaintiff's sister or mother, or "anyone associated with" them, to the Agreement (*see generally Kraft Agency v Delmonico*, 110 AD2d 177, 181-184). Although the order does not so specify, we conclude that the court thereby granted that part of plaintiff's cross motion with respect to the fifth cause of action, seeking a determination that the covenant not to compete was unenforceable to that extent (*see generally BDO Seidman v Hirshberg*, 93 NY2d 382, 394-395). Where there is a conflict between the order and the decision upon which it is based, the decision controls (*see generally Matter of Edward V.*, 204 AD2d 1060, 1061), and the order "must be modified to conform to the decision" (*Waul v State of New York*, 27 AD3d 1114, 1115, *lv denied* 7 NY3d 705). Thus, we further modify the order by granting that part of plaintiff's cross motion with respect to the fifth cause of action.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

924

KA 12-00296

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON CAMPBELL, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHANNON CAMPBELL, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 24, 2012. Defendant was resentenced upon his conviction of sexual abuse in the first degree, rape in the first degree (three counts), endangering the welfare of a child (three counts), sodomy in the first degree (three counts) and incest.

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

Memorandum: Defendant was convicted following a jury trial of, inter alia, three counts each of rape in the first degree (Penal Law § 130.35 [3]) and sodomy in the first degree (former § 130.50 [3]). On a prior appeal, we affirmed the judgment of conviction (*People v Campbell*, 286 AD2d 979, *lv denied* 97 NY2d 702), and defendant now appeals from a resentence pursuant to Correction Law § 601-d and Penal Law § 70.85. Defendant failed to preserve for our review his contention that Supreme Court erred in failing to order an updated presentence report "inasmuch as he never requested such an update, objected to the presentence report at the resentencing, or moved to vacate the resentencing on that ground" (*People v Lard*, 71 AD3d 1464, 1465, *lv denied* 14 NY3d 889). In any event, defendant's contention is without merit. "[T]he decision whether to obtain an updated [presentence] report at resentencing is a matter resting in the sound discretion of the sentencing [court] . . . Where, as here, [the] defendant has been continually incarcerated between the time of the initial sentencing and resentencing, to require an update . . . does not advance the purpose of CPL 390.20 (1)" (*id.* [internal quotation marks omitted]; *see People v Cobado*, 104 AD3d 1322, 1322-1323; *see generally People v Kuey*, 83 NY2d 278, 282-283). We reject defendant's

further contention that the imposition of five-year periods of postrelease supervision (PRS) is unduly harsh and severe, but we note, as we did in the original appeal, that the aggregate sentence of 75 years of incarceration is reduced by operation of law to 50 years (*see* Penal Law § 70.30 [1] [e] [vi]).

We do not address any of the contentions raised by defendant in his pro se supplemental brief inasmuch as they concern matters related to the original proceeding. "Where, as here, the resentence is conducted for the purpose of rectifying a *Sparber* error—that is, an error in failing to impose a required period of PRS (*see People v Sparber*, 10 NY3d 457, 464-465)—'[t]he defendant's right to appeal is limited to the correction of errors or the abuse of discretion at the resentencing proceeding' " (*People v Howard*, 96 AD3d 1701, 1702, *lv denied* 19 NY3d 1103, quoting *People v Lingle*, 16 NY3d 621, 635).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

942

KA 11-01834

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD MORGAN, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 20, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, grand larceny in the third degree, criminal possession of a forged instrument in the second degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and as a matter of discretion in the interest of justice, a new trial is granted on counts one and three of the indictment, and counts two and four of the indictment are dismissed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), grand larceny in the third degree (former § 155.35), criminal possession of a forged instrument in the second degree (§ 170.25), and criminal possession of a controlled substance in the seventh degree (§ 220.03). Defendant was convicted upon a retrial after we reversed the first judgment of conviction based on a *Batson* violation (*People v Morgan*, 75 AD3d 1050, 1051-1053, *lv denied* 15 NY3d 894). Although on the prior appeal we did not need to address on the merits defendant's contention that he was deprived of a fair trial by prosecutorial misconduct inasmuch as we granted a new trial on *Batson* grounds, we nevertheless "note[d] our strong disapproval of the misconduct of the prosecutor on summation in improperly shifting the burden of proof onto defendant and in improperly vouching for the credibility of the People's witnesses" (*id.* at 1053). We noted that, "[a]mong other objectionable remarks, the prosecutor stated on summation that '[t]he only way that you can find the defendant not guilty of burglary is if you believe that he falsely admitted to a crime that he didn't commit[,]' " and that, " ' to believe what

[defendant] want[s] you to believe, you have to conclude that [two police detectives] are liars. Two police officers with forty years of experience between them . . . They're going to come in here and perjure themselves on the stand, and risk prosecution themselves, for what? For this?' " (*id.* at 1053-1054).

On this appeal, defendant again contends that reversal is warranted based upon prosecutorial misconduct on summation, and we agree. Despite our prior admonition on defendant's first appeal, the prosecutor on retrial repeated some of the improper comments from the first summation and made additional comments that we conclude are improper. The prosecutor improperly denigrated the defense and defense counsel, repeatedly characterizing the defense as "noise," "nonsense" and a "distraction[]," and arguing that defense counsel was fabricating facts and attempting to mislead the jury (*see People v Miller*, 104 AD3d 1223, 1223-1224, *lv denied* 21 NY3d 1017; *People v Lopez*, 96 AD3d 1621, 1622, *lv denied* 19 NY3d 998; *People v Spann*, 82 AD3d 1013, 1015). In one of the more troubling passages in her summation, the prosecutor stated, "You are here for the People of the State of New York versus [defendant] . . . It is not about who isn't sitting at the defense table, it is about who is. Are you buying it? Because that's what they're selling. Theories disguised as arguments and posturing as evidence. And I'm not suggesting the defendant has the burden of proving anything because the burden rests with the People, but by the same token, it doesn't give counsel license to make stuff up and pretend that it's evidence. They all have something in common. These theories, they're noise, they're nonsense. They want you to be distracted. Do not be distracted."

In addition, the prosecutor misstated the evidence and the law (*see People v Riback*, 13 NY3d 416, 423; *Spann*, 82 AD3d at 1015-1016; *People v Hetherington*, 229 AD2d 916, 917, *lv denied* 88 NY2d 1021), made an inappropriate "guilt by association" argument (*see People v Parker*, 178 AD2d 665, 666), and improperly characterized the case as "about finding the truth and it is as simple as that" (*see People v Ward*, 107 AD3d 1605, 1606-1607; *People v Benedetto*, 294 AD2d 958, 959; *People v Smith*, 184 AD2d 326, 326, *lv denied* 80 NY2d 910). Perhaps the prosecutor's most egregious misconduct occurred when she made herself an unsworn witness and injected the integrity of the District Attorney's office into the case (*see People v Moye*, 12 NY3d 743, 744; *People v Clark*, 195 AD2d 988, 990). With respect to a chief prosecution witness, who did not testify at the first trial and who turned herself in on a warrant the day prior to her testimony, the prosecutor stated: "When she arrived at our offices, she was escorted over to Buffalo City Court because she had a warrant, because that's what you have to do, and she was released on her own recognizance by the judge. *And let me be very clear here when we talk about promises to witnesses or benefits that they received. Let me be very clear. Neither myself, nor [the other prosecuting attorney], nor anyone from our office, ever promised her anything in exchange for her testimony*" (emphasis added). The Court of Appeals condemned similar comments by the prosecutor in *People v Carter* (40 NY2d 933, 934-935).

In light of the foregoing, we conclude that reversal is warranted based on the pervasive and at times egregious misconduct on summation, particularly in light of our previous admonition to the People in this matter (*see Spann*, 82 AD3d at 1015-1016; *People v Wlasiuk*, 32 AD3d 674, 681, *lv dismissed* 7 NY3d 871). In short, as we said more than 15 years ago, "[i]t would seem, by now, unnecessary to emphasize again that the duty of the prosecutor is to honor established legal principles, not to secure a conviction by any and all means" (*People v Paul*, 229 AD2d 932, 933).

We further agree with defendant that the evidence is legally insufficient to support the conviction of grand larceny in the third degree because there is insufficient evidence that the value of the stolen property exceeded $3,000 (*see* Penal Law former § 155.35). Although defendant failed to preserve that contention for our review (*see People v Snyder*, 100 AD3d 1367, 1367-1368, *lv denied* 21 NY3d 1010), we nevertheless exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The value of stolen property is "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime" (Penal Law § 155.20 [1]). It is well established that "a victim must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value" (*People v Lopez*, 79 NY2d 402, 404), and that "[c]onclusory statements and rough estimates of value are not sufficient" (*People v Loomis*, 56 AD3d 1046, 1047).

Here, the stolen property consisted of a PlayStation video game console, video games, DVDs, a laptop, an external hard drive, and other miscellaneous computer equipment. The victim testified that the value of the laptop was "about $2,000" and that he "had it for less than a year" before the burglary, but he did not testify as to the purchase price, the condition of the laptop, or the cost to replace it (*see People v Geroyianis*, 96 AD3d 1641, 1643-1644, *lv denied* 19 NY3d 996, *reconsideration denied* 19 NY3d 1102; *People v Vandenburg*, 254 AD2d 532, 534, *lv denied* 93 NY2d 858). As for the PlayStation, the victim testified that it cost $150 in 2005. Although a "victim is competent to supply evidence of original cost" (*People v Stein*, 172 AD2d 1060, 1060, *lv denied* 78 NY2d 975), "evidence of the original purchase price, without more, will not satisfy the People's burden" (*People v Gonzalez*, 221 AD2d 203, 204). With respect to the remaining items of stolen property, the victim "provided only rough estimates of value . . . without setting forth any basis for his estimates . . . , and thus the evidence also is legally insufficient to establish the value of those remaining items" (*Geroyianis*, 96 AD3d at 1645 [internal quotation marks omitted]; *see People v Sutherland*, 102 AD3d 897, 898-899). On this record, we cannot conclude that " 'the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' " of $3,000 (*People v Brinks*, 78 AD3d 1483, 1484, *lv denied* 16 NY3d 742, *reconsideration denied* 16 NY3d 828; *see Vandenburg*, 254 AD2d at 534). We therefore dismiss count two of the indictment.

We likewise agree with defendant that the evidence is legally insufficient to support his conviction of criminal possession of a controlled substance in the seventh degree, as charged in the fourth count of the indictment. The indictment alleged that "*on or about the 2nd day of September, 2005*, [defendant] knowingly and unlawfully possessed a controlled substance, to wit: cocaine" (emphasis added). The evidence that defendant possessed a controlled substance on September 2, 2005 consisted solely of the testimony of a witness and defendant's statement that they smoked crack cocaine together on that date, but at different times. As the People correctly concede, such evidence is legally insufficient to support a conviction of criminal possession of a controlled substance (*see generally People v Martin*, 81 AD3d 1178, 1179-1180, *lv denied* 17 NY3d 819, *reconsideration denied* 17 NY3d 904). Although the evidence is legally sufficient to establish that defendant possessed a controlled substance on September 27, 2005, the date of his arrest, the indictment did not charge defendant with drug possession on that date and, contrary to the People's contention, the discrepancy cannot be characterized as a mere "variance" in the date of the offense (*see People v La Marca*, 3 NY2d 452, 458-459, *remittitur amended* 3 NY2d 942, *cert denied* 355 US 920, *rearg denied* 4 NY2d 960). We therefore dismiss count four of the indictment (*see generally People v Oberlander*, 60 AD3d 1288, 1289).

Contrary to the further contention of defendant, however, we conclude that the evidence is legally sufficient to support the conviction of burglary in the second degree and criminal possession of a forged instrument in the second degree and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

958

CA 13-00374

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

GARY M. DISCHIAVI AND LINDA DISCHIAVI,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

WILLIAM S. CALLI, JR., AS ADMINISTRATOR
CTA OF THE ESTATE OF WILLIAM S. CALLI,
ROBERT CALLI, HERBERT CULLY, CALLI, CALLI
AND CULLY, ANDREW S. KOWALCZYK, JOSEPH
STEPHEN DEERY, JR., THOMAS S. SOJA AND
CALLI, KOWALCZYK, TOLLES, DEERY AND SOJA,
DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANTS.

KERNAN AND KERNAN, P.C., UTICA (LEIGHTON R. BURNS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT WILLIAM S. CALLI, JR., AS ADMINISTRATOR CTA OF THE ESTATE OF WILLIAM S. CALLI.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID R. DUFLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS ANDREW S. KOWALCZYK, JOSEPH STEPHEN DEERY, JR. AND CALLI, KOWALCZYK, TOLLES, DEERY AND SOJA.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS HERBERT CULLY AND CALLI, CALLI AND CULLY.

GETNICK LIVINGSTON ATKINSON & PRIORE, LLP, UTICA (MICHAEL E. GETNICK OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT THOMAS S. SOJA.

GEORGE F. ANEY, HERKIMER, FOR DEFENDANT-APPELLANT-RESPONDENT ROBERT CALLI.

LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeals and cross appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered May 21, 2012. The order, inter alia, dismissed plaintiffs' legal malpractice causes of action insofar as they are premised on the failure to commence a personal injury action and dismissed plaintiffs' legal malpractice causes of action against defendants Herbert Cully and Calli, Calli and Cully insofar as they are premised on the failure of those defendants to commence a medical malpractice action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motions of defendants-appellants-respondents with respect to the third cause of action in its entirety and those parts of the motions of all defendants-appellants-respondents except Robert Calli with respect to the claim for punitive damages against them, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, breach of contract, legal malpractice and fraud, alleging, among other things, that defendants failed to commence timely legal actions to recover damages arising from injuries sustained by Gary M. Dischiavi (plaintiff). Plaintiffs allege in their complaint that plaintiff was injured as the result of an accident that occurred while he was on duty as a City of Utica police officer in 1991, and that he was further injured as a result of his ensuing medical treatment. Although plaintiffs retained defendant law firm of Calli, Kowalczyk, Tolles, Deery and Soja (CKTDS) to represent them with respect to possible claims arising from those injuries, no action was ever instituted. Plaintiffs further allege that defendants purported to have plaintiff examined by an expert physician but had a lawyer examine him instead, purported to have other expert physicians review plaintiff's medical records but had a veterinarian perform that review, misrepresented that they had commenced a personal injury action on plaintiffs' behalf, and created a fake settlement agreement for that "action." This case was previously before us on appeal, and we determined, inter alia, that Supreme Court erred in granting the motions and cross motion of various defendants for summary judgment dismissing the complaint in its entirety against them (*Dischiavi v Calli* [appeal No. 2], 68 AD3d 1691, 1692-1694).

Upon remittal and the completion of discovery, various defendants again moved for summary judgment dismissing the complaint, cross claims and/or counterclaims against them. The court dismissed the complaint insofar as asserted against certain defendants and, as relevant on appeal, the remaining defendants, i.e., defendants-appellants-respondents (hereafter, defendants), now appeal and plaintiffs cross-appeal from all or parts of an order that, inter alia, denied plaintiffs' cross motion for partial summary judgment and granted defendants' motions in part. Specifically, the court granted those parts of the motions seeking summary judgment dismissing the first and second causes of action insofar as they are premised on defendants' failure to commence a personal injury action. The court also granted that part of the motion of defendant law firm Calli, Calli and Cully and defendant Herbert Cully (collectively, CCC defendants) for summary judgment dismissing the first and second causes of action against them insofar as they are premised on their failure to commence a medical malpractice action, thereby resulting in the dismissal of those causes of action in their entirety against the CCC defendants.

Defendants Andrew S. Kowalczyk, Joseph Stephen Deery, Jr., and CKTDS (collectively, CKTDS defendants), along with defendant William S. Calli, Jr. (Calli, Jr.), as administrator CTA of the estate of

former defendant William S. Calli, Sr., contend that the court erred in denying their motions insofar as they concern the underlying medical malpractice claim. Specifically, the CKTDS defendants and Calli, Jr., contend that the underlying medical malpractice claim lacks merit, and thus that plaintiffs could not recover damages based on the failure of those defendants to commence a timely action based on that claim. We conclude, however, that the court properly denied the motions to that extent inasmuch as the CKTDS defendants and Calli, Jr. failed to meet their initial burden of establishing that plaintiffs' medical malpractice claim lacks merit (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Welch v State of New York*, 105 AD3d 1450, 1451). In any event, plaintiffs raised a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In addition, the CKTDS defendants and defendant Thomas S. Soja contend that they may not be held liable under a theory of partnership by estoppel because CKTDS was dissolved prior to any alleged legal malpractice. Even assuming, arguendo, that those defendants met their initial burden in that respect, we further conclude that the court properly determined that plaintiffs raised a triable issue of fact with respect to that issue (*see generally id.*).

To the extent that defendants sought summary judgment dismissing the first and second causes of action on the ground that the applicable three-year statute of limitations had expired prior to the commencement of this action (*see* CPLR 214 [6]; *see generally Zorn v Gilbert*, 8 NY3d 933, 933-934), we conclude that they met their initial burden on their respective motions. We further conclude, however, that plaintiffs raised a triable issue of fact whether the doctrine of continuous representation tolled the statute of limitations (*see generally Shumsky v Eisenstein*, 96 NY2d 164, 167-168). The court therefore properly determined that defendants were not entitled to the relief sought based on the statute of limitations.

We agree with all defendants that the court erred in denying those parts of their motions seeking summary judgment dismissing the third cause of action, for fraud, against them. Thus, we modify the order accordingly. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff[s] and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559; *see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421). "Where, as here, a fraud [cause of action] is asserted in connection with charges of professional malpractice, it is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations . . . which have caused additional damages, separate and distinct from those generated by the alleged malpractice" (*White of Lake George v Bell*, 251 AD2d 777, 778, *lv dismissed* 92 NY2d 947; *see Tasseff v Nussbaumer & Clarke,* 298 AD2d 877, 878; *see generally Wells Fargo Bank, N.A. v Zahran*, 100 AD3d 1549, 1550, *lv denied* 20 NY3d 861). We agree with defendants that they met their initial burden on their motions by establishing that plaintiffs did

not sustain any additional damages as a result of the alleged fraud, and plaintiffs failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325). Contrary to plaintiffs' contention, this Court's prior order denying those parts of the respective defendants' initial motions and cross motions "pursuant to CPLR 3211 (a) (7) to dismiss the complaint, which w[ere] addressed to the sufficiency of the pleadings, did not establish the law of the case for the purpose of their subsequent motion[s] pursuant to CPLR 3212 for summary judgment, which [were] addressed to the sufficiency of the evidence" (*Thompson v Lamprecht Transp.*, 39 AD3d 846, 847).

We further conclude that the court erred in denying those parts of the motions seeking summary judgment dismissing plaintiffs' claim for punitive damages except insofar as that claim is asserted against defendant Robert Calli. Plaintiffs seek to hold all other defendants liable for punitive damages under a theory of vicarious liability. It is well settled that, in order for a partnership or its members "to be held vicariously liable for punitive damages arising from the conduct of its [partners], it must have 'authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit [partner]' such that it is complicit in that conduct" (*Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 42, quoting *Loughry v Lincoln First Bank*, 67 NY2d 369, 378; *see 1 Mott St., Inc. v Con Edison*, 33 AD3d 531, 532). Here, the defendants other than Robert Calli established that only Robert Calli may have engaged in conduct giving rise to punitive damages and that they did not engage in any acts that would render them complicit in such conduct. In response, plaintiffs failed to raise a triable issue of fact whether defendants, other than Robert Calli, engaged in conduct giving rise to punitive damages or " 'authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit [partner]' " (*Melfi*, 64 AD3d at 42). Consequently, the court erred in denying those parts of the motions seeking to dismiss the claim for punitive damages except insofar as asserted against Robert Calli. We therefore further modify the order accordingly.

On their cross appeal, plaintiffs contend that the court erred in dismissing the first and second causes of action insofar as they are premised upon defendants' failure to commence a personal injury action. The court granted defendants' motions for summary judgment dismissing those causes of action to that extent based on its determination that the statute of limitations therefor had expired before plaintiffs retained any of the defendants. Plaintiffs now contend that the statute of limitations for those causes of action was extended several times by amendments to General Municipal Law § 205-e (2), which resulted in the revival of plaintiffs' causes of action until a time after they first retained CKTDS. That contention is not properly before us because it is raised for the first time on appeal, and "[a]n issue may not be raised for the first time on appeal . . . where it 'could have been obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840, quoting *Telaro v Telaro*, 25 NY2d 433, 439, *rearg denied* 26 NY2d 751). The revival statute on which plaintiffs rely applies to causes

of action that "would have been actionable on or after January [1, 1987] had this section been effective" (§ 205-e [2]), and we conclude that defendants could have made a factual showing that plaintiffs' first and second causes of action insofar as they are premised upon defendants' failure to commence a personal injury action were not actionable because they were precluded by plaintiff's receipt of benefits pursuant to General Municipal Law § 207-c.

We have considered the further contentions of the parties and conclude that they are without merit.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

963

KA 11-00702

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PERNELL A. FLANDERS, DEFENDANT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR DEFENDANT-APPELLANT.

PERNELL A. FLANDERS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered January 11, 2011. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree and reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]) and reckless endangerment in the first degree (§ 120.25). The evidence at trial established that, on the date in question, defendant and a passenger in his vehicle approached the victim and his fiancée. A physical altercation ensued during which defendant struck the victim with a .380 caliber semi-automatic pistol. Defendant then shot the pistol at the victim and in the vicinity of the victim's fiancée. Defendant returned to his vehicle to obtain a second firearm, i.e., a .22 caliber rifle, which he then used to shoot at the victim, in the vicinity of the victim's fiancée. The victim sustained multiple gunshot wounds to the neck, chin, shoulder and leg. With respect to the assault and reckless endangerment charges, the indictment alleged that defendant committed those offenses with "a .380 semi-automatic pistol *and* a .22 rifle" (emphasis added).

During its charge, County Court instructed the jury that it was alleged that defendant committed assault in the first degree by intentionally injuring the victim with a "380 semi-automatic pistol *and* a 22 caliber rifle" (emphasis added). The court further instructed the jury that it was alleged that defendant committed

reckless endangerment in the first degree by firing "a 380 semi-automatic pistol *and* a 22 rifle in the direction of [the victim's fiancée]" (emphasis added). The jurors sent a note asking if they must believe that both firearms were involved in order to find defendant guilty of the assault and reckless endangerment charges. The court instructed the jury that it "must be proven to your satisfaction beyond a reasonable doubt, that either of the weapons were involved or both, as long as you find that there was a deadly weapon involved." The jury thereafter returned a verdict of guilty on all counts charged in the indictment.

Defendant now contends that the court's instruction to the jury constructively amended the indictment, rendering it duplicitous. We reject that contention. It is well established that, " '[w]here an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together and charge the defendant with having committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the others' " (*People v Charles*, 61 NY2d 321, 327-328). Contrary to the position of the dissent, we conclude that the evidence at trial established that the multiple shots fired from two separate firearms "constitute[d] a single uninterrupted assault rather than a series of distinct criminal acts . . . , and the assault 'occurred over a short time frame, without apparent abeyance, and was triggered by a single incident of anger' " (*People v Snyder*, 100 AD3d 1367, 1367, *lv denied* 21 NY3d 1010, quoting *People v Hines*, 39 AD3d 968, 969-970, *lv denied* 9 NY3d 876; *cf. People v Bauman*, 12 NY3d 152, 155-156; *People v Casado*, 99 AD3d 1208, 1209, *lv denied* 20 NY3d 985; *see generally People v Alonzo*, 16 NY3d 267, 270). "The fact that more than one dangerous instrument allegedly was used by the defendant[], and more than one [shot] was [fired] causing the [victim] several injuries, does not transform this single criminal incident into multiple assaults or acts of [reckless endangerment] which must be charged by separate counts" (*People v Kaid*, 43 AD3d 1077, 1080; *cf. People v Negron*, 229 AD2d 340, 340-341). We respectfully disagree with the position of the dissent that there were separate impulses with an abeyance between them. Rather, the evidence established that defendant assaulted the victim and his fiancée in an attempt to seek revenge for the fiancée's alleged assault on defendant's sister. There was one motive and one impulse: to seek revenge. We see no distinction between a situation in which an assaulting defendant takes the time to reload one weapon and one in which the assaulting defendant takes the time to obtain a second weapon with the single impulse of continuing the ongoing assault.

With respect to the count of reckless endangerment in the first degree, the conduct encompassed by that count was the act of endangering the life of the victim's fiancée, who was in the vicinity of the victim the entire time defendant was shooting at the victim. "Where . . . a crime by its nature as defined in the Penal Law may be committed either by one act or by multiple acts and can be characterized as a continuing offense over time, the indictment may charge the continuing offense in a single count" (*People v First Meridian Planning Corp.*, 86 NY2d 608, 615-616). Under the

circumstances of this case, the crime of reckless endangerment "involved a continuing offense" and could therefore encompass multiple acts in one count without being duplicitous (*People v Hernandez*, 235 AD2d 367, 368, *lv denied* 89 NY2d 1012). In our view, the fact that the multiple shots were fired from two separate firearms did not transform this continuing offense into two separate offenses. We disagree with the dissent's assumption that the fiancée was "potentially out of harm's way" when she sought refuge in a vehicle during the barrage of gunshots inasmuch as the vehicle was still in the vicinity of the gunshots. "[R]eckless endangerment is a conduct-specific . . . crime," and here the conduct underlying that count of the indictment was the firing of multiple gunshots in the vicinity of the fiancée (*People v Estella*, 107 AD3d 1029, 1032, *lv denied* 21 NY3d 1042; *cf. People v Dann*, 17 AD3d 1152, 1153-1154, *lv denied* 5 NY3d 761). We thus conclude that the indictment was not rendered duplicitous by the court's instruction that the jury could find defendant guilty of the assault and reckless endangerment charges if it found that defendant used either firearm or both.

We reject the view of the dissent that " 'there were two distinct shooting incidents' " (quoting *People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814). Although the published decision in *Boykins* does not address the particular facts of the crimes, "[w]e can and do take judicial notice of the record on appeal" in that case (*People v Hill*, 30 AD2d 976, 976; *see People v Crawford*, 55 AD3d 1335, 1337, *lv denied* 11 NY3d 896). In *Boykins*, the defendant was charged with one count of attempted murder, but the evidence established that there were two distinct shooting incidents directed at the victim. The first occurred when the defendant and the codefendant first arrived at the victim's residence. At that point the victim was shot in the stomach area. The defendant and the codefendant left the residence, and another resident of the home locked the door behind them. At some time thereafter, either the defendant or the codefendant kicked open the door and shot the victim twice in the face. Here, contrary to the factual scenario in *Boykins*, there was no cessation or suspension in the criminal activity other than the time it took defendant to obtain another loaded firearm.

Inasmuch as we conclude that the counts of the indictment were not rendered duplicitous by the court's instructions, we reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to seek dismissal of the allegedly duplicitous counts of the indictment (*see People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *People v Harris*, 97 AD3d 1111, 1111-1112, *lv denied* 19 NY3d 1026; *see also People v Brown*, 82 AD3d 1698, 1701, *lv denied* 17 NY3d 792).

Contrary to defendant's further contention, we conclude that the shell casings were properly admitted in evidence. " 'The testimony presented at the trial sufficiently established the authenticity of that evidence through reasonable assurances of identity and unchanged condition' . . . , and any irregularities in the chain of custody went to the weight of the evidence rather than its admissibility" (*People v Washington*, 39 AD3d 1228, 1230, *lv denied* 9 NY3d 870; *see generally*

People v Julian, 41 NY2d 340, 342-343).

We conclude that the sentence is not unduly harsh or severe. Finally, we note that the certificate of conviction erroneously states that defendant was convicted of attempted murder in the second degree under Penal Law § 125.25 (2), and it must therefore be amended to reflect that he was convicted under Penal Law § 125.25 (1) (*see generally People v Saxton*, 32 AD3d 1286, 1286).

All concur except SCONIERS, J., who dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent in part because I disagree with the majority that the assault and reckless endangerment counts in the indictment were not rendered duplicitous based on the evidence or by County Court's charge in response to a jury note. I would therefore modify the judgment by reversing the conviction of assault and reckless endangerment and dismissing the second and fourth counts of the indictment with leave to re-present any appropriate charges under those counts to another grand jury (*see generally People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025). In view of my conclusion, I do not reach defendant's related contention concerning the denial of effective assistance of counsel.

The indictment alleged, inter alia, that defendant committed assault in the first degree (Penal Law § 120.10 [1]) and reckless endangerment in the first degree (§ 120.25) with "a .380 semi-automatic pistol and a .22 rifle," and the jury was instructed accordingly. During deliberations, the jurors sent a note that asked, with respect to both the assault and reckless endangerment counts, "must we believe both guns were involved and fired by the defendant." The court, in discussing the note with counsel, stated that the indictment alleged assault with a deadly weapon and not deadly weapons. As a result, the court subsequently instructed the jury that they could find that "either of the weapons were involved or both, as long as you find that there was a deadly weapon involved."

With respect to the assault count, this was not a case of a "single, uninterrupted criminal act" (*People v Alonzo*, 16 NY3d 267, 270); rather, defendant engaged in "two distinct shooting incidents that may constitute the crime of [assault]" with two separate weapons, the first of which was interrupted when he returned to his vehicle to retrieve a rifle (*People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814; *see generally People v Casado*, 99 AD3d 1208, 1209, *lv denied* 20 NY3d 985). It is the separate "impulses," not the time interval between the acts, that is dispositive in this case (*see People v Okafore*, 72 NY2d 81, 87-88). Here, defendant used the pistol during the course of a fist fight between the victim, defendant's passenger, and defendant, after the victim began to get the upper hand. The victim's fiancée was pushing him back toward their sports utility vehicle (SUV) when defendant fired the last shot from the pistol. Following that initial altercation, after any perceived threat posed by the victim had seemingly subsided, and after defendant stated that he was not afraid to use the pistol, defendant returned to his vehicle, retrieved a rifle from the back seat, and began firing in an

apparent attempt to end the victim's life (*see Boykins*, 85 AD3d at 1555). Defendant acted on those separate impulses with an "abeyance" between them (*People v Hines*, 39 AD3d 968, 970, *lv denied* 9 NY3d 876). Given the evidence at trial and the court's instruction in response to the jury note about the two weapons, the assault count was rendered duplicitous. "In addition, because the trial evidence establishes two distinct acts that may constitute [assault in the first degree], '[i]t is impossible to ascertain . . . whether different jurors convicted defendant based on different acts' " (*Boykins*, 85 AD3d at 1555).

Reckless endangerment can be a "continuing offense" (*People v Hernandez*, 235 AD2d 367, 368, *lv denied* 89 NY2d 1012) and, for reckless endangerment in the first degree, "the element of depravity can be alleged by establishing that defendant engaged in a course of conduct over a period of time" (*People v Bauman*, 12 NY3d 152, 155). Nevertheless, the conduct that allegedly created a grave risk of death must be specific enough to ensure a unanimous jury verdict (*see id.*; *People v Estella*, 107 AD3d 1029, 1031-1032, *lv denied* 21 NY3d 1042). Here, the testimony was that the victim's fiancée was in front of the victim when defendant fired the pistol but was able to get into the SUV, and potentially out of harm's way, when defendant retrieved and fired the rifle. There was one count and one victim, but two acts, with a seemingly greater risk of death involved with the use of the pistol. Given the court's response to the jury note, it is not possible to know whether the jurors, individually or collectively, based their verdict upon the use of the pistol, the rifle, or both. Based on defendant's break to retrieve the rifle, the fiancée's coinciding change of location, and the court's amendment of the indictment (*see Bauman*, 12 NY3d at 155), and "because of the danger that [the] jury . . . vote[d] to convict on a count without having reached a unanimous verdict" (*People v First Meridian Planning Corp.*, 86 NY2d 608, 615), the reckless endangerment count was rendered duplicitous.

Finally, the court failed to mitigate the danger that defendant was convicted on a less than unanimous verdict by neglecting to instruct the jury that they all must agree on the act or acts by which defendant injured the victim with a deadly weapon and created a grave risk of death to the victim's fiancée (*see generally People v Bradford*, 61 AD3d 1419, 1420-1421, *affd* 15 NY3d 329; *First Meridian Planning Corp.*, 86 NY2d at 616).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

979

CA 12-01791

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

GEORGE R. MARLINSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NANCY A. MARLINSKI, DEFENDANT-APPELLANT.

LAW OFFICES OF STEVEN H. GROCOTT, WEST SENECA (STEVEN H. GROCOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Janice M. Rosa, J.), entered December 22, 2011 in a divorce action. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating the eighth and ninth decretal paragraphs and directing that the parties are jointly responsible for the remaining debt on the Discover Card line of credit and that defendant is not required to compensate plaintiff in the amount of $3,569 and as modified the judgment is affirmed without costs.

Memorandum: Defendant wife appeals from a judgment of divorce that, inter alia, equitably distributed marital assets, allocated marital debt and calculated the child support for the parties' minor children. Contrary to the wife's contention, Supreme Court did not abuse or improvidently exercise its discretion in determining that plaintiff husband was entitled to an equitable share of the marital funds used to discharge the mortgage on the wife's separate residence, which had been used as the marital residence for the entire duration of the marriage. As the court noted in its decision, the parties engaged in "complex financial dealings," which often consisted of acquiring new lines of credit to pay off existing lines of credit. The testimony at trial established that, although the wife purchased the marital residence prior to the marriage, the parties used marital funds to pay for improvements and to discharge the mortgage on that residence. The husband is thus "entitled to recoup [his] equitable share of the marital funds used to reduce the indebtedness and pay for improvements to the marital abode" (*Massimi v Massimi*, 35 AD3d 400, 402, *lv denied* 9 NY3d 801; *see Markopoulos v Markopoulos*, 274 AD2d 457, 458-459; *Zelnik v Zelnik*, 169 AD2d 317, 330).

We agree with the wife, however, that the court abused it discretion in awarding the husband $3,000, which represented one-half of the parties' 2008 tax refund. The entire tax refund had been used to pay down debt on a Discover Card line of credit. While it is undisputed that, after the divorce action was commenced, the wife took a cash advance from the Discover Card line of credit and deposited the money into her separate checking account, the evidence at trial established that the wife used that money to make payments toward marital debt. We thus conclude that the Discover Card debt was marital debt, and the husband was not entitled to credit for his share of the marital funds that were used to reduce that debt. We further conclude that the court abused its discretion in awarding the husband $569, the amount withdrawn by the wife from the parties' joint checking account in September 2008 and January 2009. The evidence at trial established that the wife used the money for household bills and also to reduce the Discover Card debt. We therefore modify the judgment accordingly.

Contrary to the wife's contention, the court did not err in vacating the child support and maintenance provisions of the parties' October 2009 stipulation. In that stipulation, the parties had agreed to impute income to the wife in the amount of $15,000, and the husband had agreed to maintenance and child support awards to the wife based on that imputed income. Although "[s]tipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230; *see Krupski v Krupski*, 168 AD2d 942, 943, *lv denied* 77 NY2d 804; *see generally* CPLR 2104), "[a] stipulation of settlement should be closely scrutinized and may be set aside upon a showing that it is unconscionable or the result of fraud, or where it is shown to be manifestly unjust because of the other spouse's overreaching" (*Cruciata v Cruciata*, 10 AD3d 349, 350; *see Krupski*, 168 AD2d at 943). We agree with the court that "a reasonable inference exists that the [wife did not] fully disclose[] h[er] financial assets . . . , and, as a result, the terms of the agreement were so inequitable as to be manifestly unfair to the [husband]" (*Cruciata*, 10 AD3d at 350; *see Chapin v Chapin*, 12 AD3d 550, 551; *cf. Label v Label*, 70 AD3d 898, 900; *see also Cervera v Bressler*, 85 AD3d 839, 841-842). It is undisputed that the wife had not been employed outside the home since the birth of the parties' children, but it is likewise undisputed that she had inherited large sums of money during the course of the marriage. Moreover, the wife failed to disclose her significant stock earnings, which, by October 2009, had totaled over $48,000 for that year. By the end of 2009, the wife had an adjusted gross income of $121,901. Thus, the wife had over $100,000 more in income than was imputed to her in the stipulation, and her income was more than two times what the husband had earned in any of the years before the stipulation. We thus conclude that, regardless whether the wife can be said to have committed fraud, the wife's failure to disclose her earnings in the stock market resulted in an agreement that was manifestly unfair to the husband.

The wife further contends that, after partially vacating the stipulation, the court erred in imputing an annual income of $50,000 to her. We reject that contention. The court did not abuse its

discretion in considering the wife's gross income as "reported in the most recent federal income tax return" (Domestic Relations Law § 240 [1-b] [b] [5] [i]), including investment income (*see* § 240 [1-b] [b] [5] [ii]), as well as "such other resources as may be available to the [wife]" (§ 240 [1-b] [b] [5] [iv]), including non-income producing assets such as real property she inherited (*see* § 240 [1-b] [b] [5] [iv] [A]) and money, goods or services provided by relatives and friends (*see* § 240 [1-b] [b] [5] [iv] [D]), such as the large monetary gifts provided to her by family members. While the wife contends that her capital gains in 2009 are an anomaly that is not likely to recur, we conclude that the court properly took into consideration the volatility of the stock market when it imputed less than half of the wife's actual earnings to her as annual income. The decision whether to consider capital gains as income is a discretionary determination (*see Orofino v Orofino*, 215 AD2d 997, 998-999, *lv denied* 86 NY2d 706; *compare Matter of Gluckman v Qua*, 253 AD2d 267, 270, *lv denied* 93 NY2d 814 *with McFarland v McFarland*, 221 AD2d 983, 983-984) and, under the circumstances of this case, we see no basis upon which to disturb the court's exercise of its discretion.

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

All concur except SCONIERS, J., who dissents and votes to modify in accordance with the following Memorandum: I agree with the majority with respect to all but two of the issues being decided on this appeal, and I therefore respectfully dissent in part. In my view, Supreme Court erred to the extent it vacated a portion of the parties' partial settlement and also erred when it imputed an annual income of $50,000 to defendant wife. I would therefore further modify the judgment accordingly.

On October 21, 2009, the parties entered into a partial settlement on the record in court. Pursuant to that agreement, plaintiff husband would pay $175 per week in child support for the parties' three children and $100 per week in maintenance for three years. The parties' stipulation imputed an annual income of $15,000 to the wife. Subsequently, during the trial on unresolved issues, the husband learned that in 2009 the wife had begun investing her inherited funds and, by the time of the stipulation, the wife had capital gains of $48,684 through 14 sales of stock and an adjusted gross income of $121,901 by year's end. However, as was revealed during the trial, despite having significant capital gains in 2009, the wife had losses of $27,740 between January 1 and June 29, 2010 and her unrealized losses had totaled $61,352 at the time of trial.

Based solely on the wife's recent and indisputably short-term success investing in the stock market, the court vacated the child support and maintenance provisions of the partial settlement and imputed an annual income to her of $50,000. "Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230; *see Borghoff v Borghoff*, 8 AD3d 519, 520; *see also* CPLR 2104). This is equally true with respect to agreements entered into by the parties to a divorce

action (*see Batson v Batson*, 277 AD2d 750, 751). Hence, " '[o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation' " (*Chernow v Chernow*, 51 AD3d 705, 706, *lv dismissed* 11 NY3d 780, quoting *Hallock*, 64 NY2d at 230; *see Przewlocki v City of Lackawanna*, 112 AD2d 757, 757).

The record here is devoid of proof that the wife was aware of the extent of her capital gains as of the October 21, 2009 stipulation. Moreover, while the wife had $48,684 in capital gains on the settlement date, capital gains, unlike salary or wages, are offset by any investment losses that occur during a given tax year. Thus, treating the wife's capital gains on October 21st as income is the functional equivalent of declaring the margin of victory in a football game based on the score early in the fourth quarter. While, as it turned out, the wife's capital gains increased through the end of 2009, it was, as of October 21st, possible that she could have sustained losses that would have reduced or even completely negated those gains by the end of the year. The losses the wife sustained in the first half of 2010 alone support that potential outcome. Thus, in my view, it was error for the court to void the partial settlement based on the wife's capital gains as of the date of the settlement.

As to imputed income, " '[c]ourts have considerable discretion to . . . impute an annual income to a parent' . . . , and a court's imputation of income will not be disturbed so long as there is record support for its determination" (*Lauzonis v Lauzonis*, 105 AD3d 1351, 1351). As the majority observes, the decision whether to consider capital gains as income is discretionary (*see Orofino v Orofino*, 215 AD2d 997, 998-999, *lv denied* 86 NY2d 706). However, in my view, there must be more than one year of capital gains to warrant imputing income for years into the future. We can take judicial notice of the fact that, on March 9, 2009, the Dow Jones Industrial Average hit a 12-year low at the end of what has been called the Great Recession, but that by the end of that year the Dow rose by almost 60% from that low point (*see For Dow, another 12-year low*, http://money.cnn.com/2009/03/09/markets/markets_newyork/index.htm; *see also Dow Jones Indus. Average [DJIA] History*, http://www.fedprimerate.com/dow-jones-industrial-average-history-djia.htm; *see generally Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 222-223). In contrast, while the Dow was relatively more stable during 2010 than it had been in 2009 (*see Dow Jones Indus. Average [DJIA] History*), the wife nevertheless sustained significant losses in that year. The wife has a two-year degree, had not worked outside the home since 1994, and had never earned more than $18,000 from employment. At no time from the beginning of the marriage, even after inheriting significant sums, had the wife ever demonstrated any particular knowledge of or success with investing. This would explain why the parties' partial settlement attributed income to the wife of only $15,000 per year. The only reasonable conclusion based on this record is that the wife's capital gains in 2009 were a fluke resulting from a rapidly rising stock market. Given her losses in 2010, it is clear that the wife was about as likely to

repeat her 2009 success as someone who wins the lottery or has a lucky streak at a casino. As a result, the court also abused its discretion in imputing an annual income of $50,000 to the wife based on nothing more than one year of capital gains income.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1014

CAF 12-00140

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF KAYLEE O.

CHELSEA E., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL O. AND YVONNE O.,
RESPONDENTS-RESPONDENTS.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR PETITIONER-APPELLANT.

DANIEL J. HARTMAN, BUFFALO, FOR RESPONDENTS-RESPONDENTS.

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered July 21, 2011 in a proceeding pursuant to Social Services Law §§ 383-c and 384. The order dismissed the petition.

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

Memorandum: As part of the judicial surrender of her parental rights to the subject child, petitioner entered into an agreement (agreement) providing for post-surrender visitation between her and the child. Petitioner commenced this proceeding to enforce the agreement, alleging that respondents improperly refused to permit such visitation. Following a hearing, Family Court dismissed the petition on the ground that further visitation between petitioner and the child is not in the child's best interests.

We conclude that petitioner failed to establish that the agreement is enforceable, and thus the petition was properly dismissed. Petitioner contends that the agreement is enforceable pursuant to Social Services Law §§ 383-c and 384. We reject that contention. The Social Services Law unequivocally provides with respect to a post-surrender contact agreement that, "[s]ubsequent to the adoption of the child, enforcement of any agreement shall be in accordance with [Domestic Relations Law § 112-b]" (§ 383-c [2] [b]; *see* § 384 [2] [b]). The Domestic Relations Law in turn provides in relevant part that such an agreement "shall not be legally enforceable after any adoption approved by a court pursuant to this article unless

the court has entered an order pursuant to this section incorporating those terms and conditions into a court[-]ordered adoption agreement" (§ 112-b [6]; *see generally Matter of Andie B.*, 102 AD3d 128, 129-130). Here, petitioner failed to establish that the terms of the agreement were incorporated into the court-ordered adoption agreement.

In any event, "[p]ursuant to Domestic Relations Law § 112-b (4), '[t]he court shall not enforce an order [incorporating a post-surrender contact agreement] unless it finds that the enforcement is in the child['s] best interests' " (*Matter of Kristian J.P. v Jeannette I.C.*, 87 AD3d 1337, 1337; *see Matter of Mya V.P. [Amber R.—Laura P.]*, 79 AD3d 1794, 1795-1796). Here, in determining the issue of the child's best interests, the court was entitled to accept the opinions of respondents' experts and to credit the testimony of respondents over that of petitioner, and we afford great deference to the court's determination of that issue, particularly following a hearing (*see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401, *lv denied* 21 NY3d 862; *Matter of Triplett v Scott*, 94 AD3d 1421, 1422). We therefore reject petitioner's further contention that the court's determination concerning the child's best interests is not supported by a sound and substantial basis in the record (*see generally Kristian J.P.*, 87 AD3d at 1337-1338).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1025

KA 12-01533

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LASHAWN J. SCOTT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT 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 (Frank P. Geraci, Jr., J.), entered July 25, 2012. 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 a prior appeal, we reversed an order determining that defendant was a level three risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), and we remitted the matter to County Court for further proceedings on the ground that the People had "failed to provide defendant with the requisite 10-day notice that they intended to seek a determination different from that recommended by the Board of Examiners of Sex Offenders" (*People v Scott*, 96 AD3d 1430, 1430; *see* § 168-n [3]). Defendant now appeals from an order that, following a new hearing, again classified him as a level three risk, and he contends that the court erred in denying his request for a downward departure from his presumptive risk level. We reject that contention.

It is well settled that the burden is on the People "to establish defendant's risk level under SORA by clear and convincing evidence" (*People v Brown*, 302 AD2d 919, 920; *see* Correction Law § 168-n [3]; *People v Wroten*, 286 AD2d 189, 199, *lv denied* 97 NY2d 610). Once that presumptive risk level is established, however, either the People or the defendant may seek a departure from that presumptive risk level. "A departure from the presumptive risk level is warranted where 'there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the guidelines' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [1997 ed]). There must exist clear and convincing evidence of the existence of special circumstance[s] to warrant an upward or

downward departure" (*People v Guaman*, 8 AD3d 545, 545; *see People v Perrah*, 99 AD3d 1257, 1257, *lv denied* 20 NY3d 854; *cf. People v Wyatt*, 89 AD3d 112, 122-128, *lv denied* 18 NY3d 803). In our view, "defendant failed to establish his entitlement to a downward departure from the presumptive risk level inasmuch as he failed to present the requisite clear and convincing evidence of the existence of special circumstances warranting a downward departure" (*People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715; *see People v Hamelinck*, 23 AD3d 1060, 1060).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1027

KA 12-00606

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE RIVERA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT 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 (Frank P. Geraci, Jr., J.), entered February 21, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court's determination of his risk level is not supported by the requisite clear and convincing evidence (*see* § 168-n [3]). We reject that contention. " 'The statements in the case summary and presentence report with respect to [the number of victims and the age of the victims] constitute reliable hearsay supporting the court's assessment of points' " under those risk factors (*People v St. Jean*, 101 AD3d 1684, 1684; *see People v Adams*, 101 AD3d 1792, 1792-1793, *lv denied* 20 NY3d 860; *People v Vaughn*, 26 AD3d 776, 776-777). Defendant admitted that he had sexual contact with the victims in question, and there was reliable hearsay to establish that at least one of the victims was 10 years of age or younger at the time of the incident.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1028

KA 10-01264

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL UFARES, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered February 18, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]), defendant contends that his purported waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is unenforceable because County Court, during the plea colloquy, conflated the right to appeal with the rights automatically forfeited upon the plea of guilty (*see People v Sanborn*, 107 AD3d 1457, 1458), we nevertheless reject defendant's challenge to the severity of the sentence. The record establishes that defendant has six prior felony convictions, including three for robbery, and that he was on parole when he committed the instant robbery. In addition, pursuant to the plea agreement, the People agreed not to seek persistent felony offender status for defendant, and defendant was not prosecuted in federal court, where he faced a more severe sentence.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1030

KA 12-01764

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH R. WILSON, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cattaraugus County Court (Larry M. Himelein, J.), entered July 19, 2012 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon his conviction of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to CPL 440.46, the 2009 Drug Law Reform Act (DLRA-3). Although defendant is eligible to apply for resentencing under DLRA-3 despite the fact that he was released from incarceration and has since been reincarcerated for allegedly violating the conditions of his parole (*see People v Paulin*, 17 NY3d 238, 243-244; *People v Wallace*, 87 AD3d 824, 824), we nevertheless conclude that County Court neither abused nor improvidently exercised its discretion in determining that substantial justice required denial of his application. It is undisputed that defendant completed treatment for substance abuse and participated in many vocational programs while incarcerated, but it was within the court's discretion to conclude that those accomplishments did not outweigh his lengthy criminal history, unsatisfactory prison disciplinary record, and history of absconding (*see e.g. People v Manigault*, 107 AD3d 492, 493; *People v Ford*, 103 AD3d 492, 493; *People v Spann*, 88 AD3d 597, 598, *lv denied* 18 NY3d 886; *People v Hickman*, 85 AD3d 1057, 1057-1058, *lv denied* 18 NY3d 859).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1031

KA 11-02471

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NORMAN KOONCE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered October 31, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved 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 a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to the contention of defendant, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant next contends that he was denied his right to counsel when the police questioned him concerning the instant crimes while he was in custody and represented by counsel in an unrelated criminal case. We reject that contention. "Under New York's indelible right to counsel rule, a defendant in custody in connection with a criminal matter for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney" (*People v Lopez*, 16 NY3d 375, 377). However, "[w]hen the prior charge has been disposed of by dismissal or conviction, the indelible right to counsel disappears and the defendant is capable of waiving counsel on the new charge" (*People v Bing*, 76 NY2d 331, 344, *rearg denied* 76 NY2d 890). Here, a police detective testified at the *Huntley* hearing that defendant had been sentenced on the unrelated criminal case before the detective questioned him regarding these crimes, and County Court therefore properly determined that the police

were not precluded from questioning him regarding the instant crimes (*see People v Brant*, 277 AD2d 1022, 1022, *lv denied* 96 NY2d 756). We reject defendant's contention that the right to counsel lasted until at least 30 days after sentencing, to allow for the filing of a notice of appeal (*see People v Colwell*, 65 NY2d 883, 885).

Defendant further contends that he was denied effective assistance of counsel because defense counsel failed to request a jury charge on the voluntariness of defendant's statements to the police and failed to object to multiple instances of alleged prosecutorial misconduct on summation. With respect to the jury charge, we conclude that defendant failed to demonstrate the absence of a strategic or other legitimate explanation for defense counsel's alleged error (*see People v Benevento*, 91 NY2d 708, 712; *People v Sinclair*, 90 AD3d 1518, 1518). Indeed, we note that the statements of defendant to the police were exculpatory. With respect to the alleged instances of prosecutorial misconduct, we agree with the People that the prosecutor did not improperly bolster the adequacy of the police investigation or the testimony of the prosecution witnesses but, rather, the prosecutor's comments were fair response to defense counsel's summation (*see People v Williams*, 98 AD3d 1279, 1280, *lv denied* 20 NY3d 1066; *People v Rivers*, 82 AD3d 1623, 1624, *lv denied* 17 NY3d 904). Thus, defense counsel's failure to object to those comments cannot be said to have deprived defendant of effective assistance of counsel (*see People v Hill*, 82 AD3d 1715, 1716, *lv denied* 17 NY3d 806). While we agree with defendant that the prosecutor improperly denigrated the defense, that misconduct was not so egregious as to deprive defendant of a fair trial (*see People v Heck*, 103 AD3d 1140, 1143; *People v Lopez*, 96 AD3d 1621, 1622, *lv denied* 19 NY3d 998), and defense counsel's failure to object to those comments did not deprive defendant of effective assistance of counsel (*see Heck*, 103 AD3d at 1143; *People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954).

Defendant contends that the court erred in admitting in evidence a portion of a recorded jailhouse telephone call made by defendant. He contends that the taping of the telephone call without a warrant was prohibited inasmuch as, although defendant was warned that calls may be monitored or recorded, he was not expressly warned of the possible use by law enforcement of the statements made in the recorded calls. Defendant further contends that the admission of the conversation amounted to the admission of evidence of an uncharged crime. Defendant's contentions are not preserved for our review (*see* CPL 470.05 [2]) and, in any event, they are without merit. An eavesdropping warrant is not required when one of the parties to the conversation consents to the eavesdropping (*see People v Lasher*, 58 NY2d 962, 963; *People v Wood*, 299 AD2d 739, 740-741, *lv denied* 99 NY2d 621), and we conclude that defendant impliedly consented to the recording here (*see generally Curley v Board of Trustees of Vil. of Suffern*, 213 AD2d 583, 583, *appeal dismissed* 87 NY2d 860; *United States v Friedman*, 300 F3d 111, 123, *cert denied* 538 US 981). We further conclude that the conversation involved only the present offense, not an uncharged crime. Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

We agree with defendant, however, that the court erred in failing to rule on defendant's renewed motion to "rule on whether the jurors who voted this indictment were present for all the testimony presented on this case" (*see People v Spratley*, 96 AD3d 1420, 1421, *following remittal* 103 AD3d 1211, *lv denied* 21 NY3d 1020). In an omnibus motion, defense counsel requested an attendance sheet of grand jurors hearing proof on the days on which evidence was presented on this case, and a list of the grand jurors voting the indictment. The court's order holding that the grand jury evidence was legally sufficient did not address that part of defendant's omnibus motion concerning the attendance of the grand jurors who voted the indictment, and defense counsel therefore renewed that part of his omnibus motion. The record does not reflect that the court ever ruled on defendant's renewed motion, and a failure to rule on a motion cannot be deemed a denial thereof (*see id.*; *see also People v Concepcion*, 17 NY3d 192, 197-198). We therefore hold the case, reserve decision and remit the matter to County Court to determine defendant's renewed motion.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1032

KA 12-01263

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FREDERICK WEAVER, DEFENDANT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (M. William Boller, A.J.), rendered April 23, 2012. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on July 28, 2013 and by the attorneys for the parties on July 30 and August 28, 2013,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1033

KA 06-03778

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS RIVERA, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered October 10, 2006. The judgment convicted defendant, upon jury verdicts, of criminal possession of a weapon in the second degree and 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, following separate jury trials, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]) and murder in the second degree (§ 125.25 [1]). At the first trial, the jury found defendant guilty of the weapons offense but could not reach a verdict on the murder count. County Court accepted a partial verdict and, following a second trial, defendant was found guilty of murder. Defendant contends that, under the principles of double jeopardy, he should not have been retried on the murder count because the evidence at the first trial was legally insufficient to establish his commission of that offense, and a guilty verdict would have been against the weight of the evidence. Defendant further contends that the verdict at the second trial is against the weight of the evidence. We reject those contentions.

A conviction is supported by legally sufficient evidence when, viewing the facts in the light most favorable to the People, " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). Here, a prosecution witness testified at the first trial that she saw defendant shoot the victim in the back of the head from close range. The witness was unequivocal in her identification of defendant, whom she had known for

three years prior to the shooting. Accepting the testimony of that eyewitness as true, as we must in the context of defendant's challenge to the legal sufficiency of the evidence (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational jury to conclude that defendant intentionally killed the victim and thereby committed murder in the second degree.

With respect to the weight of the evidence, defendant contends that, although the jury did not reach a verdict on the murder count at the first trial, the People failed to prove his guilt beyond a reasonable doubt and should not have been given a second opportunity to seek a conviction. Because the jury did not render a verdict on the murder count, however, there is no verdict from the first trial to which to apply a weight-of-the-evidence test (*cf. People v Mason*, 101 AD3d 1659, 1660, *revd on other grounds* 21 NY3d 962; *People v Scerbo*, 74 AD3d 1730, 1732-1733, *lv denied* 15 NY3d 757). In any event, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that a guilty verdict on the murder count, if one had been rendered at the first trial, would not have been against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We further conclude that the verdict with respect to the weapons offense is not contrary to the weight of the evidence.

As noted, a prosecution witness testified that she saw defendant shoot the victim. Although the witness had been drinking heavily on the night in question and had smoked marihuana, it cannot be said that her testimony was "so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982; *see People v Smith*, 73 AD3d 1469, 1470, *lv denied* 15 NY3d 778). We note that much of the witness's testimony was corroborated by other witnesses, several of whom placed defendant at the scene of the crime with what appeared to be a gun in his hand. Moreover, the evidence established that the victim was shot in the back of the head with a .380 caliber bullet from a range of five to six feet and, according to several witnesses, defendant was standing behind the victim when he was shot. Although another person fired two shots from a .45 caliber firearm shortly after the victim was shot, the shell casings for those bullets were found approximately 50 feet from the victim's body, and it is undisputed that the victim was not struck by a .45 caliber bullet.

We further conclude that the verdict at the retrial is not against the weight of the evidence. At the retrial, two witnesses who knew defendant testified that they saw him shoot the victim, and their testimony was amply corroborated by other evidence. As at the first trial, defendant did not testify and called no witnesses. Under the circumstances, even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495; *People v Gay*, 105 AD3d 1427, 1427-1428).

Finally, defendant's contention that the court failed to ask him whether he wished to make a statement at sentencing, as required by CPL 380.50 (1), is unpreserved for our review (*see People v Sharp*, 56 AD3d 1230, 1231, *lv denied* 11 NY3d 900), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1034

CAF 12-00853

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF NORMAN E. GREEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JACQUELINE BONTZOLAKES, RESPONDENT-APPELLANT.

MARY ANNE CONNELL, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Erie County (Rosalie S. Bailey, J.), entered March 27, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified an existing custody and visitation order by requiring that respondent's access to the subject child be supervised.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph to the extent that it delegates authority to the Catholic Charities Therapeutic Supervised Visitation Program to determine the duration and frequency of respondent's visitation with the child and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Respondent mother and the Attorney for the Child (appellants) appeal from an order in a proceeding pursuant to Family Court Act article 6 that modified an existing custody and visitation order by requiring that the mother's access to the subject child be supervised. In an October 7, 2009 order (2009 order), Family Court modified a prior custody order by awarding sole custody of the subject child to petitioner father and granting liberal access to the mother. The 2009 order changed custody from the mother to the father after the court determined that there was a change in circumstances, i.e., the mother's repeated frustration of the father's access and her failure to follow court orders. We affirmed the 2009 order on appeal (*Matter of Green v Bontzolakes*, 83 AD3d 1401, 1402, *lv denied* 17 NY3d 703). The instant order limited the mother's access to supervised visitation based largely upon the court's finding that the mother, without notifying the father and in violation of the 2009 order, absconded with the child, leaving the country for a period of 39 days.

We reject appellants' contentions that the court erred in determining that there was a change in circumstances and in imposing the condition that the mother's access to the child be supervised by the Catholic Charities Therapeutic Supervised Visitation Program. The court's determination was " 'based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, [and] is entitled to great weight,' " and we conclude that it is supported by a sound and substantial basis in the record (*Matter of Harder v Phetteplace*, 93 AD3d 1199, 1200, *lv denied* 19 NY3d 808). The mother's violation of the 2009 order and her pattern of continued violation of court orders constitute a sufficient change in circumstances, particularly in light of her prolonged and intentional interference with the father's custodial rights and failure to communicate with him (*see Matter of Zwack v Kosier*, 61 AD3d 1020, 1021, *lv denied* 13 NY3d 702; *see also Matter of Owens v Garner*, 63 AD3d 1585, 1586; *Matter of Tyrone W. v Dawn M.P.*, 27 AD3d 1147, 1148, *lv denied* 7 NY3d 705). Likewise, the court's determination that unsupervised visitation would be detrimental to the child has a sound and substantial basis in the record (*see Matter of Binong Xu v Sullivan*, 91 AD3d 771, 771-772; *see also Matter of Lane v Lane*, 68 AD3d 995, 996-997). The mother put the child at risk of emotional and intellectual harm by absconding with her, causing her to miss over a month of school, and failing to appreciate the importance of the child's relationship with her father (*see Lane*, 68 AD3d at 997; *Matter of Spurck v Spurck*, 254 AD2d 546, 547-548; *Chirumbolo v Chirumbolo*, 75 AD2d 992, 993).

We agree with appellants, however, that the court "erred in failing to set a supervised visitation schedule, implicitly leaving it to the supervisor to determine" (*Matter of Bonthu v Bonthu*, 67 AD3d 906, 907, *lv dismissed* 14 NY3d 852; *see Wills v Wills*, 283 AD2d 1023, 1024). By ordering only that visitation "shall take place through the Catholic Charities Therapeutic Supervised Visitation program," the court improperly delegated its authority to the supervising agency (*see Matter of St. Pierre v Burrows*, 14 AD3d 889, 892; *see also Matter of Mackenzie V. v Patrice V.*, 74 AD3d 1406, 1407-1408). We note in addition that the court erred in merely indicating that "access should include the child's siblings, if that can be accommodated by the program." If the court determined that sibling visitation is indeed in the best interests of the child, the court should specify in its order that the agency or organization designated to supervise visitation must be able to accommodate sibling visits. We therefore modify the order accordingly, and we remit the matter to Family Court to determine the access schedule and whether sibling visitation shall occur.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1035

CAF 12-01380

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF BRIAN SHAW,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KATIE MAY SEALS-OWENS AND MICHELLE LEWIS,
RESPONDENTS-RESPONDENTS.

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

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-RESPONDENT KATIE MAY SEALS-OWENS.

WILLIAM J. BARRETT, ATTORNEY FOR THE CHILD, MANLIUS.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 11, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking visitation with the subject child.

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

Memorandum: Petitioner appeals from an order dismissing with prejudice his Family Court Act article 6 petition seeking visitation with his daughter. While we agree with petitioner that, under the unique circumstances of this case, Family Court erred in taking judicial notice of the alleged fact that his daughter is a severely abused child under Social Services Law § 384-b (8) (a) (iii) (A), we nevertheless conclude that the court properly dismissed the petition with prejudice. Inasmuch as there is an existing order of protection prohibiting petitioner from having any contact with his daughter until June 22, 2018, the court was without authority to award petitioner visitation (*see e.g. Matter of Samantha WW. v Gerald XX.*, 107 AD3d 1313, 1315-1316; *Matter of William O. v John A.*, 84 AD3d 1447, 1448; *Matter of Balram v Balram*, 53 AD3d 808, 809-810, *lv denied* 11 NY3d 708).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1036

CAF 12-01382

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF SKYLA H. AND SHAYLEE H.

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

JAMES H., II, RESPONDENT-APPELLANT.

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

MICHAEL D. WERNER, WATERTOWN, FOR PETITIONER-RESPONDENT.

KIMBERLY A. WOOD, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered June 27, 2012 in a proceeding pursuant to Family Court Act article 10. The order determined the subject children to be abused and derivatively abused.

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

Memorandum: On appeal from an order adjudicating the subject children abused and derivatively abused, respondent father contends that Family Court violated his right to due process by conducting proceedings in his absence. That contention is not preserved for our review (*see Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1342, *lv denied* 19 NY3d 801) and, in any event, we conclude that it is without merit. " 'While due process of law applies in Family [Court] Act article 10 proceedings and includes the right of a parent to be present at every stage of the proceedings, that right is not absolute' " (*Matter of Assatta N.P. [Nelson L.]*, 92 AD3d 945, 945; *see Atreyu G.*, 91 AD3d at 1342). Here, at the time of the article 10 proceeding, the father was incarcerated on criminal charges stemming from his conviction of sexually abusing one of his daughters, i.e., the same conduct that formed the basis for the article 10 proceeding. The father was not present at the court appearance when the court decided petitioner's motion for summary judgment, but we conclude that the father was not prejudiced by his absence from that appearance (*see Matter of Eric L.*, 51 AD3d 1400, 1401-1402, *lv denied* 10 NY3d 716; *see also Assatta N.P.*, 92 AD3d at 945). "It is well settled that evidence that a parent has been convicted of having raped or sexually abused a child is sufficient to support a finding of abuse of that child within the meaning of the Family Court Act" (*Matter of Miranda F. [Kevin D.]*, 91 AD3d 1303, 1305; *see Matter of Doe*, 47 AD3d 283, 285, *lv denied* 10

NY3d 709), and under the circumstances of this case there was nothing the father could have stated at the appearance that would warrant the denial of petitioner's motion for summary judgment. The father was also not present at the scheduled dispositional hearing, but the father's attorney indicated that his office obtained permission from the father to agree to the proposed disposition (*see generally Matter of Patricia C.*, 63 AD3d 1710, 1711).

We reject the father's further contention that his attorney was ineffective for failing to protect his due process right to appear at the proceedings. The father failed to "demonstrat[e] both that he . . . was denied meaningful representation and that the deficient representation resulted in actual prejudice" (*Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704; *see Assatta N.P.*, 92 AD3d at 945-946).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1038

CA 12-02139

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

MARK A. LICCIARDI, INDIVIDUALLY AND AS A CITY OF ROCHESTER FIREFIGHTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, CITY OF ROCHESTER FIRE DEPARTMENT, JOHN CAUFIELD, INDIVIDUALLY AND AS CITY OF ROCHESTER FIRE CHIEF, SALVATORE MITRANO, III, INDIVIDUALLY AND AS EXECUTIVE DEPUTY CHIEF, MARTIN MCMILLIAN, INDIVIDUALLY AND AS LINE DEPUTY FIRE CHIEF, RICHARD YACKEL, INDIVIDUALLY AND AS BATTALION CHIEF, KEVIN CADY, INDIVIDUALLY AND AS A CITY OF ROCHESTER FIRE LIEUTENANT, MAUREEN HOPE, INDIVIDUALLY AND AS FIRE DEPARTMENT CASE MANAGER, AND SUSAN WALZ, INDIVIDUALLY AND AS VICE PRINCIPAL OF NORTHSIDE ELEMENTARY SCHOOL IN THE FAIRPORT SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS.

EMMELYN LOGAN-BALDWIN, ROCHESTER, FOR PLAINTIFF-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (J. RYAN HATCH OF COUNSEL), FOR DEFENDANT-RESPONDENT SUSAN WALZ, INDIVIDUALLY AND AS VICE PRINCIPAL OF NORTHSIDE ELEMENTARY SCHOOL IN THE FAIRPORT SCHOOL DISTRICT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 11, 2012. The order denied the motion of plaintiff for leave to renew or reargue the motion of defendant Susan Walz, individually and as Vice Principal of Northside Elementary School in the Fairport School District, to dismiss the complaint against her and seeking to compel disclosure from Walz.

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

Memorandum: Plaintiff appeals from an order denying his motion for leave to renew or reargue the motion of defendant Susan Walz, individually and as Vice Principal of Northside Elementary School in the Fairport School District, to dismiss the complaint against her and seeking to compel disclosure from Walz. Plaintiff offered no new facts in support of that part of the motion seeking leave to renew or reargue, but merely argued that Supreme Court had misapprehended the

law and therefore reached the wrong conclusion with respect to the prior motion. That part of the motion, therefore, was in fact only a motion for leave to reargue, the denial of which is not appealable (*see Mugabo v City of Buffalo*, 94 AD3d 1577, 1577). Inasmuch as the complaint against Walz had been dismissed, the court properly denied as moot that part of the motion seeking to compel disclosure from her (*see Kinney & Kinsella, Inc. v NEI Fashions, LLC*, 85 AD3d 514, 515).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1039

CA 13-00609

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

THEODORE F. BARNES, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LISA A. DELLAPENTA, D.W. DELLAPENTA, JR., AND ANNE THOMPSON, AS VOLUNTARY ADMINISTRATOR OF THE ESTATE OF J. ANDREW THOMPSON, DECEASED, DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LISA A. DELLAPENTA AND D.W. DELLAPENTA, JR.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (TARA E. WATERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT ANNE THOMPSON, AS VOLUNTARY ADMINISTRATOR OF THE ESTATE OF J. ANDREW THOMPSON, DECEASED.

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 2, 2012 in a personal injury action. The judgment dismissed the complaint upon a verdict of no cause of action.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he allegedly sustained when the vehicle he was driving was rear-ended in a chain-reaction motor vehicle accident involving a vehicle driven by defendant D.W. Dellapenta, Jr. and a vehicle driven by J. Andrew Thompson (decedent), whose estate was substituted as a defendant. The accident occurred on a cold, clear and sunny winter day, when strong winds caused a sudden and temporary whiteout as snow was blown across an inclined off-ramp connecting the eastbound New York State Thruway to Interstate 290 in the Town of Amherst. Plaintiff appeals from a judgment dismissing his complaint entered upon a jury verdict of no cause of action.

Supreme Court gave the jury a sudden stopping charge (*see* PJI 2:83) as made applicable to defendants and plaintiff, and plaintiff contends that the court erred in including him in that charge. We reject that contention. While plaintiff claimed that he was forced to stop due to the actions of the vehicle ahead of him (*see generally*

Carhuayano v J&R Hacking, 28 AD3d 413, 414), Dellapenta testified that plaintiff did not slow down before the whiteout, he did not see any vehicles ahead of plaintiff, plaintiff's vehicle was completely stopped in the whiteout, he never saw plaintiff's brake or hazard lights, and plaintiff told Dellapenta after the accident that he stopped because he could not see. Thus, the issue whether plaintiff "stopped suddenly, without an apparent reason to do so," was properly submitted to the jury (*Stalikas v United Materials*, 306 AD2d 810, 811, *affd* 100 NY2d 626; *see Niemiec v Jones*, 237 AD2d 267, 268).

We reject plaintiff's further contention that the court erred in instructing the jury on the emergency doctrine (*see* PJI 2:14) inasmuch as, evaluating the evidence in the light most favorable to defendants, a reasonable view of the evidence supported the conclusion that a sudden and temporary whiteout constituted a qualifying emergency (*see Lifson v City of Syracuse*, 17 NY3d 492, 497; *Sossin v Lewis*, 9 AD3d 849, 850-851, *amended on rearg* 11 AD3d 1045; *Barber v Young*, 238 AD2d 822, 823-824, *lv denied* 90 NY2d 808). Although Dellapenta had previously experienced whiteouts at that location and decedent had experienced blowing snow at that location, such experience does not negate the applicability of the emergency doctrine "as to the events in issue in this case" (*Kuci v Manhattan & Bronx Surface Tr. Operating Auth.*, 88 NY2d 923, 924).

Plaintiff failed to preserve for our review his contention that the verdict was against the weight of the evidence because there is no indication in the record that he made a posttrial motion to set aside the verdict (*see Homan v Herzig* [appeal No. 2], 55 AD3d 1413, 1413-1414). In any event, "the preponderance of the evidence in favor of the plaintiff[] [was not] so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*Wilson v Mary Imogene Bassett Hosp.*, 307 AD2d 748, 748; *see Stalikas*, 306 AD2d at 810-811).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1040

CA 12-01806

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

CHERYL FOLEY AND WILLIAM FOLEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WEST-HERR FORD, INC., ET AL., DEFENDANTS.

TIMOTHY B. HOWARD, SHERIFF, COUNTY OF ERIE,
APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered January 27, 2012. The order denied the motion of Timothy B. Howard, Sheriff, County of Erie, for an award of poundage.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and plaintiffs are directed to pay Timothy B. Howard, Sheriff, County of Erie, $24,500 as poundage pursuant to CPLR 8012 (b) (1), (2).

Memorandum: Timothy B. Howard, Sheriff of the County of Erie (Sheriff), appeals from an order that denied his motion for an award of poundage (*see generally* CPLR 8012 [b]). Plaintiffs commenced the underlying negligence and products liability action seeking damages for injuries sustained by plaintiff Cheryl Foley in a motor vehicle accident. By agreement dated September 30, 2009 (2009 Agreement), plaintiffs and defendants "agree[d] *to settle* the . . . case on or before December 15, 2009" in accordance with three enunciated terms: defendant Ford Motor Company would pay plaintiffs $650,000 on behalf of all defendants; plaintiffs agreed to accept that sum in full satisfaction of all claims against defendants; and plaintiffs agreed to execute a general release and a stipulation of discontinuance and defendants would make payment in accordance with CPLR 5003-a (emphasis added).

Despite the 2009 Agreement, the parties had unresolved issues concerning potential liens and the language of the general release. In March 2010, the attorney for defendants requested "a pretrial conference for purposes of *finalizing the settlement*" of the

underlying action (emphasis added). Plaintiffs sent proof that any potential liens had been resolved, but the parties continued to disagree on the language of the release. Supreme Court scheduled a conference for June 2011, noting that, "if the parties [could not] reach an agreement as to the language of the release," the matter would be restored to the trial calendar. Despite the continued disagreement on the terms of the release, plaintiffs' attorney filed a judgment for $726,611 on July 5, 2011 pursuant to CPLR 5003-a.

Plaintiffs' attorney thereafter enlisted the services of the Erie County Sheriff's Office (Sheriff's Office) to serve executions and notices of levy on two banks as garnishees of defendants, West-Herr Ford, Inc. and Ford Motor Company. Those documents were served upon the garnishees on July 12, 2011. On July 21, 2011, the Sheriff's Office was allegedly informed by plaintiffs' attorney "that the executions had achieved their desired effect, and that the defendants had agreed to settle the matter." Plaintiffs' attorney was then informed that the Sheriff's Office would nevertheless be seeking poundage in the amount of $24,500 pursuant to CPLR 8012 (b) (1). The next day, a stipulated order was entered upon the "joint application" of plaintiffs and defendants, pursuant to which "the instant action remain[ed] settled pursuant to the terms of the [2009 Agreement]"; the judgment filed July 5, 2011 was "deemed invalid from its inception" and "deemed null and void"; and the executions and notices served by the Sheriff were "deemed to be null and void." On July 25, 2011, the Sheriff's Office received a copy of that stipulated order from one of the garnishees.

The Sheriff thereafter moved for an order awarding the payment of poundage pursuant to CPLR 8012. We conclude that the court erred in denying that motion. " 'Poundage is a fee awarded to the Sheriff in the nature of a percentage commission upon moneys recovered pursuant to a levy or [an] execution of attachment' . . . The Sheriff's right to receive poundage fees is wholly statutory . . . , and the statute must be strictly construed . . . Under the statute, the Sheriff is entitled to poundage fees 'for collecting money by virtue of an execution' (CPLR 8012 [b] [1])" (*Famous Pizza v Metss Kosher Pizza*, 119 AD2d 721, 721). Although it is undisputed that the Sheriff did not actually collect any money, an award of poundage may still be made where, inter alia, "a settlement is made after a levy by virtue of an execution" (*id.*; *see* CPLR 8012 [b] [2]; *Solow Mgt. Corp. v Tanger*, 10 NY3d 326, 330; *Personeni v Aquino*, 6 NY2d 35, 38).

Based on the references to the 2009 Agreement in letters to the court and between the attorneys for the parties, we conclude that the 2009 Agreement did not constitute a final settlement but, rather, "was merely an agreement to agree sometime in the future" (*Sterling Fifth Assoc. v Carpentille Corp., Inc.*, 10 AD3d 282, 284). Even assuming, arguendo, that the 2009 Agreement constituted an actual settlement, we nevertheless conclude that the Sheriff is entitled to poundage because, after plaintiffs filed the judgment and served the executions and notices of levy, the parties entered into a subsequent agreement to apply jointly to the court to have the judgment vacated. Moreover, where, as here, "payment by the debtor is made directly to the

creditor after a sheriff levies, the payment constitutes a settlement, and the sheriff will be entitled to poundage" (*Kurtzman v Bergstol*, 62 AD3d 757, 758; *see Cabrera v Hirth*, 87 AD3d 844, 847; *cf. Alvarez v Brooklyn Hosp.-Caledonian Hosp.*, 255 AD2d 278, 279-280). Pursuant to the unambiguous language of the statute, the Sheriff is entitled to $24,500 in poundage based on the settlement amount of $650,000 (*see* CPLR 8012 [b] [1], [2]).

We reject the contention of plaintiffs that an award of poundage to the Sheriff is inequitable. The legislative intent in enacting the statute was that, "when a party has made use of the services of the Sheriff's office in the pursuit of a claim, and he [or she] later satisfies that claim by means of a settlement, the Sheriff is entitled to his [or her] poundage whether he [or she] has actually made any collections or not" (*Matter of Pearson*, 72 Misc 2d 995, 997-998). " '[T]o permit plaintiffs to succeed [in opposing the Sheriff's motion] would create a dangerous precedent whereby a party might avoid poundage fees' " by stipulating that the judgment that was the subject of the execution was void but the underlying action remained settled, " 'after using the process of our courts and the services of the Sheriff's office. This was not the intent of the Legislature. Such an interpretation would do violence to the letter and spirit of the statutory provisions here in question' " (*id.* at 998).

We likewise reject the further contention of plaintiffs that they should not be liable for the payment of poundage. Although "CPLR 8012 (b) is silent on th[e] question" concerning who is liable to pay poundage where, as here, a settlement has occurred after levy (*Cabrera*, 87 AD3d at 847-848), "[i]t has long been customary that where a sheriff levies against a defendant's property and the matter is thereafter settled, the judgment creditor is liable to the sheriff for the payment of poundage fees as the party who invoked the sheriff's services" (*id.* at 849). We see no basis to deviate from the customary practice, and we thus conclude that plaintiffs are liable to pay the award of poundage to the Sheriff.

Based on our resolution, we see no need to address the Sheriff's remaining contentions.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1041

CA 12-01664

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

CHARLOTTE KREGG, AS GUARDIAN OF CHRISTOPHER M. WILLIAMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EILEEN MALDONADO, ET AL., DEFENDANTS, AMERICAN SUZUKI MOTOR CORPORATION AND SUZUKI MOTOR CORPORATION OF JAPAN, DEFENDANTS-RESPONDENTS.

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

WEBSTER SZANYI LLP, BUFFALO (THOMAS S. LANE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 25, 2012. The order denied the cross motion of plaintiff to compel defendants American Suzuki Motor Corporation and Suzuki Motor Corporation of Japan to further respond to her notice to produce.

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

Memorandum: The parties appear before us for a second time on a dispute over discovery (*see Kregg v Maldonado*, 98 AD3d 1289) in this action seeking damages for injuries sustained by Christopher M. Williams when he was driving a Suzuki motorcycle. Supreme Court properly denied plaintiff's cross motion to compel defendants American Suzuki Motor Corporation and Suzuki Motor Corporation of Japan to further respond to plaintiff's notice to produce. Plaintiff's "bare allegations of relevancy" with respect to the information sought are insufficient to entitle plaintiff to that relief (*Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421; *see Dempski v State Farm Mut. Auto. Ins. Co.*, 249 AD2d 895, 896).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1043

CA 13-00727

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

ROBERT BAUMAN AND JEANNINE BAUMAN,
PLAINTIFFS-APPELLANTS,

V ORDER

DEBRA MAYNARD, WENDY FARREN, CHARLENE DEYOUNG,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (J. MICHAEL WOOD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 20, 2012. The judgment, among other things, dismissed plaintiffs' complaint following a nonjury trial.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1047

KA 11-02010

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY L. HABERER, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 15, 2011. Defendant was resentenced by imposing a period of postrelease supervision upon his conviction of sodomy in the first degree.

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

Memorandum: Defendant appeals from a resentence pursuant to which County Court added a mandatory period of postrelease supervision to the sentence previously imposed on his conviction, upon a jury verdict, of sodomy in the first degree (Penal Law former § 130.50 [3]). Contrary to defendant's contention, the court did not violate his due process or statutory rights by its failure to reconsider the term of incarceration that was previously imposed. At defendant's original sentencing, the court committed a *Sparber* error by failing to impose a five-year period of postrelease supervision (*see* § 70.45 [1], [2]; *People v Lingle*, 16 NY3d 621, 629; *see generally People v Sparber*, 10 NY3d 457, 468-471). Resentencing following a *Sparber* error "is limited to remedying [the] specific procedural error—i.e., . . . mak[ing] the required pronouncement" of postrelease supervision (*Lingle*, 16 NY3d at 635 [internal quotation marks omitted]). Thus, "[t]he court . . . was bound to reimpose the original sentence, aside from the addition of [the] required period of postrelease supervision" (*People v Savery*, 90 AD3d 1505, 1506, *lv denied* 18 NY3d 928).

Defendant's further contention that the sentence is excessive is not properly before us. "Where, as here, defendant appeals from a resentence conducted to address an error in failing to impose a period of postrelease supervision, this Court is without authority to reduce the period of incarceration imposed" (*People v Condes*, 100 AD3d 1552, 1553, *lv denied* 20 NY3d 1060; *see Lingle*, 16 NY3d at 635). Finally,

we have reviewed defendant's remaining contentions, but conclude that they do not require modification or reversal of the resentence.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1048

KA 12-01955

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRADLEE E. BURNS, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (LEAH RENE NOWOTARSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (MARSHALL A. KELLY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered August 17, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]). Although "[d]efendant's challenge to the amount of restitution is not foreclosed by his waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement" (*People v Tessitore*, 101 AD3d 1621, 1622, *lv denied* 20 NY3d 1104 [internal quotation marks omitted]; *see People v Miller*, 87 AD3d 1303, 1304, *lv denied* 18 NY3d 926), that contention is unpreserved for our review inasmuch as defendant did not object during the restitution hearing or otherwise alert County Court of his objection (*see* CPL 470.05 [2]; *see also People v Horne*, 97 NY2d 404, 414 n 3). In any event, we conclude that the People established the amount of restitution by a preponderance of the evidence, and there is no basis to disturb the restitution award (*see People v Lucieer*, 107 AD3d 1611, 1613; *see generally* CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1049

KA 12-00882

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC SAHM, DEFENDANT-APPELLANT.

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

ERIC SAHM, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 2, 2012. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), 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; *People v Hidalgo*, 91 NY2d 733, 737).

We reject defendant's further contention that his plea of guilty was not knowingly, intelligently and voluntarily entered. " 'Here, defendant's belated and conclusory allegations of innocence in support of the motion [to withdraw the plea] are belied by the plea colloquy' " (*People v Nelson*, 66 AD3d 1430, 1430, *lv denied* 14 NY3d 772), as is defendant's conclusory and unsupported allegation made in his pro se supplemental brief that his attention deficit hyperactivity disorder rendered him unable to understand the proceedings (*see People v Brooks*, 89 AD3d 747, 747-748, *lv denied* 18 NY3d 955). Moreover, the requirements of the Sex Offender Registration Act are collateral consequences of a guilty plea (*see People v Magliocco*, 101 AD3d 1724, 1724), and the potential termination of parental rights with respect to biological children is not an automatic consequence of being convicted of a sex offense or having to register as a sex offender

(*see generally Matter of Afton C. [James C.]*, 17 NY3d 1, 10-11). Thus, County Court was not required to advise defendant of those matters at the time of the plea.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1050

KA 12-02109

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE IRVIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered September 4, 2012. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree and endangering the welfare of a child.

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 first degree (Penal Law § 130.35 [3]), criminal sexual act in the first degree (§ 130.50 [3]), sexual abuse in the first degree (§ 130.65 [3]), and endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that the testimony of a police witness regarding his observations of the victim's interview deprived him of his right of confrontation (*see People v Davis*, 87 AD3d 1332, 1334-1335, *lv denied* 18 NY3d 858, *reconsideration denied* 18 NY3d 956). In any event, even assuming, arguendo, that the police witness's testimony equated to the introduction of the victim's testimonial statements in evidence, we note that " '[t]he Confrontation Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted' " (*People v Reynoso*, 2 NY3d 820, 821, quoting *Crawford v Washington*, 541 US 36, 59 n 9; *see Davis*, 87 AD3d at 1335). Here, the testimony was properly admitted in evidence for the purpose of explaining the police witness's actions and the sequence of events leading to defendant's arrest (*see People v Davis*, 23 AD3d 833, 835, *lv denied* 6 NY3d 811). To the extent that defendant contends that he was deprived of his right of confrontation by the victim's failure to testify, that contention is unpreserved for our review and, in any event, is without merit (*see People v Watts*, 58 AD3d 647, 648, *lv dismissed* 12 NY3d 763, *lv denied* 12 NY3d 789; *see also People v Andre W.*, 44 NY2d 179, 184).

Contrary to defendant's contention, County Court properly refused to suppress the written statement that he made to a police witness. The record of the suppression hearing supports the court's determination that defendant knowingly, voluntarily and intelligently waived his *Miranda* rights before making the statement (*see People v Sands*, 81 AD3d 1263, 1263, *lv denied* 17 NY3d 800).

Defendant further contends that the court deprived him of his constitutional rights to a fair trial, impartial jury, and due process by failing to excuse two prospective jurors who did not unequivocally assure their impartiality. "By failing to raise that challenge in the trial court, however, defendant failed to preserve it for our review" (*People v Stepney*, 93 AD3d 1297, 1297-1298, *lv denied* 19 NY3d 968). In any event, "even if defendant had challenged [those] prospective juror[s] . . . and his challenge[s] had merit, [they] nevertheless would not be properly before us because he failed to exhaust his peremptory challenges prior to the completion of jury selection" (*id.* at 1298).

By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review his contention that there is legally insufficient evidence to corroborate his confession pursuant to CPL 60.50 (*see People v Gray*, 86 NY2d 10, 19; *People v Tyra*, 84 AD3d 1758, 1759, *lv denied* 17 NY3d 822). Defendant, however, also contends that the verdict is against the weight of the evidence, and " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of [that contention]' " (*Stepney*, 93 AD3d at 1298; *see People v Danielson*, 9 NY3d 342, 349-350). Viewing the evidence in light of the elements of the crimes as charged to the jury, we conclude that "the People proved beyond a reasonable doubt all elements of the crimes charged" (*Stepney*, 93 AD3d at 1298; *see Danielson*, 9 NY3d at 349; *see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that he was denied effective assistance of counsel. To the extent that defendant contends that he was denied effective assistance of counsel based upon defense counsel's failure to make a more specific motion for a trial order of dismissal, that contention is without merit because defendant failed to demonstrate that the motion, if made, would have been successful (*see People v Bassett*, 55 AD3d 1434, 1437-1438, *lv denied* 11 NY3d 922). To the extent that defendant contends that defense counsel was ineffective for failing to challenge two prospective jurors, that contention also lacks merit inasmuch as defendant " 'failed to show the absence of a strategic explanation for defense counsel's failure' to challenge th[ose] prospective juror[s]" (*Stepney*, 93 AD3d at 1298). With respect to each of the remaining alleged instances of ineffective assistance, we conclude that defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712), and the record establishes that defense counsel provided meaningful representation to defendant (*see People v Baldi*, 54 NY2d 137, 147). Defendant's contention with respect to

alleged prosecutorial misconduct has not been preserved for our review (*see People v Arnold*, 107 AD3d 1526, 1527; *People v Mull*, 89 AD3d 1445, 1446, *lv denied* 19 NY3d 965), 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]).

Defendant failed to preserve for our review any contention regarding the failure to comply with the procedural requirements of CPL 400.21 (*see People v Perez*, 85 AD3d 1538, 1541). In any event, "[a]lthough [the court] did not formally ask defendant whether he wished to controvert the allegations in the [predicate] felony offender statement (*see* CPL 400.21 [3]), the record establishes that defendant had an opportunity to do so" (*People v Hughes*, 28 AD3d 1185, 1185, *lv denied* 7 NY3d 790). Thus, under the circumstances presented here, we conclude that there was the requisite substantial compliance with CPL 400.21 (*see id.*). Defendant's contention that the court erred in setting the expiration date of the order of protection is also unpreserved for our review (*see* CPL 470.05 [2]). In any event, the court properly calculated the order of protection's expiration date (*see* CPL 530.13 [4] [A]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1052

KA 12-00548

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON E. HURD, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered February 14, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in denying his request for a downward departure from the presumptive risk level because one of his prior convictions upon which that risk level was calculated was for endangering the welfare of a child (Penal Law § 260.10) and did not involve events of a sexual nature. We reject that contention. A departure from the presumptive risk level is warranted where "there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). Here, even assuming, arguendo, that the court erroneously treated defendant's conviction of endangering the welfare of a child as a sex crime, we note that defendant's score on the risk assessment instrument would still yield a presumptive level three risk, and defendant presented no other basis to support his request for a downward departure. Consequently, "defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" from the presumptive risk level yielded by the risk assessment instrument (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1053

KA 10-01382

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAOUL BALDWIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered April 13, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted kidnapping 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 kidnapping in the second degree (Penal Law §§ 110.00, 135.20). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), 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; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1054

KA 11-00919

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OSCAR A. ARANDA, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, 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 (Melchor E. Castro, A.J.), rendered April 29, 2011. The judgment convicted defendant, upon a nonjury verdict, of predatory sexual assault against a child and sexual abuse in the first degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of predatory sexual assault against a child (Penal Law § 130.96) and three counts of sexual abuse in the first degree (§ 130.65 [3]). Defendant failed to preserve for our review his contention that his statement to the victim's stepfather was inadmissible hearsay and did not fall within the admission exception to the hearsay rule (*see* CPL 470.05 [2]; *see generally People v Jones*, 92 AD3d 1218, 1218, *lv denied* 19 NY3d 962), 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]). We reject defendant's further contention that defense counsel's failure to object to that testimony constituted ineffective assistance of counsel. Defendant's statement was indeed an admission (*see People v Ward*, 107 AD3d 1605, 1605; *see also* Jerome Prince, Richardson on Evidence § 8-204 [Farrell 11th ed 1995]), and thus there was little or no chance that the objection would have been sustained (*see generally People v Lewis*, 67 AD3d 1396, 1396, *lv denied* 14 NY3d 772). Finally, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1055

KA 12-00253

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS J. ARROYO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 15, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and reckless endangerment 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and reckless endangerment in the first degree (§ 120.25). By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). Defendant also contends, however, that the verdict is against the weight of the evidence, and " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of [that contention]' " (*People v Stepney*, 93 AD3d 1297, 1298, *lv denied* 19 NY3d 968; *see People v Danielson*, 9 NY3d 342, 348-349). Viewing the evidence in light of the elements of the crimes as charged to the jury, we conclude that "the People proved beyond a reasonable doubt all elements of the crimes charged" (*Stepney*, 93 AD3d at 1298; *see Danielson*, 9 NY3d at 349; *see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that Supreme Court erred in denying his motion to preclude the People from introducing in evidence a printout of a mugshot photograph containing defendant's signed handwritten statement that the person in the photograph sold him a vehicle on the evening of defendant's arrest. We reject defendant's

contention that he was entitled to preclusion on the ground that the printout was not included in the CPL 710.30 notice. The People's notice of intention to introduce statements by defendant at trial " 'was sufficient under CPL 710.30 to apprise the defendant that they would be introducing [the printout] . . . since the statements contained the sum and substance of what [the printout] indicated' " (*People v Mikel*, 303 AD2d 1031, 1031, *lv denied* 100 NY2d 564; *see People v Bennett*, 56 NY2d 837, 839; *People v Peppard*, 27 AD3d 1143, 1143-1144, *lv denied* 7 NY3d 793).

Contrary to defendant's contention, the court properly denied his request for a missing witness charge. "[D]efendant's request for such a charge, made after the close of proof, was untimely" (*People v Rosario*, 277 AD2d 943, 943, *affd* 96 NY2d 857). In any event, defendant failed to meet his burden of establishing his entitlement to such a charge inasmuch as the uncalled witness's testimony would have been cumulative (*see People v Savinon*, 100 NY2d 192, 197; *People v Gonzalez*, 68 NY2d 424, 427).

We reject defendant's further contention that he was denied effective assistance of counsel. Defense counsel's failure to object to allegedly improper comments by the prosecutor on summation does not constitute ineffective assistance of counsel. The prosecutor's comments either were "not so egregious as to deny defendant a fair trial" or did not in fact constitute prosecutorial misconduct (*People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954). To the extent that defendant contends that he was denied effective assistance of counsel based upon defense counsel's failure to make a more specific trial order of dismissal motion, request a probable cause hearing, or move to suppress his statements to the police and physical evidence found in the vehicle he was driving, his contention is without merit because he failed to demonstrate that the motions, if made, would have been successful (*see People v Noguel*, 93 AD3d 1319, 1320, *lv denied* 19 NY3d 965).

We conclude that the sentence is not unduly harsh or severe. We note, however, that the certificate of conviction fails to reflect that defendant was sentenced to a five-year period of postrelease supervision, and it must therefore be amended to reflect that fact (*see People v Smoke*, 43 AD3d 1332, 1333, *lv denied* 9 NY3d 1039).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1056

KA 08-02111

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE B. AVILEZ, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered August 14, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of robbery in the second degree (Penal Law § 160.10 [1]) in connection with the home invasion of his cousin's home. We reject defendant's contention that the testimony of the accomplice was not sufficiently corroborated and thus that the evidence is legally insufficient to support the conviction. Both the accomplice and the victim testified that defendant was inside the home when the accomplice entered and that the accomplice pointed what appeared to be a handgun at defendant while defendant told the victim to give the accomplice money. The accomplice's testimony that defendant had planned the crime was sufficiently corroborated by the testimony of the victim, who observed defendant talking with the accomplice outside the home prior to the crime (*see People v Reome*, 15 NY3d 188, 191-192), and by statements defendant made to his girlfriend in a recorded telephone conversation while he was incarcerated (*see People v Mohamed*, 94 AD3d 1462, 1463, *lv denied* 19 NY3d 999, *reconsideration denied* 20 NY3d 934). The sentence is not unduly harsh or severe.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1057

KA 11-02354

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN COLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered October 11, 2011. The judgment convicted defendant, after a nonjury trial, of robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of robbery in the third degree (Penal Law § 160.05). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Where, as here, the defendant's challenge is focused upon the credibility of the witnesses, we accord "great deference to the resolution of credibility issues by the trier of fact because those 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 Vanlare*, 77 AD3d 1313, 1315, *lv denied* 15 NY3d 956 [internal quotation marks omitted]). Consequently, although a different verdict would not have been unreasonable based on all of the credible evidence (*see Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495), County Court specifically credited the victim's testimony, and we see no basis to disturb that determination.

Additionally, inasmuch as defendant's challenge to the legal sufficiency of the evidence is without merit, there is also no merit to his further contention that he was denied effective assistance of

counsel because defense counsel failed to preserve that challenge for our review (*see People v Stephenson*, 104 AD3d 1277, 1279, *lv denied* 21 NY3d 1020; *People v Perez*, 89 AD3d 1393, 1394, *lv denied* 18 NY3d 961). Finally, the sentence is not unduly harsh or severe.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1058

KA 09-00789

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLEN DAVIS, ALSO KNOWN AS THOMAS DAVIS,
DEFENDANT-APPELLANT.

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

GLEN DAVIS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 4, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). Viewing the evidence in light of the elements of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495). "[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, *lv denied* 13 NY3d 942 [internal quotation marks omitted]). Defendant's further contention that County Court erred in failing to charge the jury on justification with respect to ordinary physical force, as opposed to deadly physical force, is not preserved for our review (*see People v Carr*, 59 AD3d 945, 946, *affd* 14 NY3d 808; *People v Johnson*, 103 AD3d 1226, 1226, *lv denied* 21 NY3d 944). In any event, that contention lacks merit. Inasmuch as "the charge against defendant required proof of his use of deadly physical force, the court properly instructed the jury on deadly physical force as part of defendant's justification defense" (*People v Davis*, 118 AD2d 206, 210, *lv denied* 68 NY2d 768). Contrary

to the contention of defendant in his pro se supplemental brief, defense counsel was not ineffective in failing to seek an instruction with respect to ordinary physical force because an attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see Johnson*, 103 AD3d at 1226).

Defendant's remaining contentions are in his main brief and concern the court's preclusionary rulings. None of those contentions requires reversal or modification of the judgment of conviction.

First, defendant contends that the court erred in precluding defendant from testifying that over one month before the murder he and the victim had an exchange in which the victim asked defendant why defendant was "clocking," i.e., watching, the victim. Although defendant contends that such statement could be considered a threat, we conclude that "[i]t was within the court's discretion to preclude [that testimony] as too speculative or conjectural to be presented to the jury" (*People v Parks*, 85 AD3d 557, 557-558, *lv denied* 17 NY3d 904).

Second, defendant contends that he was thwarted in his efforts to explain his fear of the victim when the court refused to allow him to testify as to what two associates of the victim had told defendant about leaving the apartment building in which defendant resided. Even assuming, arguendo, that defendant preserved his contention for our review, we conclude that any error in precluding defendant from testifying on this point is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). We note in particular that "the precluded testimony was essentially cumulative of other evidence presented at trial" and that "defendant was provided a meaningful opportunity to present a complete defense" (*People v Ramsey*, 59 AD3d 1046, 1048, *lv denied* 12 NY3d 858 [internal quotation marks omitted]). Here, defendant testified that a competing drug dealer known to defendant had been shot by the victim, that the victim and associates of the victim had severely beaten defendant, and that the victim had frightened defendant and defendant's girlfriend into moving from the apartment building in which they resided.

Third, defendant contends that the court erred in refusing to allow him to explain his state of mind in returning to the apartment building from which he had previously moved on the day of the shooting. The court did not in fact preclude such testimony, however, inasmuch as the court permitted defendant to testify that he did not anticipate the presence of the victim or the victim's associates on the morning of the shooting.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1061

CA 13-00608

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

KAREN M. LINNANE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAJOS SZABO AND EDITH M. SZABO,
DEFENDANTS-APPELLANTS.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (MICHAEL J. COOPER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 22, 2013. The order granted the motion of plaintiff for partial summary judgment on negligence and on the issue of serious injury with respect to three of the categories set forth in the bill of particulars, and denied defendants' cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion and granting defendants' cross motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the claim that plaintiff sustained a serious injury to her left knee and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving was struck by a vehicle operated by Edith M. Szabo (defendant). Plaintiff alleged that she sustained qualifying serious injuries pursuant to Insurance Law § 5102 (d) with respect to injuries she sustained to both knees, her left shoulder, and her cervical and lumbar spine. It is undisputed that plaintiff had surgery on her right knee, her left shoulder and her lumbar spine following the accident. Plaintiff moved for partial summary judgment on negligence and on the issue of serious injury with respect to three of the categories set forth in the bill of particulars, i.e., the permanent consequential limitation of use, significant limitation of use and 90/180-day categories, and defendants cross-moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a qualifying injury under any of the categories alleged in the bill of particulars. Supreme Court granted plaintiff's motion and denied defendants' cross motion.

Addressing first the issue of serious injury, we conclude on the record before us that plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102 (d) in connection with the alleged injury to her left knee, inasmuch as the record establishes that she sustained only a minor, mild or slight limitation of her left knee (*see Monette v Trummer* [appeal No. 2], 96 AD3d 1547, 1548-1549). We therefore modify the order by denying plaintiff's motion with respect to the left knee and granting defendants' cross motion in that regard. We further conclude with respect to both plaintiff's motion and defendants' cross motion that "[s]ufficient record evidence exists to raise a triable issue of fact whether plaintiff sustained a 'serious injury' " under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories with respect to the alleged injuries to plaintiff's right knee, left shoulder, and cervical and lumbar spine (*see Tyson v Nazarian*, 20 NY3d 967, 968), based upon the conflicting reports and affidavits of the parties' medical experts (*see Verkey v Hebard*, 99 AD3d 1205, 1206). We therefore further modify the order accordingly.

We agree with defendants that the court erred in granting plaintiff's motion with respect to the issue of negligence. Plaintiff submitted defendant's deposition testimony, which related a nonnegligent explanation for the accident, and she thus failed to establish her entitlement to judgment on the issue of negligence (*see generally Zuckerman v City of New York*, 49 NY2d 557, 561). We therefore further modify the order accordingly.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1062

CA 12-02061

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

JUDY MILLS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD MILLS, DEFENDANT-APPELLANT.

RICHARD MILLS, ROMULUS, DEFENDANT-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered October 10, 2012. The order denied the motion of defendant to vacate a default judgment of divorce.

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

Memorandum: Defendant appeals from an order denying his motion to vacate a default judgment of divorce. The default judgment was entered in 2002 and, in 2011, defendant first applied for poor person relief in order to file a motion to vacate the default. Upon the denial of the motion for poor person relief, defendant moved pro se seeking, among other relief, leave to reargue that motion and, after the denial of the reargument motion, defendant moved to vacate the default judgment. Contrary to defendant's contention, Supreme Court did not err in denying defendant's motion to vacate the default.

Initially, we note that defendant's contention that the court erred in denying his application for poor person relief is not properly before us. Defendant did not file a notice of appeal with respect to the order that initially denied that application (*see* CPLR 5513 [a]; *Matter of HSBC Bank USA, NA [Makowski]*, 72 AD3d 1515, 1516-1517; *DiSanto v DiSanto*, 29 AD3d 935, 935). In addition, in a subsequent order, the court denied defendant's motion for leave to reargue his application for poor person relief, and defendant failed to file a notice of appeal with respect to that order. Even if he had filed a notice of appeal, however, it is settled that "[a]n order denying a motion to reargue is not appealable" (*Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Defendant's further contention that the court was required to appoint a guardian ad litem for him is raised for the first time on appeal and therefore is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We nevertheless review that contention inasmuch as it involves "[a] question of law appearing on the face of the record . . . [that] could not have been avoided by the opposing

party if brought to that party's attention in a timely manner" (*Oram v Capone*, 206 AD2d 839, 840). We reject defendant's contention, however, and conclude that he failed to establish that the court was required to appoint a guardian ad litem before granting the default judgment (*see generally* CPLR 1201, 1203; *cf. State of New York v Kama*, 267 AD2d 225, 225-226). To the contrary, even assuming, arguendo, that the evidence submitted by defendant was properly considered by the court (*cf. generally Mohrmann v Lynch-Mohrmann*, 24 AD3d 735, 736), we conclude that the evidence "failed to set forth any professional medical opinion that [he] may have lacked the mental ability to adequately protect [his] rights and interests during the relevant time period" (*id.*).

With respect to defendant's contentions concerning vacatur of the default judgment, it is well settled that "[t]he determination of whether . . . to vacate a default . . . is generally left to the sound discretion of the court" (*Ahmad v Aniolowiski*, 28 AD3d 692, 692; *see Shouse v Lyons*, 265 AD2d 901, 902). Contrary to defendant's contention, we conclude that the court properly determined "that defendant had actual notice of the default judgment as early as [2004, and unquestionably had notice of it in 2009], thus, [his 2011] motion to vacate the default judgment pursuant to CPLR 5015 (a) (1)—which permits vacatur of a judgment on the ground of excusable default within one year—is . . . untimely" (*State of N.Y. Higher Educ. Servs. Corp. v Sparozic*, 35 AD3d 1069, 1070, *lv denied* 8 NY3d 958).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1068

TP 13-00696

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

IN THE MATTER OF ROLAND CODY, PETITIONER,

V ORDER

BRIAN FISCHER, 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.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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 [Mark H. Dadd, A.J.], entered April 16, 2013) 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: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1069

TP 13-00769

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

IN THE MATTER OF JOSE D. MARTINEZ, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, MR. SMITH, SUPERINTENDENT OF MID-STATE C.F., OFFICER FULLER, MARCY C.F., AND OFFICER THORP, MARCY C.F., RESPONDENTS.

JOSE D. MARTINEZ, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order and judgment (one paper) of the Supreme Court, Oneida County [Samuel D. Hester, J.], entered April 17, 2013) 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: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1070

KA 13-00121

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER D. ALDRICH, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 5, 2012. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1071

KA 12-01933

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK L. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 13, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]) and robbery in the second degree (§ 160.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1072

KA 11-00577

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEYON T. ROBERTS, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered March 4, 2011. 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]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction because his motion to dismiss was not specifically directed at the ground advanced on appeal (*see People v Gray*, 86 NY2d 10, 19; *People v Ange*, 37 AD3d 1143, 1144, *lv denied* 9 NY3d 839). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We note in particular that the jury's credibility determinations are entitled to great deference " 'because those 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' " (*see Ange*, 37 AD3d at 1144, quoting *People v Lane*, 7 NY3d 888, 890).

We reject defendant's further contention that he did not receive effective assistance of counsel. Rather, we conclude that "the defense reflect[ed] a reasonable and legitimate strategy under the circumstances and evidence presented," and thus it did "not fall to the level of ineffective assistance" (*People v Benevento*, 91 NY2d 708, 712-713; *see generally People v Baldi*, 54 NY2d 137, 147).

Finally, we reject defendant's contention that County Court erred in adjudicating him a persistent violent felony offender pursuant to

CPL 400.16. Prior to his conviction herein for a class C violent felony offense (*see* CPL 70.02 [1] [b]), defendant was convicted of two violent felony offenses, i.e., attempted robbery in the first degree in 1998 and attempted burglary in the first degree in 2002. Defendant is precluded from challenging the constitutionality of the 1998 conviction because he failed to challenge the constitutionality of that conviction in the 2002 proceedings (*see People v Wilson*, 231 AD2d 912, 913, *lv denied* 89 NY2d 868). We have examined defendant's remaining contention and conclude that it lacks merit.

Frances E. Cafarell

Entered: November 8, 2013

Clerk of the Court

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

1074

KA 13-00411

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

BYRON CLARK, DEFENDANT-RESPONDENT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID R. PANEPINTO OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), dated December 14, 2012. The order granted the motion of defendant to suppress physical evidence.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1075

KA 11-01021

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. COX, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered October 29, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession 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 him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). Defendant's contention regarding the voluntariness of his plea is not preserved for our review because he did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Rosado*, 70 AD3d 1315, 1316, *lv denied* 14 NY3d 892). In any event, the record demonstrates that defendant's plea was knowing, voluntary and intelligent (*see People v Seeber*, 4 NY3d 780, 781-782).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1076

KA 12-01589

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL L. RODRIGUEZ, DEFENDANT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE C. FODOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 13, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]) and robbery in the second degree (§ 160.10 [1]). Contrary to defendant's contention, we conclude that he knowingly, intelligently and voluntarily waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256; *People v Kemp*, 94 NY2d 831, 833). The challenge by defendant to County Court's suppression ruling is encompassed by that valid waiver of the right to appeal (*see Kemp*, 94 NY2d at 833; *People v Goossens*, 92 AD3d 1282, 1283, *lv denied* 19 NY3d 960).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1080

KA 11-01486

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AUBREY D. BAILEY, II, DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN 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 (James J. Piampiano, J.), rendered July 18, 2011. The judgment convicted defendant, upon a nonjury verdict, of 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: Defendant appeals from a judgment convicting him upon a nonjury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Contrary to the contention of defendant, we conclude that the evidence, viewed in the light most favorable to the People, is legally sufficient to disprove his defense of temporary and lawful possession of the weapon (*see People v Lucas*, 94 AD3d 1441, 1441, *lv denied* 19 NY3d 964; *People v Myers*, 265 AD2d 598, 600; *People v Miller*, 259 AD2d 1037, 1037, *lv denied* 93 NY2d 927). Even if, as defendant contends, he originally acquired the gun by disarming his alleged assailant in the course of a robbery, we conclude that the evidence is legally sufficient to establish that he thereafter possessed it with the requisite unlawful intent (*see People v Sheehan*, 41 AD3d 335, 335, *lv denied* 9 NY3d 993; *People v Gonzalez*, 262 AD2d 1061, 1061-1062, *lv denied* 93 NY2d 1018). After evading his alleged robber, defendant returned to the scene of the robbery with the gun drawn and fired five shots, one of which struck his alleged assailant in the leg. Defendant then regained possession of his property, a duffel bag containing $27,000 in cash, and fled upon the approach of the police. Such conduct is “utterly at odds with [defendant’s] claim of innocent possession . . . temporarily and incidentally [resulting] from . . . disarming a wrongful possessor” (*Gonzalez*, 262 AD2d at 1062 [internal quotation marks omitted]; *see People v Banks*, 76 NY2d 799, 801; *People v Aracil*, 45 AD3d 401, 401-402, *lv denied* 9 NY3d 1030).

Defendant further contends that he had no duty to retreat, but was justified in acting as he did, because the People failed to prove that he could have retreated with complete safety. We reject that contention. It is well settled that the defense of justification, which involves the "justifiable *use of physical force*" (Penal Law § 35.05 [emphasis added]), does not apply to criminal *possession* of a weapon (*see People v Pons*, 68 NY2d 264, 265, 267; *see also People v Almodovar*, 62 NY2d 126, 130; *People v Jenkins*, 81 AD3d 662, 663, *lv denied* 16 NY3d 860). Thus, the "duty to retreat" rule, which applies to the defense of justification in connection with the use of deadly physical force (*see* § 35.15 [2] [a]), is not relevant here. Nonetheless, justification is relevant to a defendant's intent in using a weapon. In other words, "[t]he use of a firearm to engage in conduct that is justifiable under the law is not unlawful. Thus, an intent to use a firearm against another justifiably is not an intent to use it unlawfully" (CJI2d[NY] Penal Law art 265, Intent to Use Unlawfully and Justification). Here, however, the evidence is legally sufficient to establish that defendant "possessed the firearm with the intent to use it against another unlawfully and not solely with the intent to use it justifiably" (*id.*; *see People v Britton*, 27 AD3d 1014, 1015, *lv denied* 6 NY3d 892; *cf. Pons*, 68 NY2d at 267-268).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see Gonzalez*, 262 AD2d at 1061-1062; *see generally People v Bleakley*, 69 NY2d 490, 495). Additionally, we reject defendant's contention that County Court erred in excluding testimony that, 10 months subsequent to the events at issue, his alleged assailant was found in possession of multiple firearms. "The trial court is granted broad discretion in making evidentiary rulings in connection with the preclusion or admission of testimony and such rulings should not be disturbed absent an abuse of discretion" (*People v Almonor*, 93 NY2d 571, 583; *see People v Carroll*, 95 NY2d 375, 385), and we discern no such abuse of discretion here (*see Almonor*, 93 NY2d at 583; *see generally People v Scarola*, 71 NY2d 769, 777-778).

Finally, the sentence is not unduly harsh or severe.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1081

CA 13-00693

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

THE ONEIDA INDIAN NATION, A SOVEREIGN NATION,
PLAINTIFF-APPELLANT,

V ORDER

HUNT CONSTRUCTION GROUP, INC.,
DEFENDANT-RESPONDENT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), AND WILLIAMS & CONNOLLY LLP, WASHINGTON, D.C. FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 8, 2013. The order denied the motion of plaintiff to dismiss the second through sixth counterclaims of defendant.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 16 and 17, 2013,

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1082

CA 13-00515

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

MARY BETH DEJOHN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SPEECH, LANGUAGE & COMMUNICATION ASSOCIATES, SLP, OT, PT, PLLC, TAMI D. TREUTLIEN AND SCOTT TREUTLIEN, DEFENDANTS-APPELLANTS.

DIMATTEO LAW OFFICE, WARSAW (DAVID M. ROACH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (CHAD E. MURRAY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered October 9, 2012. The order denied the motion of defendants to dismiss the complaint.

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

Memorandum: On appeal from an order denying defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (5), defendants contend that Supreme Court erred in determining that an alleged oral agreement between the parties is not void and unenforceable pursuant to the statute of frauds (*see* General Obligations Law § 5-701 [a] [1]; *see generally Hubbell v T.J. Madde Constr. Co., Inc.*, 32 AD3d 1306, 1306). The alleged oral agreement provided that defendants would purchase plaintiff's business for $480,000 and make an initial payment of $10,000, followed by 23 monthly payments of $20,000 and a final payment of $10,000. No party asserted that prepayment of the purchase price was prohibited under the alleged oral agreement. Plaintiff asserted that she fully performed her obligations under the alleged oral agreement and that defendants made several payments thereunder before defaulting. In support of the motion, defendant Tami D. Treutlien averred that she and the other defendants did not reach an agreement with plaintiff, but she did not specifically controvert that payments were made to plaintiff.

Taking plaintiff's "allegations as true and resolv[ing] all inferences which reasonably flow therefrom in [her] favor" (*Cron v Hargro Fabrics*, 91 NY2d 362, 366), we conclude that the court properly denied the motion. "As long as [an] agreement may be 'fairly and reasonably interpreted' such that it may be performed within a year,

the [s]tatute of [f]rauds will not act as a bar [to enforcing it] however unexpected, unlikely, or even improbable that such performance will occur during that time frame" (*id*. at 366). Here, the absence of a term prohibiting payment in full within the first year makes possible full performance of the alleged oral agreement within that year, and thus defendants did not meet their burden of establishing that the statute of frauds renders the alleged oral agreement void and unenforceable (*see Moon v Moon*, 6 AD3d 796, 798).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1083

CA 12-02046

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

JAMES A. SLAYTON AND KATHLEEN L. SLAYTON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

VENKATESWARA R. KOLLI, M.D., ET AL., DEFENDANTS,
KENMORE MERCY HOSPITAL, DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEMPSEY & DEMPSEY, BUFFALO (HELEN KANEY DEMPSEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered October 12, 2012. The order directed defendant Kenmore Mercy Hospital to disclose a "patient/visitor occurrence report" dated April 6, 2011 to plaintiffs' counsel.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff James A. Slayton while undergoing laparoscopic cholecystectomy surgery. Plaintiffs moved for, inter alia, an order compelling defendants to respond to their discovery demands. At issue herein is a "patient/visitor occurrence report," which defendant Kenmore Mercy Hospital (hospital) asserts is privileged, and thus not discoverable, pursuant to Public Health Law § 2805-m and Education Law § 6527 (3). Following an in camera review of the report, Supreme Court granted plaintiffs' motion to the extent of ordering the hospital to disclose the report to plaintiffs' counsel within 20 days of service of the order with notice of entry. This Court granted a stay of enforcement of that order pending the hospital's appeal.

Initially, we conclude that the court erred in holding that the privilege set forth in Education Law § 6527 (3) is inapplicable to the report. Inasmuch as the report is not a "hospital-wide [plan] to improve quality and prevent malpractice," this Court's holding in *Aldridge v Brodman* is inapplicable (49 AD3d 1192, 1193-1194). We nevertheless conclude that the court did not abuse its discretion in granting plaintiffs' motion to the extent of ordering the hospital to disclose the report to plaintiffs (*cf. Matter of Coniber v United Mem.*

Med. Ctr., 81 AD3d 1329, 1330). Here, the hospital failed to meet its burden of establishing that the report was "generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3) or a malpractice prevention program pursuant to Public Health Law § 2805-j" (*id.* at 1330 [internal quotation marks omitted]). Morever, with respect to the privilege set forth in Public Health Law § 2805-j, we deem the conclusory statement in the affidavit submitted by the hospital's director of risk management that "[t]he report was prepared solely and exclusively in connection with the hospital's malpractice prevention program, as required by statute" to be insufficient to meet the hospital's burden of demonstrating that the form was actually generated at the behest of the hospital's malpractice prevention program.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1084

CA 13-00096

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

IN THE MATTER OF EDDIE SANCHEZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered January 24, 2012 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the denial of his application for release to parole supervision in January 2011. The Attorney General has advised this Court that, subsequent to that denial, petitioner reappeared before the Board of Parole on January 28, 2013 and was denied release again. Consequently, this appeal must be dismissed as moot (*see Matter of Dobranski v Alexander*, 69 AD3d 1091, 1091). Contrary to petitioner's contention, this matter does not fall within the exception to the mootness doctrine (*see Matter of Malangone v Dennison*, 46 AD3d 1155, 1155; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1088

CA 12-02386

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

PRICE TRUCKING CORP., FOR ITSELF AND ALL OTHER SIMILARLY SITUATED TRUST FUND BENEFICIARIES OF CERTAIN TRUST FUNDS PURSUANT TO NEW YORK LIEN LAW ARTICLE 3-A, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AAA ENVIRONMENTAL, INC., ENVIRITE OF OHIO, INC., MIKE LINA PAVING, INC., DEFENDANTS-RESPONDENTS, FIRST NIAGARA BANK, N.A., DEFENDANT-APPELLANT, NORAMPAC INDUSTRIES, INC., ET AL., DEFENDANTS.

DAVIDSON FINK LLP, ROCHESTER (DAVID L. RASMUSSEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (THOMAS K. O'GARA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 6, 2012. The order, among other things, granted in part the motion of plaintiff for partial summary judgment seeking, inter alia, a determination on its first cause of action that defendant First Niagara Bank, N.A. was liable for violations of Lien Law article 3-A, and a determination on its fifth cause of action that it is entitled to attorneys' fees.

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

Memorandum: Defendant AAA Environmental, Inc. (AAA) entered into a contract with defendant Norampac Industries, Inc. (Norampac) to perform environmental remediation services at premises owned by Norampac. AAA thereafter entered into subcontracts with various entities. Payments issued by Norampac to AAA were deposited into AAA's operational account at defendant First Niagara Bank, N.A. (First Niagara). AAA and First Niagara had an agreement (agreement) whereby each night funds from AAA's operational account would be transferred automatically into AAA's line of credit account to reduce the amounts owed by AAA on that account. Conversely, if the amount to be charged against AAA's operational account the next business day exceeded the funds available in that account, funds would be transferred automatically from the line of credit account to the operational account pursuant to the agreement. Plaintiff, on behalf of itself and

all other similarly situated subcontractors of AAA on the Norampac project, commenced this action alleging, inter alia, that First Niagara's automatic transfer of funds from the operational account into the line of credit account constituted a violation of Lien Law article 3-A. Plaintiff subsequently moved for partial summary judgment seeking, inter alia, a determination on its first cause of action that First Niagara was liable as a matter of law for violations of Lien Law article 3-A, and a determination on its fifth cause of action that it is entitled to attorneys' fees pursuant to CPLR 909. In opposing the motion, First Niagara argued that it was a holder in due course pursuant to Lien Law § 72 (1) and that it could not be held liable because it did not have actual notice that it was receiving diverted Lien Law trust assets. As relevant on appeal, Supreme Court granted those parts of plaintiff's motion for partial summary judgment on liability on the first and fifth causes of action, upon determining that First Niagara was a Lien Law statutory trustee, and that it had both actual and constructive notice that the automatic transfer of funds from AAA's operational account into AAA's line of credit account constituted a diversion of Lien Law trust assets. We conclude that the court erred in granting those parts of plaintiff's motion, and we therefore modify the order accordingly.

Contrary to the court's determination, First Niagara is not a Lien Law statutory trustee under the facts of this case and thus cannot be held liable for a violation of the Lien Law on that basis. "A lender is not a statutory trustee because '[n]o one other than an owner, contractor, or subcontractor is designated as a prospective trustee in article 3-A [of the Lien Law]' " (*Matter of ALB Contr. Co. v York-Jersey Mtge. Co.*, 60 AD2d 989, 989; *see Caledonia Lbr. & Coal Co. v Chili Hgts. Apts.*, 70 AD2d 766, 766). Although the Court of Appeals has held that a lender may become a statutory trustee when a contractor assigns its right of payment from the owner to the lender as security for a loan and the owner makes payments directly to the lender until the contractor's debt is repaid (*see Aspro Mech. Contr. v Fleet Bank*, 1 NY3d 324, 330, *rearg denied* 2 NY3d 760), First Niagara received no such assignment here. Contrary to plaintiff's contention, our decision in *Local No. 4, Intl. Assn. of Heat & Frost & Asbestos Workers v Buffalo Wholesale Supply Co., Inc.* (49 AD3d 1276) does not compel a different result. In that case, we did not determine that all lenders that come into possession of trust assets are statutory trustees per se; rather, we wrote in the procedural posture of a motion to dismiss the complaint for failure to state a cause of action that a lender "may be held liable for diverting [trust] assets" under that theory (*id.* at 1278), in accordance with the decision of the Court of Appeals in *Aspro* (*see* 1 NY3d at 330).

We further agree with First Niagara that the court erred in determining as a matter of law that it had actual notice that it was receiving diverted Lien Law trust funds, and thus could be held liable under Lien Law § 72 (1). Plaintiff's own submissions raise issues of fact whether First Niagara had actual notice, and thus we need not consider the sufficiency of First Niagara's opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We also agree with First Niagara that the court erred in applying a constructive notice standard in determining that First Niagara was not a holder in due course, and thus could be liable under Lien Law § 72 (1). As the Court of Appeals noted in *I-T-E Imperial Corp.—Empire Div. v Bankers Trust Co.* (51 NY2d 811), "[w]ith the adoption . . . of the Uniform Commercial Code, the concept of notice under [UCC] article 3 (and by analogy under article 4 as well . . .) has, as we have held in *Chemical Bank of Rochester v Haskell* (51 NY2d 85), been changed from an objective to a subjective standard, and that change must be deemed to have amended the Lien Law as well" (*id.* at 813-814; *see LeChase Data/Telecom Servs., LLC v Goebert*, 6 NY3d 281, 291-292). Furthermore, "[t]he purpose of UCC 3-304 (7)—unique to New York and Virginia—[is] to require that questions of notice . . . be determined by a subjective test of actual knowledge rather than an objective test which might involve constructive knowledge" (*Hartford Acc. & Indem. Co. v American Express Co.*, 74 NY2d 153, 162).

Contrary to plaintiff's contention, *LeChase* does not require the application of a constructive notice standard here. The lender in *LeChase* was not a bank but instead was a factor, i.e., a company that lends money on the security of accounts receivable (*see* 6 NY3d at 284-285). The Court of Appeals held that the factor in that case acknowledged by filing a UCC-1 financing statement that its factoring arrangement was a UCC article 9 financing transaction and thus the factor was subject to the constructive notice standard supplied by UCC 1-201 (25) (*see id.* at 284, 292). In distinguishing its holding in *I-T-E*, the Court reiterated that "[a] holder in due course such as the bank in *I-T-E* will have customarily accepted trust assets in the form of an endorsed check, and cannot evaluate the trust status of every check deposited by all its contractor or construction-related customers" (*id.* at 292). Here, First Niagara was not a factor, nor was it an assignee of AAA's accounts receivable, and there is no evidence in the record that First Niagara filed a UCC-1 financing statement or that the relationship between First Niagara and AAA was otherwise governed by UCC article 9 (*cf. id.* at 292). We therefore conclude that First Niagara is subject "to the 'concept of notice' in articles 3 and 4 of the Uniform Commercial Code, which govern commercial paper and bank deposits and collections respectively" (*id.* at 291), i.e., actual notice. Thus, only actual notice that it was receiving diverted Lien Law trust funds would preclude First Niagara from relying on the holder in due course defense provided by Lien Law § 72 (1) and subject it to liability under the statute (*see id.* at 291-292; *I-T-E Imperial Corp.—Empire Div.*, 51 NY2d at 813-814).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1089

TP 13-00771

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF HOWARD MICHAEL, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, DAVID STALLONE, SUPERINTENDENT, CAYUGA CORRECTIONAL FACILITY AND ALBERT PRACK, DIRECTOR, SPECIAL HOUSING AND INMATE DISCIPLINE, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

HOWARD MICHAEL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered April 24, 2013) to review a determination finding, 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: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1091

KA 12-00971

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDGAR P. ATCHISON, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 2, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, unlawful fleeing a police officer in a motor vehicle in the third degree and reckless driving.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment for criminal possession of a weapon in the second degree to a determinate term of 10 years and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that he was deprived of a fair trial by improper and prejudicial comments made by the prosecutor during his cross-examination of a defense witness. Specifically, defendant contends that the prosecutor, in asking the defense witness whether she told the prosecutor in a meeting prior to trial that she was afraid of defendant, testified to facts not in evidence and thereby placed the prosecutor's credibility at issue. Although we agree with defendant that the prosecutor's questions about the witness's statements to him were improper (*see generally People v Paperno*, 54 NY2d 294, 300-301; *People v Blake*, 139 AD2d 110, 114), we conclude that Supreme Court's failure to sustain defense counsel's objection to the line of questioning is harmless error. The evidence of guilt is overwhelming, and there is no reasonable possibility that the jury would have acquitted defendant if the prosecutor had not improperly placed his own credibility at issue before the jury (*see generally People v Crimmins*, 36 NY2d 230, 237). We note in particular that defendant admitted at trial that he possessed the firearm in question, but claimed that his possession was temporary and innocent. According to defendant, the gun belonged to someone else, and the only

time he possessed the weapon was when he threw it out of the window of his moving vehicle, which the police were pursuing. Even accepting defendant's testimony as true, we conclude that his conduct was "utterly at odds with any claim of innocent possession" (*People v Williams*, 50 NY2d 1043, 1045; *see People v McCoy*, 46 AD3d 1348, 1350, *lv denied* 10 NY3d 813).

We agree with defendant, however, that the sentence imposed for criminal possession of a weapon in the second degree—a determinate term of imprisonment of 15 years plus a term of postrelease supervision of five years, the maximum punishment permitted by law—is unduly harsh and severe. Defendant has no prior felony convictions, and he served four years in the United States Navy, receiving an honorable discharge. Also, it is undisputed that defendant did not threaten anyone with the weapon or use it in a violent manner. Although we are mindful that defendant's actions endangered the lives of innocent people, including the police officers who were pursuing his vehicle, we conclude that the maximum punishment is not warranted. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence imposed for criminal possession of a weapon in the second degree to a determinate term of imprisonment of 10 years (*see generally* CPL 470.15 [6] [b]), to be followed by the five-year period of postrelease supervision imposed by the court.

We have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1093

KA 09-02126

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAN ANTONIO RUSSELL, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered May 15, 2009. The judgment convicted defendant as a juvenile offender upon his plea of guilty of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him as a juvenile offender upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that the waiver of the right to appeal is not valid, and he challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by County Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1096

KA 10-00668

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIM HENRY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered February 1, 2010. The judgment convicted defendant, upon his 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 him upon a plea of guilty of vehicular manslaughter in the first degree (Penal Law § 125.13 [3]). We agree with defendant that his waiver of the right to appeal is invalid because County Court's " 'single reference to defendant's right to appeal is insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Allen*, 64 AD3d 1190, 1191, *lv denied* 13 NY3d 794; *see People v Said*, 105 AD3d 1392, 1393, *lv denied* 21 NY3d 1019). The court's somewhat expanded discussion of the right to appeal on the date of sentencing, after the sentence was pronounced, did not rectify the inadequate colloquy at the time the plea was entered (*see People v Gil*, 109 AD3d 484, 484-485).

We nevertheless reject defendant's contention that the court erred in refusing to suppress his statements to the police on the ground that the statements allegedly were made in violation of his right to counsel. The right to counsel attaches, inter alia, "when a person in custody requests to speak to an attorney or when an attorney who is retained to represent the suspect enters the matter under investigation" (*People v Grice*, 100 NY2d 318, 321; *see People v Foster*, 72 AD3d 1652, 1653, *lv dismissed* 15 NY3d 750). Here, defendant did not ask to speak to an attorney at any point during the police interrogation. Defendant's statements to the effect that he

had an attorney and his questions whether he should have an attorney present were not an unequivocal invocation of the right to counsel (*see People v Hicks*, 69 NY2d 969, 970, *rearg denied* 70 NY2d 796; *People v Hall*, 53 AD3d 1080, 1081-1082, *lv denied* 11 NY3d 855; *People v Cotton*, 277 AD2d 461, 462, *lv denied* 96 NY2d 757). Further, defendant failed to "present[] evidence establishing that he was in fact represented by counsel at the time of interrogation, as defendant contended" (*People v Hilts*, 19 AD3d 1178, 1179). Although defendant indicated that he had a lawyer in connection with his marital separation, we conclude that the lawyer "was not retained 'in the matter at issue' " (*Foster*, 72 AD3d at 1654, quoting *People v West*, 81 NY2d 370, 373-374). Contrary to the further contention of defendant, "the record of the suppression hearing supports the court's determination that the statements at issue were not rendered involuntary by reason of any alleged coercion by the police" (*People v Kirk*, 96 AD3d 1354, 1357, *lv denied* 20 NY3d 1012; *see People v Camacho*, 70 AD3d 1393, 1393-1394, *lv denied* 14 NY3d 886; *People v Martin*, 55 AD3d 1236, 1237, *lv denied* 11 NY3d 927, *reconsideration denied* 12 NY3d 855).

Defendant further contends that the court erred in refusing to suppress certain identification testimony because it was based on an unduly suggestive single-photograph display. We reject that contention. Where, as here, the defendant's identity is not in issue, " 'suggestiveness' is not a concern" (*People v Gissendanner*, 48 NY2d 543, 552; *see People v Frederick*, 196 AD2d 791, 792, *lv denied* 82 NY2d 894; *People v Mati*, 178 AD2d 556, 556, *lv denied* 79 NY2d 921).

Finally, the agreed-upon sentence is not unduly harsh or severe.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1097

KA 11-00015

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYNTHIA S. GALENS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered November 10, 2010. 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 her upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). We reject defendant's contention that she was denied effective assistance of counsel based upon her attorney's allegedly ineffectual and irrelevant arguments during summation. "Counsel presented a plausible defense of lack of intent to cause serious physical injury" (*People v Russo*, 4 AD3d 133, 133, *lv denied* 2 NY3d 806), and he effectively asserted that theory to the jury in his summation (*see People v Barrera*, 69 AD3d 951, 952). The fact that defense counsel also argued that defendant lacked intent to kill, which is not an element of manslaughter in the first degree, did not prejudice defendant and did not alone render the summation ineffective.

Nor was defense counsel ineffective in failing to object to alleged hearsay testimony concerning out-of-court statements made by the victim. The testimony at issue was admissible for the nonhearsay purpose of establishing the victim's deteriorated physical condition at the time his statements were made (*see generally People v DiFabio*, 170 AD2d 1028, 1029, *affd* 79 NY2d 836). In any event, even assuming, arguendo, that the testimony at issue constituted inadmissible hearsay, the single error by defense counsel in failing to object to its admission was not so egregious as to deprive defendant of a fair trial (*see People v Hobot*, 84 NY2d 1021, 1022; *People v Cosby*, 82 AD3d 63, 67, *lv denied* 16 NY3d 857). Defense counsel's failure to renew the motion for a trial order of dismissal does not constitute

ineffective assistance inasmuch as the evidence is legally sufficient to support the conviction and renewal of the motion had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152; *see People v Holt*, 93 AD3d 1304, 1305, *lv denied* 20 NY3d 933).

Defendant failed to preserve for our review her further contention that she was denied a fair trial by the prosecutor's improper questions on cross-examination concerning the veracity of prosecution witnesses (*see* CPL 470.05 [2]; *People v Washington*, 89 AD3d 1516, 1516-1517, *lv denied* 18 NY3d 963), 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]).

Finally, we reject defendant's contention that she was penalized for exercising her right to trial and that the sentence is otherwise unduly harsh and severe. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting [her] right to trial" (*People v Dorn*, 71 AD3d 1523, 1524 [internal quotation marks omitted]), nor does that fact render the sentence unduly harsh or severe (*see People v Rawleigh*, 89 AD3d 1483, 1485, *lv denied* 18 NY3d 961). We note that defendant intentionally poured a large quantity of antifreeze into the victim's margarita mix and then, after knowing that the victim consumed the antifreeze, defendant failed to seek medical assistance for him despite seeing him foaming at the mouth and struggling to breathe. Under the circumstances, the sentence imposed by County Court, which is slightly less than the maximum sentence permitted by law, is appropriate.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1098

KA 09-01279

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNON L. CARTER, DEFENDANT-APPELLANT.

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

VERNON L. CARTER, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered May 21, 2009. 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]). County Court properly denied defendant's request to charge criminal trespass in the second degree (§ 140.15 [1]) as a lesser included offense of burglary in the second degree because "[t]here is no reasonable view of the evidence that defendant entered the building without the intent to commit a crime therein" (*People v Smith*, 12 AD3d 1106, 1107, *lv denied* 4 NY3d 767; *see People v Rickett*, 94 NY2d 929, 930). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). To the contrary, "[t]he overwhelming weight of the evidence supports the [verdict convicting defendant] of burglary in the second degree" (*People v Moore*, 190 AD2d 1023, 1023, *lv denied* 81 NY2d 1077). We have considered defendant's contentions in his pro se supplemental brief and conclude that they are without merit.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1099

KA 09-01465

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WENDELL L. FUQUA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 18, 2009. The judgment convicted defendant, upon a jury verdict, of 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 judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that Supreme Court erred in refusing to grant his request to instruct the jury that his mere presence in the area where the gun was possessed by another person or his mere knowledge that another person possessed the gun were insufficient to establish his guilt. The court's definition of the term "possess" was taken from the Criminal Jury Instructions, and that definition adequately conveyed the inference that defendant could not be convicted based on his mere presence in the area where another person possessed the gun or his mere knowledge that another person possessed the gun (*see People v Johnson*, 190 AD2d 753, 754, *lv denied* 81 NY2d 972; *People v Wooley*, 187 AD2d 623, 623, *lv denied* 81 NY2d 849; *see also People v Henderson*, 307 AD2d 746, 746-747, *lv denied* 100 NY2d 595). We presume that the jurors had " 'sufficient intelligence' " to make that inference, and defendant was "not 'entitled to select the phraseology' that makes [that] inference[] all the more explicit" (*People v Samuels*, 99 NY2d 20, 25-26). We reject defendant's further contention that the court erred in refusing to grant his renewed request for such a jury instruction, following its receipt of a note from the jury regarding the definition of the term "possession." The court meaningfully

responded to the jury's request by rereading its original instruction with respect to the definition of that term (*see People v Shanks*, 207 AD2d 710, 710, *lv denied* 84 NY2d 1015), and the jury "gave no indication after the original charge was repeated that [its] concern had not been satisfied" (*People v Malloy*, 55 NY2d 296, 303, *cert denied* 459 US 847; *see People v Davis*, 118 AD2d 206, 212, *lv denied* 68 NY2d 768).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1100

KA 12-00571

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STYLES C. SALTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 28, 2012. 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: 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]). We reject defendant's contention that County Court erred in refusing to suppress a gun seized by the police from defendant and statements made by defendant to the police as the result of an allegedly illegal stop and frisk. Two anonymous 911 calls reported a homicide and gave a description of two suspects, one of whom was an African-American male in his twenties wearing dark clothing and a red top. In addition, a police radio dispatch described one of the suspects as an African-American male last seen in the vicinity of the area in which defendant was stopped, wearing a black leather jacket, black jeans and "something red on the top area." A police officer testified that he observed defendant, an African-American male in a black leather jacket, black pants and a red shirt, near the location where the suspect had last been seen. The officer further testified that defendant was standing at an angle with his left side away from the officer and that defendant's arm was clenched at his left side. Defendant was not responsive when the officer asked him what was wrong with his arm, and the officer then conducted a pat down of defendant and recovered a gun. Contrary to defendant's contention, we conclude that the officer had the requisite reasonable suspicion to stop and detain defendant under level three of *People v De Bour* (40 NY2d 210, 223; *see People v Thompson*, 107 AD3d 1609, 1610; *People v Powell*, 101 AD3d 1783, 1785, *lv denied* 20 NY3d

1102; *see generally People v Moore*, 6 NY3d 496, 498-499). Defendant matched the description of the suspect in the 911 calls and the police radio dispatch, and the officer observed defendant acting in a suspicious manner (*see Moore*, 6 NY3d at 500-501; *see also People v Zeigler*, 61 AD3d 1398, 1399, *lv denied* 13 NY3d 864).

Finally, we conclude that defendant's sentence is not unduly harsh or severe.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1101

KAH 12-01071

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
KESTER SANDY, PETITIONER-APPELLANT,

V ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

KESTER SANDY, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated memorandum, decision and order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 20, 2012 in a proceeding pursuant to CPLR article 70. The judgment denied and dismissed the petition.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1102

KAH 12-01771

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
WILLIE WILLIAMS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, AND ANDREA W. EVANS,
CHAIRWOMAN, NEW YORK STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated memorandum and order) of the Supreme Court, Erie County (John L. Michalski, A.J.), dated June 12, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner commenced this habeas corpus proceeding alleging that he is entitled to immediate release from prison pursuant to Executive Law former § 259-j (3-a), which has since been replaced by Correction Law § 205 (4). According to petitioner, his sentence of 20 years to life should be terminated because, from 1994 to 1997, he had "three years of unrevoked presumptive release or parole" (§ 205 [4]). We reject that contention. As a threshold matter, we note that section 205 (4) applies only to prisoners serving sentences for qualifying drug felonies, and defendant is serving a sentence for attempted murder in the second degree. In any event, petitioner is not entitled to relief under the statute because he violated parole several times after his three years of unrevoked release and before the effective date of Executive Law § 259-j (3-a) (*see Matter of Rosario v New York State Div. of Parole*, 84 AD3d 1665, 1666; *Matter of Murphy v Ewald*, 77 AD3d 778, 779, *lv denied* 16 NY3d 701).

To the extent that the petition further alleged that petitioner was deprived of a final revocation hearing when his parole was revoked in 2009 upon his conviction of a new drug felony, we conclude that Supreme Court properly converted the habeas corpus petition to a CPLR article 78 petition and then denied the petition. "Upon petitioner's

conviction of a felony committed while under parole supervision, petitioner's parole was revoked by operation of law" (*People ex rel. Stevenson v Beaver*, 309 AD2d 1171, 1172, *lv denied* 1 NY3d 506). Thus, contrary to petitioner's contention, a parole revocation hearing was not required (*see* Executive Law § 259-i [3] [d] [iii]; *People ex rel. Harris v Sullivan*, 74 NY2d 305, 308; *People ex rel. Ward v Russi*, 219 AD2d 862, 862, *lv denied* 87 NY2d 803).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1104

CA 13-00598

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

ESTHER L. CIANCIOLA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANK CIANCIOLA, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

A.O. SMITH WATER PRODUCTS CO., ET AL., DEFENDANTS, KELLY-MOORE PAINT COMPANY, DEFENDANT-RESPONDENT.

NAPOLI BERN RIPKA SHKOLNIK & ASSOC., LLP, NEW YORK CITY (DENISE A. RUBIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAWKINS PARNELL THACKSTON & YOUNG LLP, AUSTIN, TEXAS (PATRICIA KAY ANDREWS, OF THE TEXAS AND OKLAHOMA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 13, 2012. The order granted the motion of defendant Kelly-Moore Paint Company to dismiss the amended complaint and any cross claims against it.

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

Memorandum: Plaintiff appeals from an order granting the motion of Kelly-Moore Paint Company (defendant) to dismiss the amended complaint and any cross claims against it for lack of personal jurisdiction pursuant to CPLR 3211 (a) (8). According to plaintiff, she made a prima facie showing that defendant is subject to long-arm jurisdiction pursuant to CPLR 302 (a) (1) because defendant transacted business within New York and her claims arise from that transaction of business. We conclude that Supreme Court properly granted the motion. Even assuming, arguendo, that defendant transacted business in New York, we conclude that plaintiff did not establish the requisite substantial relationship between defendant's transaction of business and plaintiff's claims against defendant (*see Kruetter v McFadden Oil Corp.*, 71 NY2d 460, 467; *Holness v Maritime Overseas Corp.*, 251 AD2d 220, 224).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1105

CA 13-00549

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

REGINA M. SHANAHAN, AS EXECUTRIX OF THE ESTATE OF DANIEL B. SHANAHAN, JR., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN A. MACKOWIAK AND VALERIE MACKOWIAK, DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. PAULINO, II, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT H. PERK, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered June 28, 2012. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this wrongful death action as executrix of the estate of Daniel B. Shanahan, Jr. (decedent), seeking damages for fatal injuries sustained by decedent in a motor vehicle accident. The accident occurred when the vehicle operated by decedent crossed over into the opposite lane of traffic and collided with a vehicle operated by John A. Mackowiak (defendant). Defendants moved for summary judgment dismissing the complaint, contending that decedent's conduct in crossing into defendant's lane of travel was the sole proximate cause of the accident and that defendant did not have time to react to avoid the collision. We agree with defendants that Supreme Court erred in denying their motion.

Under the emergency doctrine, " 'when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes [the driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the [driver] has not created the emergency' " (*Caristo v Sanzone*, 96 NY2d 172, 174; *see Lifson v City of Syracuse*, 17 NY3d 492, 497; *Stewart v Kier*, 100 AD3d 1389, 1389-

1390). It is well established that a driver is "not required to anticipate that [a] vehicle, traveling in the opposite direction, [will] cross over into his [or her] lane of travel" (*Cardot v Genova*, 280 AD2d 983, 983; *see Wasson v Szafarski*, 6 AD3d 1182, 1183).

Here, defendants met their initial burden by establishing that the emergency doctrine applied, inasmuch as they established that decedent's vehicle unexpectedly crossed over into defendant's lane of travel, defendant had been operating his vehicle in a lawful and prudent manner, and defendant had little time to react to avoid the collision (*see generally Kweh v Edmunds*, 93 AD3d 1247, 1248; *Clough v Szymanski*, 26 AD3d 894, 895; *Pilarski v Consolidated Rail Corp.*, 269 AD2d 821, 822). Although "it generally remains a question for the trier of fact to determine whether an emergency existed and, if so, whether the [driver's] response was reasonable" (*Schlanger v Doe*, 53 AD3d 827, 828; *see Stewart*, 100 AD3d at 1390), we conclude that summary judgment is appropriate here because defendants presented "sufficient evidence to establish the reasonableness of [defendant's] actions [in an emergency situation] and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact" (*Patterson v Central N.Y. Regional Transp. Auth. [CNYRTA]*, 94 AD3d 1565, 1566, *lv denied* 19 NY3d 815 [internal quotation marks omitted]). The speculative assertion of plaintiff's expert that decedent's vehicle was in defendant's lane of travel for a sufficient period of time for defendant to have avoided the collision is insufficient to raise an issue of fact to defeat the motion (*see Hubbard v County of Madison*, 93 AD3d 939, 942, *lv denied* 19 NY3d 805; *Wasson*, 6 AD3d at 1183).

We reject plaintiff's contention that she was entitled to a less stringent burden of proof in establishing the existence of an issue of fact, pursuant to *Noseworthy v City of New York* (298 NY 76, 80). Plaintiff "has the burden of raising a triable issue of fact . . . before the *Noseworthy* rule may be applied, and she failed to meet that burden" (*Humphrey v Ka Choya's, Inc.*, 16 AD3d 1029, 1030; *see Smith v Stark*, 67 NY2d 693, 694-695).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1106

CA 13-00550

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

MARIE M. WRIGHT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL DENARD, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered June 29, 2012 in a breach of contract action. The order granted the motion of defendant to vacate a default judgment and order, and to extend the time in which to serve an answer.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the judgment and order entered on defendant's default is reinstated.

Memorandum: In this breach of contract action, plaintiff appeals from an order granting defendant's motion to vacate the judgment and order entered against him upon his default in answering the complaint and to extend the time in which to serve an answer. We agree with plaintiff that Supreme Court erred in granting defendant's motion. Although defendant did not specify the statutory basis for his motion, we note that it appears that he sought relief pursuant to CPLR 5015 (a) (1) and (4), based on excusable neglect and lack of jurisdiction. Addressing first CPLR 5015 (a) (4), defendant was not entitled to vacatur on the ground that the court lacked jurisdiction over him (*see Pilawa v Dalbey*, 275 AD2d 1035, 1036). The affidavit of plaintiff's process server constituted prima facie evidence that defendant was personally served pursuant to CPLR 308 (1) (*see Reich v Redley*, 96 AD3d 1038, 1038), and defendant failed to rebut the presumption of proper service by providing "specific facts to rebut the statements in the process server's affidavit[]" (*Indymac Fed. Bank FSB v Quattrochi*, 99 AD3d 763, 764 [internal quotation marks omitted]; *see Christiana Bank & Trust Co. v Eichler*, 94 AD3d 1170, 1170-1171). Here, defendant submitted an affidavit in which he averred that he is brown-skinned and balding, not black-skinned and bald as described in the process server's affidavit. Defendant did not, however, dispute the age, height and weight set forth in the affidavit of the process server, and he failed to identify the six-foot tall, more than 200-pound individual who allegedly accepted service at his residence. We thus conclude that defendant's "denial of service in this case was

insufficient to rebut the presumption of proper service created by the plaintiff's duly executed affidavit of service" (*Reich*, 96 AD3d at 1038; *see generally Matter of Nazarian v Monaco Imports*, 255 AD2d 265, 265-266). To the extent that defendant's motion was based on excusable default pursuant to CPLR 5015 (a) (1), we likewise conclude that he "failed to establish a reasonable excuse for his default [in answering the complaint inasmuch as] the only excuse he proffered was that he was not served with process" (*Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 221; *see Reich*, 96 AD3d at 1039; *see generally Pilawa*, 275 AD2d at 1036).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1107

CA 13-00605

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

JESSE VANNAME AND DAWN VANNAME,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROCHESTER GAS & ELECTRIC, INC.,
DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

NIXON PEABODY LLP, ROCHESTER (KEVIN T. SAUNDERS OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered April 26, 2011. The order granted that part of the motion of defendant Rochester Gas & Electric, Inc. for summary judgment dismissing the amended complaint with respect to the Labor Law § 241 (6) cause of action, and otherwise denied the motion.

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

Memorandum: Plaintiffs commenced this common-law negligence and Labor Law action seeking damages for injuries sustained by Jesse VanName (plaintiff) in a work-related accident. Plaintiff's employer had been hired to install a water main and plaintiff, a pipe layer, assisted his coworker, an excavator operator, in digging a trench. Prior to the accident, an employee of Rochester Gas & Electric, Inc. (defendant) had marked the location of the underground electric line by placing flags directly above the line. On the morning of the accident, plaintiff attempted unsuccessfully to locate the electric line with the aid of that marker in the area where they were digging. Plaintiff directed the excavator operator where to dig, and plaintiff allegedly sustained an electric shock and resultant injuries when the bucket of the excavator struck the electric line as he stood nearby. Defendant moved for summary judgment dismissing the amended complaint against it, and Supreme Court granted that part of the motion with respect to the Labor Law § 241 (6) cause of action. We affirm.

Contrary to defendant's contention on its cross appeal, the court properly denied that part of its motion with respect to the common-law negligence and Labor Law § 200 causes of action. Even assuming,

arguendo, that defendant met its initial burden of establishing that it did not create the allegedly dangerous condition, we conclude that plaintiffs raised a triable issue of fact through plaintiff's deposition testimony that defendant did not accurately mark the location of the underground electric line (*see generally Babiack v Ontario Exteriors, Inc.*, 106 AD3d 1448, 1450). Given the conflicting testimony submitted by defendant concerning the circumstances of the accident, we further conclude that defendant did not meet its burden of establishing as a matter of law with respect to the common-law negligence and Labor Law § 200 causes of action that plaintiff's alleged negligence constituted an intervening, superseding cause of the accident (*see Bucklaew v Walters*, 75 AD3d 1140, 1142; *Meseck v General Elec. Co.*, 195 AD2d 798, 800-801; *cf. Misirlakis v East Coast Entertainment Props.*, 297 AD2d 312, 312-313, *lv denied* 100 NY2d 637). Also with respect to defendant's cross appeal, we note that defendant has informed this Court that the loss of consortium cause of action was dismissed subsequent to the filing of the cross appeal, and thus defendant is abandoning any contention with respect to that cause of action (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

With respect to plaintiffs' appeal, we conclude that the court properly granted that part of defendant's motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is premised upon the alleged violation of 12 NYCRR 23-1.13 (b) and (d). Section 23-1.13 does not "apply to or in connection with operations conducted by" defendant, which is "subject to the jurisdiction of the Public Service Commission" (12 NYCRR 23-1.13 [a]; *see* Public Service Law § 5 [1] [b]; *Greenough v Niagara Mohawk Power Corp.*, 13 AD3d 1160, 1162). Plaintiffs have abandoned any contentions with respect to the remaining alleged violations of the Industrial Code by failing to address them in their brief (*see Ciesinski*, 202 AD2d at 984).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1111

KA 12-01759

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KHALLIN D. BIGBY, ALSO KNOWN AS KO, ALSO KNOWN AS CALI, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (KRISTIN L. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Cayuga County Court (Thomas G. Leone, J.), rendered August 3, 2012. Defendant was resentenced upon his conviction of criminal sale of a controlled substance in the third degree.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1112

KA 09-01244

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID RODRIGUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered March 30, 2009. The judgment convicted defendant upon his plea of guilty of, inter alia, course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant contends that Supreme Court erred in refusing to suppress statements that he made in his home to a police investigator who was executing a search warrant. We reject that contention. The court properly determined that *Miranda* warnings were not required because defendant was not in custody when he made the statements at issue (*see People v Witherspoon*, 66 AD3d 1456, 1458, *lv denied* 13 NY3d 942; *People v Nunez*, 51 AD3d 1398, 1400, *lv denied* 11 NY3d 792; *People v Soroka*, 28 AD3d 1219, 1220, *lv denied* 7 NY3d 818). Defendant was not handcuffed or otherwise restrained during the interview or the execution of the search warrant, and he was free to move about the apartment (*see People v Cerrato*, 24 NY2d 1, 8, *cert denied* 397 US 940; *People v Lavere*, 236 AD2d 809, 809, *lv denied* 90 NY2d 860). Defendant was not told that he was under arrest and, indeed, the investigator left the apartment without arresting defendant (*see Cerrato*, 24 NY2d at 8-9; *Soroka*, 28 AD3d at 1220; *Lavere*, 236 AD2d at 809). We conclude that, under those circumstances, a reasonable person innocent of any wrongdoing would not have believed that he or she was in custody (*see People v Paulman*, 5 NY3d 122, 129; *People v Yukl*, 25 NY2d 585, 589,

cert denied 400 US 851; *Lavere*, 236 AD2d at 809).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1114

KA 11-01951

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID H. WILLIAMS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Thomas M. Van Strydonck, J.), rendered July 27, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, criminally using drug paraphernalia in the second degree (two counts) and unlawful possession of marihuana.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1116

KA 12-00835

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES E. SHELTON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered April 25, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and driving while intoxicated, a misdemeanor (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]) and two counts of misdemeanor driving while intoxicated (Vehicle and Traffic Law § 1192 [2], [3]). The charges stem from an incident during which defendant used his vehicle to run over the victim, who sustained serious physical injuries.

Before sentencing, defendant moved to set aside the verdict pursuant to CPL 330.30 (1), contending, inter alia, that he was denied effective assistance of counsel because his former defense attorney never fully explained the specific nature of a plea offer and never informed defendant of the possibility that he could be indicted on a more serious charge or that the more serious charge had a mandatory determinate term of incarceration. We conclude that County Court properly denied the motion.

It is well settled that "[t]he basis for vacating a jury verdict prior to sentencing is strictly circumscribed by CPL 330.30 to allow vacatur only if reversal would have been mandated on appeal as a matter of law" (*People v Tillman*, 273 AD2d 913, 913, *lv denied* 95 NY2d 939 [internal quotation marks omitted]; *see People v Sheltray*, 244 AD2d 854, 854, *lv denied* 91 NY2d 897). The statute is a limitation on a trial court's "jurisdiction" (*People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *see People v Davidson*, 299 AD2d 830, 831, *lv*

denied 99 NY2d 613), i.e., the "power" (*People v Carter*, 63 NY2d 530, 536), or " 'authority' " to set aside a verdict (*Sheltray*, 244 AD2d at 854; *see People v Adams*, 13 AD3d 316, 317, *following remittal* 52 AD3d 243, *lv denied* 11 NY3d 829; *People v Fai Cheung*, 247 AD2d 405, 405, *lv denied* 92 NY2d 851).

It is likewise well settled that a trial court "lack[s] the authority to consider facts not appearing on the record in determining [a] defendant's motion pursuant to CPL 330.30 (1) to set aside the verdict on the ground, inter alia, of ineffective assistance of counsel" (*People v Green*, 92 AD3d 894, 896, *lv denied* 19 NY3d 961; *see People v Hardy*, 49 AD3d 1232, 1233, *affd* 13 NY3d 805; *People v Griffin*, 48 AD3d 1233, 1236, *lv denied* 10 NY3d 840). Thus, "to the extent that [a defendant's motion] concerns matters outside the record on appeal, the proper procedural vehicle is a motion pursuant to CPL 440.10" (*Hardy*, 49 AD3d at 1233; *see Griffin*, 48 AD3d at 1236). Here, because defendant's motion "did not raise a 'ground appearing in the record' (CPL 330.30 [1])," reversal on direct appeal would not have been mandated as a matter of law, and the court lacked the authority to grant the motion (*Hardy*, 49 AD3d at 1233; *see Griffin*, 48 AD3d at 1236).

Contrary to defendant's contention, we conclude that the prosecutor raised the above-mentioned statutory limitations in opposition to the motion. Even assuming, arguendo, that he did not raise them, we conclude that the prosecutor's failure to assert them in opposition to the motion could not have bestowed upon the court the authority to exceed the parameters of CPL 330.30 (1). Defendant further contends that, because the court did not set forth a legal reason for denying that part of his motion to set aside the verdict, we cannot address the statutory limitations without violating *People v Concepcion* (17 NY3d 192, 194-195). We reject that contention. The decision of the Court of Appeals in *Concepcion* does not limit our authority to conclude that a motion was properly denied where, as here, there was no legal basis upon which the court could have granted the motion.

With respect to defendant's remaining contentions, we conclude that, 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), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *Bleakley*, 69 NY2d at 495). It was for the jury to determine whether to credit the testimony of the prosecution's witnesses, and we see no reason to disturb the jury's credibility determination (*see id.*).

We further conclude that the court did not err in refusing to suppress defendant's oral and written statements to the police. The

police officers responded to a dispatch call concerning a motor vehicle accident. Upon arriving at the scene, a group of bystanders informed the officers that a nearby slow-moving vehicle, in which defendant was the sole occupant, had run over the victim. After one officer activated the lights and siren of his police vehicle, defendant's vehicle stopped. The officers approached the vehicle, whereupon they observed an open beer can in a cup holder. One officer asked defendant, "what happened," and he responded that he "ran that guy over." We agree with the court that, "[a]lthough defendant was seized within the meaning of the Fourth Amendment to the United States Constitution and article I, § 12 of the New York State Constitution during the period of this questioning . . . , he was not, as a matter of law, in custody at th[at] time for purposes of the need to give *Miranda* warnings. When a seizure of a person remains at the stop and frisk inquiry level and does not constitute a restraint on his or her freedom of movement of the degree associated with a formal arrest, *Miranda* warnings need not be given prior to questioning" (*People v Bennett*, 70 NY2d 891, 893-894; *see People v Huffman*, 41 NY2d 29, 34). It is well established that " 'threshold crime scene inquiries' designed to clarify the situation and questions that are purely investigatory in nature do not need to be preceded by *Miranda* warnings" (*People v Mayerhofer*, 283 AD2d 672, 674; *see People v Coffey*, 107 AD3d 1047, 1050, *lv denied* 21 NY3d 1041; *People v DeBlase*, 142 AD2d 926, 927; *People v La Joy*, 109 AD2d 916, 918). Our "determination disposes of defendant's further [contention] that his [written] statement to the [officer] was tainted by the alleged illegality of the [officer's] initial questioning" (*Coffey*, 107 AD3d at 1050; *see People v Hennigan*, 135 AD2d 1082, 1083).

Finally, we conclude that the sentence is not unduly harsh or severe in view of defendant's prior criminal record and his lack of remorse.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1119

CAF 12-00713

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

IN THE MATTER OF JAMES D.D., JOSEPH D.,
AND WILKINS F.
---------- MEMORANDUM AND ORDER
YATES COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

TAMELA F., RESPONDENT-APPELLANT.

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

SHARON ALLEN, ATTORNEY FOR THE CHILDREN, NAPLES.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered March 23, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed respondent and the subject minor children under the supervision of petitioner.

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

Memorandum: Respondent mother appeals from an order of disposition that brings up for review an order of fact-finding, in which Family Court determined that she neglected the children who are the subject of this proceeding. We affirm. To establish neglect, it was petitioner's burden to "demonstrate by a preponderance of the evidence 'first, that [the] child[ren's] physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship' " (*Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). In determining whether petitioner met its burden, "[w]e must give great deference to [the court]'s assessment of the credibility of the witnesses at the fact-finding hearing," and we note that the court's decision " 'will not be disturbed unless [it] lack[s] a sound and substantial basis in the record' " (*Ilona H.*, 93 AD3d at 1166). Here, we conclude that the court's decision has a sound and substantial basis in the record. The undisputed evidence at the hearing established that the mother's husband repeatedly misused alcohol to the point of intoxication (*see* § 1046 [a] [iii]), and that the harm to the children was causally related to the mother's failure to acknowledge, confront, and

adequately address her husband's alcohol abuse and associated aggressive behavior (*see Matter of Kimberly Z. [Jason Z.]*, 88 AD3d 1181, 1183, 1185; *Matter of Ian DD.*, 252 AD2d 669, 670; *cf. Matter of Tomas E.* [appeal No. 2], 295 AD2d 1015, 1019). Finally, the mother failed to preserve for our review her contention that the court erred in requesting an oral report from the Attorney for the Children and, in any event, any alleged error is harmless (*see Matter of Amy L.W. v Brendan K.H.*, 37 AD3d 1060, 1061).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1120

CAF 12-01514

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

IN THE MATTER OF WILLIAM C. KELSEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON L. KELSEY, RESPONDENT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR RESPONDENT-APPELLANT.

KIMBERLY WHITE WEISBECK, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered April 19, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted primary physical placement of the subject children to petitioner.

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

Memorandum: Contrary to respondent mother's contention, Family Court properly modified the parties' existing custody arrangement by transferring primary physical placement of the children from the mother to petitioner father. It is well settled that a party seeking a change in an existing custody arrangement has the burden of establishing a change in circumstances sufficient to warrant an inquiry into whether the best interests of the children call for a change in custody (*see Matter of Cole v Nofri*, 107 AD3d 1510, 1511; *Matter of York v Zullich*, 89 AD3d 1447, 1448). We conclude that the father met that burden here by submitting, inter alia, evidence that the mother's former live-in boyfriend abused one of the children (*see Matter of Stephen R.H. v Lisa A.H*, 41 AD3d 1310, 1311). Contrary to the mother's contention, the court's determination with respect to the best interests of the children is based upon the totality of the circumstances (*see id*. at 1311; *see generally Friederwitzer v Friederwitzer*, 55 NY2d 89, 95). The record establishes that the court carefully weighed the appropriate factors, and we conclude that its determination has a sound and substantial basis in the record (*see Matter of Tarant v Ostrowski*, 96 AD3d 1580, 1582, *lv denied* 20 NY3d 855).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1121

CAF 12-01896

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

IN THE MATTER OF SHANE D. O'BRIEN,
PETITIONER-APPELLANT,

V ORDER

THOMAS DIXON, RESPONDENT-RESPONDENT.

SHANE D. O'BRIEN, PETITIONER-APPELLANT PRO SE.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered September 20, 2012 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's written objections to an order of the Support Magistrate.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1122

CAF 12-00579

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

IN THE MATTER OF SHEILA A. GRIFFIN,
PETITIONER-RESPONDENT,

V ORDER

LAMONT A. BARTON, JR., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR RESPONDENT-APPELLANT.

RHIAN D. JONES, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.H.O.), entered February 21, 2012 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1125

CA 13-00702

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

BRENDA HYDE AND MICHAEL HYDE, INDIVIDUALLY AND AS HUSBAND AND WIFE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TRANSCONTINENT RECORD SALES, INC., LEONARD SILVER, LEON TRINGALI, DOING BUSINESS AS LEON STUDIO ONE SCHOOL OF HAIR DESIGN AND CAREER TRAINING CENTER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW J. CONNELLY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 15, 2012. The order granted the motion of defendants Transcontinent Record Sales, Inc., Leonard Silver and Leon Tringali, doing business as Leon Studio One School of Hair Design and Career Training Center, for summary judgment dismissing the amended complaint against them.

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

Memorandum: Plaintiffs, individually and as husband and wife, commenced this action to recover damages for injuries sustained by Brenda Hyde (plaintiff) after she slipped and fell on snow or ice in the parking lot of the building of defendants-respondents (defendants). Contrary to plaintiffs' contention, Supreme Court properly granted defendants' motion for summary judgment dismissing the amended complaint against them. Defendants "established their entitlement to judgment as a matter of law on the issue whether plaintiff's fall occurred while a storm was in progress or within a reasonable time thereafter" (*Santerre v Golub Corp.*, 11 AD3d 945, 947; *see Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153, 1153-1154; *Camacho v Garcia*, 273 AD2d 835, 835), and plaintiffs failed to raise a triable issue of fact in opposition (*see Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiffs' claim that defendants created or exacerbated the hazard by shoveling but not salting the area in question was supported by only hearsay statements of defendants' employee and thus was insufficient to raise a triable issue of fact

(*see Candela v City of New York*, 8 AD3d 45, 47; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Contrary to plaintiffs' contention, they did not establish that defendants' employee, who allegedly stated that he had shoveled but not salted the area in which the accident occurred, had the authority to speak on behalf of defendants. Plaintiffs therefore failed to establish that the employee's statements fell within an exception to the hearsay rule as "an admission binding on [defendants]" (*Tyrrell v Wal-Mart Stores*, 97 NY2d 650, 652; *see generally Reed v McCord*, 160 NY 330, 341).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1126

CA 13-00233

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

IN THE MATTER OF PABLO DEJESUS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered May 23, 2012 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: Inasmuch as petitioner has been released to parole supervision, his appeal from the judgment denying his CPLR article 78 petition seeking release to parole has been rendered moot (*see People ex rel. Baron v New York State Dept. of Corrections*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807; *People ex rel. Graham v Fischer*, 70 AD3d 1381, 1381-1382; *People ex rel. Mitchell v Unger*, 63 AD3d 1591, 1591), and the exception to the mootness doctrine does not apply herein (*see Baron*, 94 AD3d at 1410; *Graham*, 70 AD3d at 1381-1382; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1127

CA 13-00742

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

JULIE B. HEWITT AND TIMOTHY C. HEWITT,
PLAINTIFFS-RESPONDENTS,

V ORDER

CHARLES L. MAYTUM AND A AUTOMOTIVE, INC.,
DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BURGETT & ROBBINS, LLP, JAMESTOWN (LYDIA ALLEN CAYLOR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered December 5, 2012 in a personal injury action. The order denied in part the motion of defendants for summary judgment dismissing the complaint.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1129

CA 12-02390

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

ROSA COPLON JEWISH HOME & INFIRMARY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LARRY LADUCA, ALSO KNOWN AS LAWRENCE LADUCA,
DEFENDANT-APPELLANT.

WILLIAM R. HITES, BUFFALO, FOR DEFENDANT-APPELLANT.

DAVID B. COTTER, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 1, 2012. The order and judgment granted the motion of plaintiff for summary judgment and awarded plaintiff money damages.

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

Memorandum: Plaintiff commenced this action to recover the outstanding balance owed for nursing home care that it rendered to defendant's mother, who is now deceased. The outstanding balance resulted from defendant's alleged breach of the parties' contract, in which defendant had agreed to be responsible for ensuring payment to plaintiff from his mother's income, assets, and insurance policy, as well as from Medicare and Medicaid, to the extent that those resources were available. We agree with defendant that Supreme Court erred in granting plaintiff's motion for summary judgment. Plaintiff failed to meet its initial burden of establishing its entitlement to judgment as a matter of law (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324) and indeed, plaintiff's own submissions in support of its motion raise triable issues of fact whether defendant owes plaintiff any money and, if so, in what amount (*see generally Andrews, Pusateri, Brandt, Shoemaker & Roberson, P.C. v County of Niagara*, 91 AD3d 1287, 1287-1288).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1130

TP 13-00697

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF KHALAIRE ALLAH, PETITIONER,

V ORDER

BRIAN FISCHER, 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.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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 [Mark H. Dadd, A.J.], entered April 16, 2013) 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1131

TP 13-00612

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF MONROE COUNTY AND MONROE COUNTY SHERIFF'S OFFICE, PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD AND MONROE COUNTY DEPUTY SHERIFF'S ASSOCIATION, INC., RESPONDENTS.

HARRIS BEACH, PLLC, PITTSFORD (KARLEE S. BOLANOS OF COUNSEL), FOR PETITIONERS.

DAVID P. QUINN, ALBANY, FOR RESPONDENT NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR RESPONDENT MONROE COUNTY DEPUTY SHERIFF'S ASSOCIATION, INC.

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, Monroe County [Thomas A. Stander, J.], entered April 3, 2013) to review a determination of respondent New York State Public Employment Relations Board. The determination, among other things, affirmed the decision of the Administrative Law Judge finding that petitioners had violated Civil Service Law § 209-a (1) (d).

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed and the counterclaim of respondent New York State Public Employment Relations Board for enforcement of its order dated November 14, 2012 is granted.

Memorandum: This case arises from an improper practice charge filed by respondent Monroe County Deputy Sheriff's Association, Inc. (MCDSA) alleging that petitioner Monroe County Sheriff's Office assigned non-MCDSA members to perform certain security screening work at the Monroe County Jail and the Monroe County Correctional Facility that had previously been performed exclusively by MCDSA members. Following a hearing, the Administrative Law Judge (ALJ) determined that petitioners had violated Civil Service Law § 209-a (1) (d) by assigning the duties of security screening at the jail and at the correctional facility to non-MCDSA employees. Respondent New York State Public Employment Relations Board (PERB) denied the exceptions

filed by petitioners and affirmed the ALJ's decision. Petitioners then commenced this CPLR article 78 proceeding.

Contrary to petitioners' contention, the determination of PERB that petitioners violated Civil Service Law § 209-a (1) (d), i.e., that the work in question had been reassigned to non-MCDSA members, that the reassigned tasks are substantially similar to those previously performed by MCDSA members, and that the qualifications for the job at issue did not change significantly (*see Matter of State of N.Y. Dept. of Correctional Servs. v Kinsella*, 220 AD2d 19, 22), is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). Contrary to petitioners' further contention, public policy considerations do not require annulment of PERB's determination (*see Matter of City of New York v Board of Collective Bargaining of the City of N.Y.*, 107 AD3d 612, 612-613; *cf. Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd.*, 19 NY3d 876, 878). Moreover, we conclude that petitioners waived their contention that MCDSA did not timely file the improper practice charge (*see* 4 NYCRR 204.1; *Matter of Watt v Town of Gaines*, 140 AD2d 947, 947, *lv denied in part and dismissed in part* 72 NY2d 1040; *see also Mendez v Steen Trucking*, 254 AD2d 715, 716; *Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd.*, 147 AD2d 574, 574, *amended* 156 AD2d 842, *lv dismissed* 78 NY2d 1122). In any event, that contention is without merit.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1132

TP 13-00486

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF PAMELA MARCOTTE, PETITIONER,

V MEMORANDUM AND ORDER

PAUL HOLAHAN, COMMISSIONER OF ENVIRONMENTAL SERVICES AND CITY OF ROCHESTER, RESPONDENTS.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (MATTHEW J. FUSCO OF COUNSEL), FOR PETITIONER.

ROBERT J. BERGIN, CORPORATION COUNSEL, ROCHESTER (YVETTE CHANCELLOR GREEN OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Evelyn Frazee, J.], entered March 18, 2013) to annul a determination finding petitioner guilty of specified acts of misconduct and imposing a penalty of demotion.

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

Memorandum: Petitioner, an employee of respondent City of Rochester, commenced this CPLR article 78 proceeding seeking to annul the determination finding her guilty of specified acts of misconduct and imposing a penalty of demotion. Contrary to petitioner's contention, the determination is supported by substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180). Additionally, we conclude that the penalty of demotion "is not so disproportionate to the offense[s] as to be shocking to one's sense of fairness, and thus does not constitute an abuse of discretion as a matter of law" (*Matter of Szczepaniak v City of Rochester*, 101 AD3d 1620, 1621 [internal quotation marks omitted]).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1134

KA 12-01479

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM PICHCUSKIE, DEFENDANT-APPELLANT.

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

WILLIAM PICHCUSKIE, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Sara S. Farkas, J.), dated July 13, 2012. 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 oral decision determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). In the exercise of our discretion, we deem the appeal as properly taken from the order that was subsequently entered (*see* CPLR 5520 [c]; *see generally Adams v Daughtery*, ___ AD3d ___, ___ [Oct. 4, 2013]). Contrary to defendant's contention in his main brief, County Court properly determined after a SORA hearing that an upward departure was warranted based upon a videotaped statement of a victim and the affidavit of another person who described defendant's victimization of him when he was between the ages of 12 and 16. We reject defendant's contention in his main brief that the affidavit was improperly admitted at the hearing because he was never charged with the conduct specified in the affidavit, which we note was conduct that was reported after the statute of limitations had run. *Crawford v Washington* (541 US 36), concerning a defendant's right to confront witnesses, does not apply in SORA hearings (*see People v Bolton*, 50 AD3d 990, 990, *lv denied* 11 NY3d 701; *People v Dort*, 18 AD3d 23, 25, *lv denied* 4 NY3d 885), and an out-of-court statement of a victim constitutes reliable hearsay in SORA hearings (*see generally People v Mingo*, 12 NY3d 563, 572-574). We reject defendant's further contention in his main and pro se supplemental briefs that the People failed to present clear and convincing evidence to support the

assessment of 20 points against him for fostering a relationship with the victim in the videotaped statement for the purpose of victimizing him. That assessment of points is supported by the reliable hearsay contained in the victim's videotaped statement admitted at the hearing (*see generally id.* at 572-573). We reject defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel at the SORA hearing (*see People v Rotterman*, 96 AD3d 1467, 1468, *lv denied* 19 NY3d 813; *People v Bowles*, 89 AD3d 171, 181, *lv denied* 18 NY3d 807; *see generally People v Baldi*, 54 NY2d 137, 147). Finally, defendant's contention in his pro se supplemental brief that he should be a level one sex offender is improperly raised for the first time on appeal and we therefore do not address it (*see People v Windham*, 10 NY3d 801, 802).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1135

KA 09-01274

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES KING, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered May 22, 2009. The judgment convicted defendant, after a nonjury trial, of criminal sale of a controlled substance in or near school grounds, criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal sale of a controlled substance in or near school grounds (Penal Law § 220.44 [2]), criminal sale of a controlled substance in the third degree (§ 220.39 [1]), and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant failed to preserve for our review his contention that reversal is required based on prosecutorial misconduct on summation (*see People v Green*, 43 AD3d 1279, 1281, *lv denied* 9 NY3d 1034) and, in any event, that contention is without merit. We agree with defendant that it was improper for the prosecutor to remark that a witness was afraid of defendant inasmuch as that was not a fair comment on the evidence (*see People v Facciolo*, 288 AD2d 392, 394; *cf. People v Bahamonte*, 89 AD3d 512, 512-513, *lv denied* 18 NY3d 881). We further agree with defendant that the prosecutor improperly used defendants past crimes of violence to suggest that the witness had "a reason to be afraid." It is fundamental that the function of cross-examining a defendant about his or her prior criminal, vicious, or immoral acts "is solely to impeach [the defendant's] credibility as a witness" (*People v Sandoval*, 34 NY2d 371, 376). Nevertheless, we conclude that the prosecutor's isolated remarks were not so egregious as to deprive defendant of a fair trial (*see People v Miller,* 104 AD3d 1223, 1223-1224, *lv denied* 21 NY3d 1017; *People v Scott*, 60 AD3d 1483,

1484, *lv denied* 12 NY3d 859), particularly considering that this was a bench trial (*see People v Dixon*, 50 AD3d 1519, 1519-1520, *lv denied* 10 NY3d 958; *see generally People v Moreno*, 70 NY2d 403, 406).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1136

KA 12-00147

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKY SEBRING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 22, 2011. The judgment convicted defendant, after a nonjury trial, of forgery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of forgery in the second degree (Penal Law § 170.10 [1]). We reject defendant's contention that the verdict is against the weight of the evidence because one of the People's witnesses was not credible. " 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422; *see People v Hollins*, 278 AD2d 932, 932, *lv denied* 96 NY2d 759). Here, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, he was not denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). We note in particular that the failure of defense counsel to make a specific motion for a trial order of dismissal or to move for a *Wade* hearing does not constitute ineffective assistance. Any motion for a trial order of dismissal would have had no chance of success (*see People v Horton*, 79 AD3d 1614, 1616, *lv denied* 16 NY3d 859), and "no *Wade* hearing was required because the identifying witness[ ] knew defendant, and thus the identification was merely confirmatory" (*People v Maryon*, 20 AD3d 911, 912, *lv denied* 5 NY3d

854). Further, defense counsel's waiver of his opening statement is "attributable to or substantially ameliorated by the fact that defendant elected to waive a jury trial" (*id.* at 913; *see People v Webster*, 56 AD3d 1242, 1243, *lv denied* 11 NY3d 931).

With respect to defendant's challenge to the severity of the sentence, we note that defendant's release to parole supervision does not render his challenge moot because he "remains under the control of the Parole Board until his sentence has terminated" (*People v Hannig*, 68 AD3d 1779, 1780, *lv denied* 14 NY3d 801 [internal quotation marks omitted]; *see People v Barber*, 106 AD3d 1533, 1533). We nevertheless conclude that his challenge lacks merit.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1139

KA 12-00164

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALLAS E. PONZO, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 6, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fifth degree, aggravated unlicensed operation of a motor vehicle in the second degree, speeding and failure to obey a police officer.

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, criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]) and aggravated unlicensed operation of a motor vehicle in the second degree (Vehicle and Traffic Law § 511 [2] [a] [iv]). We reject defendant's contention that Supreme Court erred in refusing to suppress the crack cocaine seized from the vehicle he was driving. The court's implicit credibility determinations " 'are entitled to great deference on appeal and will not be disturbed unless clearly unsupported by the record' " (*People v Bush*, 107 AD3d 1581, 1582). The testimony at the suppression hearing established that the State Troopers observed defendant driving a vehicle in excess of the posted speed limit, which justified their stop of the vehicle for speeding (*see People v Williams*, 79 AD3d 1653, 1654, *affd* 17 NY3d 834). Thereafter, one of the Troopers, trained in the recognition of marihuana, detected the odor of marihuana when he approached the vehicle, which provided probable cause to search the vehicle (*see People v Chestnut*, 43 AD2d 260, 261, *affd* 36 NY2d 971; *People v Cuffie*, 109 AD3d 1200, 1201). Further, the Trooper noticed marihuana "residue" on the driver's side floorboard and seat. "Having justifiably stopped the vehicle for [a traffic violation] and having detected the odor of marihuana from inside it, [the Trooper] had

reasonable suspicion that the [vehicle] contained drugs and the subsequent canine sniff was proper" (*People v Gathogo*, 276 AD2d 925, 926-927, *lv denied* 96 NY2d 734). Contrary to defendant's contention, the Trooper's testimony was not "incredible as a matter of law," i.e., " 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*Bush*, 107 AD3d at 1582).

We note that defendant's release to parole supervision does not render moot his challenge to the severity of the sentence because "he 'remains under the control of the Parole Board until his sentence has terminated' " (*People v Barber*, 106 AD3d 1533, 1533). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1140

CAF 13-00708

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF JOANNA BARTON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM BARTON, RESPONDENT-APPELLANT.

CYNTHIA FEATHERS, GLENS FALLS, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered September 25, 2012 in a proceeding pursuant to Family Court Act article 4. The order granted petitioner an upward modification of child support.

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

Memorandum: Respondent father appeals from an order granting petitioner mother an upward modification of child support. Pursuant to an agreement of the parties that was incorporated but not merged in their judgment of divorce, the parties agreed with respect to child support that, "in the event that either party's income increases or decreases by 25% through no fault of their own, either may petition the Court for a de novo review of their respective child[ ] support obligations and school cost contributions." In her petition, the mother alleged that her income had decreased by 25%. After a hearing, the Support Magistrate determined that the father had more than a 25% increase in income, and thereafter calculated the father's child support obligation in accordance with the Child Support Standards Act ([CSSA] Family Ct Act § 413).

Although he does not dispute that his income has increased more than 25%, the father contends that the Support Magistrate should have dismissed the petition after finding that the mother failed to demonstrate that she had a 25% decrease in income. We reject that contention. While the father is correct that Family Court Act § 441 requires a court to dismiss a petition for modification of child support if the allegations of the petition are not established by competent proof, we note that pleadings are to be liberally construed (*see* CPLR 3026; Family Ct Act § 165 [a]) and that courts may sua sponte conform the pleadings to the evidence (*see* CPLR 3025 [c]; *Harbor Assoc. v Asheroff*, 35 AD2d 667, 668, *lv denied* 27 NY2d 490; *see also* CPLR 3017 [a]). We conclude that the Support Magistrate properly conformed the petition to the proof, and we reject the father's

contention that he was prejudiced thereby (*see Matter of Heintz v Heintz*, 28 AD3d 1154, 1154-1155; *Matter of Chesko v Chesko*, 274 AD2d 729, 730).

We reject the father's further contention that the amount of child support awarded was unjust and inappropriate (*see* Family Ct Act § 413 [1] [f]). Although the father's visitation expenses were extraordinary inasmuch as he lived and worked in New York City but also maintained a home in Syracuse to visit the children on weekends, that was simply one factor for the court to consider (*see* § 413 [1] [f] [9]). The father also notes that his child support obligation as set forth in the agreement was less than what would be the amount under the CSSA because, inter alia, he agreed to pay for the children's private school tuition without contribution from the mother. He contends that, "[g]iven this linkage, it made no sense [for the Support Magistrate] to keep the father's tuition obligation intact (with a negligible contribution from the mother), while quadrupling his basic support." We reject that contention. The Support Magistrate ordered the mother to pay her pro rata share of the private school tuition and, while the father dismisses the mother's contribution as negligible, that is a function of the vast disparity in income between the parties. We have considered the father's remaining contentions and conclude that they are without merit.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1142

CAF 12-01182

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF TERRENCE S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

CASSI A.S., RESPONDENT-APPELLANT.

KELIANN M. ARGY-ELNISKI, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (COLLEEN S. HEAD OF COUNSEL), FOR PETITIONER-RESPONDENT.

LINDA M. JONES, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 1, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1143

CA 13-00734

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

SAMANTHA CLARK, AS PARENT AND NATURAL GUARDIAN
OF JOSEPH RAY, AN INFANT,
PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

JOSHUA GOTTHART, ET AL., DEFENDANTS,
AND LYNDA GOTTHART, DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICE OF DESTIN C. SANTACROSE, BUFFALO (CHRISTOPHER R. TURNER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 3, 2012. The order denied the motion of defendant Lynda Gotthart for summary judgment dismissing the complaint and all cross claims against her and denied the cross motion of plaintiff for summary judgment on the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 24, 2013,

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1147

CA 13-00716

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

JENNIFER KRAJEWSKI AND ADAM KRAJEWSKI,
PLAINTIFFS-RESPONDENTS,

V ORDER

LINDA ANDRIACCIO, NICHOLAS ANDRIACCIO,
DEFENDANTS-RESPONDENTS,
AND TRUTEMP HEATING, INC., DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

CANTOR, DOLCE & PANEPINTO, P.C., BUFFALO (FRANK J. DOLCE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered February 21, 2013. The order, inter alia, denied the motion of defendant Trutemp Heating, Inc. for summary judgment dismissing the second amended complaint and all cross claims against it, and to strike plaintiffs' note of issue and certificate of readiness and compel disclosure of the mental health records of plaintiff Jennifer Krajewski.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1150.1
KA 12-00179

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK J. POVOSKI, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. POVOSKI, JR., DEFENDANT-APPELLANT PRO SE.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Ontario County Court (Craig J. Doran, J.), dated October 14, 2011. The order denied the motion of defendant to set aside his sentence pursuant to CPL 440.20.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and directing that all sentences shall run concurrently and as modified the order is affirmed.

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.20 seeking to set aside the sentence imposed with respect to his conviction of robbery in the second degree (Penal Law § 160.10 [2] [a]), forgery in the second degree (§ 170.10 [1]), and assault in the second degree (§ 120.05 [6]). County Court directed that the sentence on the robbery count shall run consecutively to the sentence imposed on the forgery count, and that those sentences shall run concurrently with the sentence imposed on the assault count.

We note at the outset that the court erred in denying the motion on the ground that defendant could have raised this issue on his direct appeal. Mandatory denial of a motion pursuant to CPL 440.20 is required only when the issue "was previously determined on the merits upon an appeal from the judgment or sentence" (CPL 440.20 [2]), which in this case it was not (*People v Povoski*, 55 AD3d 1221, 1221-1222, *lv denied* 11 NY3d 929). The court erred in conflating the provisions of CPL 440.10 with those of CPL 440.20. The procedural bar set forth in CPL 440.10 (2) (c) "applies only to motions made pursuant to section 440.10, and it is undisputed that the instant motion was made pursuant to section 440.20" (*People v McCants*, 15 AD3d 892, 893).

We agree with defendant that the consecutive sentences for the

robbery and forgery counts are illegal under the facts of this case. The indictment and charge to the jury set forth that either count could serve as the predicate for the count of felony assault, and thus the predicate counts must run concurrently with the count of felony assault (*see People v Parks*, 95 NY2d 811, 814-815; *People v Davis*, 68 AD3d 1653, 1655, *lv denied* 14 NY3d 839; *People v Ahedo*, 229 AD2d 588, 589-590, *lv denied* 88 NY2d 964). The sentences imposed on the counts of robbery and forgery must therefore also run concurrently (*see People v Dickens*, 269 AD2d 463, 464, *lv denied* 95 NY2d 852; *see also Parks*, 95 NY2d at 814-815). We therefore modify the order by granting the motion in part and directing all sentences to run concurrently (*see People v Lemon*, 38 AD3d 1298, 1299, *lv denied* 9 NY3d 846, *reconsideration denied* 9 NY3d 962; *People v Parton*, 26 AD3d 868, 870, *lv denied* 7 NY3d 760; *see generally People v LaSalle*, 95 NY2d 827, 829).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1150

CA 12-01758

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF ANTHONY AMAKER,
PETITIONER-APPELLANT,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered July 5, 2012 in a CPLR article 78 proceeding. The judgment denied the motion of petitioner requesting that the amended petition be summarily granted and denied the amended petition.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1151

TP 13-00698

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

IN THE MATTER OF DARRELL CLINTON, PETITIONER,

V ORDER

BRIAN FISCHER, 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.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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 [Mark H. Dadd, A.J.], entered April 11, 2013) 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: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1152

TP 13-00733

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

IN THE MATTER OF FRANCES ALBINO, PETITIONER,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH AND ELIZABETH R. BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, RESPONDENTS.

MANNION & COPANI, SYRACUSE (ANTHONY F. COPANI OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [John C. Cherundolo, A.J.], entered April 22, 2013) to review a determination finding that petitioner was subject to a 14.46-month delay in her Medicaid eligibility due to her transfer of resources in order to qualify for Medicaid coverage.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the determination that a 14.46-month delay in her Medicaid eligibility was properly imposed as a penalty for transferring resources in order to qualify for Medicaid coverage. We confirm the determination.

Petitioner purchased a life estate in real property located on Diffin Road in Cicero (Diffin Road property) sometime prior to July 2007. On July 23, 2007, petitioner's daughter and grandson purchased a home located on Lakeshore Road in Cicero (Lakeshore Road property) as joint tenants with rights of survivorship for $215,000. Then, on October 19, 2007, petitioner purchased a life estate in the Lakeshore Road property for $70,000, paying $35,000 each to her daughter and grandson.

On November 13, 2008, i.e., approximately 13 months after she had purchased a life estate in the Lakeshore Road property, petitioner became a resident of an assisted living facility. On November 30,

2009, petitioner entered into a contract to sell her interest in the Diffin Road property to persons unrelated to her for $159,000. Then, on January 2, 2010, petitioner fell and broke her hip. That injury required surgery and hospitalization for five days, after which time petitioner was discharged, and she thereafter resided in a nursing home.

Petitioner was initially a "private pay" client at the nursing home and, between March 2010 and October 2010, she paid over $54,000 to stay at that facility. By April 2010, however, petitioner had also applied to the Onondaga County Department of Social Services (OCDSS) for medical assistance. By decision dated June 9, 2011, OCDSS denied petitioner's request for assistance for the month of March 2010, reasoning that petitioner had excess income of $8,063.13 for that month. More importantly for purposes of this matter, OCDSS also assessed petitioner a penalty of a period of 14.46 months for which she would be ineligible for Medicaid. The penalty was based on OCDSS's determination that, on October 19, 2007, petitioner purchased the life estate in the Lakeshore Road property and that, on February 2, 2010, she gifted to her daughter cash totaling $36,250, thus yielding total divestments of $106,250.

At the fair hearing conducted on the administrative appeal filed by petitioner, OCDSS tendered evidence establishing that petitioner's 2007 and 2008 federal income tax returns listed the Diffin Road property as her address, that her driver's license listed the Diffin Road property as her address, and that she never registered the Lakeshore Road property as her address with the Onondaga County Board of Elections. Petitioner responded with evidence that included undated mail sent to her at the Lakeshore Road property, and an undated, unsworn statement in which she expressed her intent to return to her "home" at the Lakeshore Road property when able to do so. The determination of OCDSS was affirmed on administrative appeal, and we now confirm the determination following the fair hearing inasmuch as it is supported by the requisite substantial evidence (*see generally Matter of Mallery v Shah*, 93 AD3d 936, 937).

" 'In determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual . . . for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services' for a certain penalty period (Social Services Law § 366 [5] [d] [3]). The look-back period is the '[60]-month period[ ] immediately preceding the date that an [applicant] is both institutionalized and has applied for medical assistance' (§ 366 [5] [d] [1] [vi]). Where an applicant has transferred assets for less than fair market value, the burden of proof is on the applicant to 'rebut the presumption that the transfer of funds was motivated, in part if not in whole, by . . . anticipation of future need to qualify for medical assistance' " (*Matter of Donvito v Shah*, 108 AD3d 1196, 1197-1198). With respect to the specific issue of the purchase of a life estate for less than fair market value, Social Services Law § 366 (5) (e) (3) (ii) provides that "the purchase of a life estate interest in another person's home shall be treated as the disposal of an asset

for less than fair market value unless the purchaser resided in such home for a period of at least one year after the date of purchase."

"When 'reviewing a Medicaid eligibility determination made after a fair hearing, "the court must review the record, as a whole, to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law" ' (*Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 822-823, *lv denied* 13 NY3d 712). Substantial evidence is 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see Matter of Lundy v City of Oswego*, 59 AD3d 954). 'The petitioner bears the burden of demonstrating eligibility' (*Matter of Gabrynowicz v New York State Dept. of Health*, 37 AD3d 464, 465), and the agency's determination should be upheld when it is 'premised upon a reasonable interpretation of the relevant statutory provisions and is consistent with the underlying policy of the Medicaid statute' (*Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 658)" (*Matter of Peterson v Daines*, 77 AD3d 1391, 1392-1393).

Applying those rules here, we conclude that the determination that petitioner transferred assets for less than fair market value is supported by substantial evidence. We note that our review is limited to petitioner's purchase of the life estate in the Lakeshore Road property inasmuch as petitioner does not challenge herein the determination with respect to the transfer of cash to her daughter. In any event, the evidence submitted at the fair hearing demonstrates that, although petitioner came to reside in an assisted living facility approximately 13 months after she purchased the life estate in the Lakeshore Road property, there is no objective proof that petitioner resided at the Lakeshore Road property for a period of at least one year after the date of such purchase (*see* Social Services Law § 366 [5] [e] [3] [ii]). Indeed, despite the fact that petitioner purchased the life estate in the Lakeshore Road property on October 19, 2007, petitioner's 2007 and 2008 federal income tax returns list the Diffin Road property as petitioner's address, as did petitioner's driver's license and a voter registration form that petitioner completed in 1990. Petitioner's efforts to explain the addresses listed on her tax returns and driver's license are unpersuasive, particularly in view of the fact that the Lakeshore Road property is not listed as petitioner's address either on mail sent to petitioner by the Onondaga County Board of Elections relative to the 2009 primary election or in OCDSS's address history for petitioner. Moreover, petitioner did not have a telephone or utility bill in her name at the Lakeshore Road property, and she did not sell the Diffin Road property, which she had acquired well before purchasing the Lakeshore Road property life estate, until November 30, 2009, i.e., over one year *after* entering the assisted living facility.

Petitioner's contention that her daughter and grandson purchased the Lakeshore Road property in part for her use and enjoyment is belied by the fact that they sold petitioner a life estate in that property approximately two months after they initially bought it. At the time she purchased the life estate in the Lakeshore Road property,

petitioner was 85 years old, and there is nothing in the record to indicate that she was in good health at the time of that transaction, or that her entry into an assisted living facility approximately 13 months thereafter and application for Medicaid benefits less than three years thereafter, were unanticipated events (*cf. Mallery*, 93 AD3d at 938).

Finally, we note that there is no merit to what appears to be petitioner's further contention that the Lakeshore Road property should be considered her homestead and thus an exempt asset for Medicaid eligibility purposes (*see* Social Services Law § 366 [2] [a] [1] [ii]; 18 NYCRR 360-1.4 [f]).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1154

KA 09-01960

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TROY R. GRIFFIN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered September 10, 2009. The judgment convicted defendant, upon a nonjury verdict, of rape in the first degree and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of rape in the first degree (Penal Law § 130.35 [3]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that Supreme Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). In support of his motion, defendant asserted that the People's bill of particulars was due on January 7, 2009—15 days after defendant's request (*see* CPL 200.95 [2])—but that it was not served until August 10, 2009. According to defendant, the time period from January 7 to August 10, which exceeds six months, constitutes postreadiness delay that should be charged to the People, thus warranting dismissal under CPL 30.30. We reject that contention.

Prior to their failure to serve a timely bill of particulars, the People announced their readiness for trial on the record, and "[f]ailing to serve a bill of particulars is in no way inconsistent with the prosecution's continued readiness" (*People v Cole*, 90 AD2d 27, 29; *see generally People v Anderson*, 66 NY2d 529, 534-536). We addressed a similar contention in *People v Runion* (107 AD2d 1080), determining that "[t]he court should not have granted the motion made under CPL 30.30 to dismiss the indictment because of the delays of the prosecutor, after she had announced her readiness for trial, in providing discovery materials and in serving a supplemental bill of particulars. Defendant's remedies for such delays do not include

dismissal under CPL 30.30" (*id.* at 1080). Defendant's reliance on *People v McCaffrey* (78 AD2d 1003), which was decided before *Runion*, is misplaced inasmuch as that case appears to have involved prereadiness delay and not, as here, allegations of postreadiness delay, which is treated differently under CPL 30.30 (*see Cole*, 90 AD2d at 30; *see generally People v Cortes*, 80 NY2d 201, 211).

We reject defendant's further contention that the time frame set forth in the indictment during which the offenses were committed violated his right to adequate notice and the opportunity to prepare a defense. The victim was 10 years old when the crimes were committed, and she did not report them to the police until approximately five years later. Based on information obtained from the victim and other sources, a police investigator determined that the offenses were committed during a two-month period in the summer of 2003. That time frame was reasonable under the circumstances (*see People v Watt*, 81 NY2d 772, 774-775), and sufficiently specific to permit defendant to prepare a defense (*see generally People v Keindl*, 68 NY2d 410, 416; *People v Morris*, 61 NY2d 290, 293).

Defendant's contention that the evidence at trial is legally insufficient to support the conviction is not preserved for our review because he failed to move for a trial order of dismissal at the close of his case (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, the victim testified that defendant had sexual intercourse with her when she was 10 years old, and we conclude that her testimony, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish defendant's guilt. Moreover, the testimony of the victim that the incident occurred during the summer of 2003, along with evidence that defendant was incarcerated on another offense in 2003 until July 13 of that year, is legally sufficient to establish that the crimes were committed during the time frame alleged in the indictment, i.e., July 13, 2003 to September 30, 2003 (*see generally People v Bleakley*, 69 NY2d 490, 495).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant contends that the victim's testimony was not credible, the credibility issues identified by defendant on appeal were placed before the court at trial. Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the finder of fact, which had the "opportunity to view the witnesses, hear the testimony and observe demeanor" (*id.*; *see People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831). Although an acquittal would not have been unreasonable given the inconsistencies in the victim's testimony (*see People v Kilbury*, 83 AD3d 1579, 1580-1581, *lv denied* 17 NY3d 860; *People v Hill*, 74 AD3d 1782, 1782, *lv denied* 15 NY3d 805), it cannot be said that the court failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495; *People v Gaston*, 100 AD3d 1463, 1464).

Contrary to defendant's contention, the sentence—a determinate term of imprisonment of 10 years—is not unduly harsh or severe. Defendant has two prior felony convictions, one of them for a sexual offense, and the court herein could have sentenced him to 25 years in prison for the crime of rape in the first degree. Under the circumstances, we perceive no basis to modify his sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1155

KA 11-02183

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKIE J. ROBINSON, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James A. W. McLeod, A.J.), rendered August 29, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the fourth degree (Penal Law §§ 20.00, 155.30 [1]). We reject defendant's contention that the evidence is legally insufficient to establish that he intended to steal the property at issue or that the value of that property was greater than $1,000 (*see generally People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, the testimony of an accomplice was adequately corroborated inasmuch as surveillance video footage, as well as the testimony of a store employee and a police officer who responded to the scene " 'tend[ed] to connect the defendant with the commission of the crime in such a way as [could] reasonably satisfy the jury that the accomplice [was] telling the truth' " (*People v Reome*, 15 NY3d 188, 192, quoting *People v Dixon*, 231 NY 111, 116; *see* CPL 60.22 [1]). We conclude that, viewing the evidence in light of the elements of the crime as charged to the jury, the verdict is not against the weight of the evidence (*see Danielson*, 9 NY3d at 349; *see generally Bleakley*, 69 NY2d at 495).

Although we agree with defendant that County Court abused its discretion in refusing to admit in evidence a noncollateral prior inconsistent statement of an accomplice who testified for the prosecution (*see People v Duncan*, 46 NY2d 74, 80, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910), we conclude that the error "is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and

there is no significant probability that defendant otherwise would have been acquitted" (*People v Cartledge*, 50 AD3d 1555, 1555-1556, *lv denied* 10 NY3d 957; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Likewise, to the extent that the court erred in refusing to admit in evidence a notarized document signed by an accomplice, we conclude that the error is harmless (*see Cartledge*, 50 AD3d at 1555-1556; *see generally Crimmins*, 36 NY2d at 241-242).

Defendant contends that he was deprived of a fair trial by prosecutorial misconduct based on two comments made by the prosecutor on summation. Defendant's challenge to the first comment is unpreserved for our review inasmuch as defendant's "objection[] w[as] sustained without any request for a curative instruction and the court is thus deemed to have corrected any error to defendant's satisfaction" (*People v Ennis*, 107 AD3d 1617, 1620). We decline to exercise our power to review defendant's contention with respect to that comment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Although we agree with defendant that the prosecutor's second comment impermissibly shifted the burden of proof, we conclude that the comment "w[as] not so . . . egregious as to deny defendant a fair trial" (*People v Rogers*, 103 AD3d 1150, 1153-1154, *lv denied* 21 NY3d 946). Furthermore, "the court clearly and unequivocally instructed the jury that the burden of proof on all issues remained with the prosecution" (*People v Pepe*, 259 AD2d 949, 950, *lv denied* 93 NY2d 1024).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1156

KA 12-00633

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYRIQUE L. MASSEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered January 6, 2012. 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: 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 record does not support defendant's contention that County Court misapprehended the extent of its discretion when it denied his request for a "violent felony override" pursuant to 7 NYCRR 1900.4 (c) (1) (iii) (*see People v Williams*, 84 AD3d 1417, 1417, *lv denied* 17 NY3d 863; *see generally People v Singer*, 104 AD3d 1311, 1311), and we reject defendant's further contention that the court abused its discretion in denying that request. The sentence, which is in accordance with the terms of the plea agreement, is not unduly harsh or severe.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1157

KA 12-01269

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID F.D., DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Genesee County Court (Robert C. Noonan, J.), rendered June 5, 2012. The adjudication, entered upon his plea of guilty of a violation of probation, sentenced defendant to a term of intermittent incarceration and continued his term of probation.

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

Memorandum: Defendant appeals from an adjudication, entered upon his plea of guilty of a violation of probation, sentencing him to a term of intermittent incarceration and continuing his term of probation. Defendant's contention that his plea was not knowingly, intelligently, or voluntarily entered is not preserved for our review because he failed to move to withdraw the plea or to vacate the adjudication on that ground (*see People v Atkinson*, 105 AD3d 1349, 1350; *People v Williams*, 91 AD3d 1299, 1299; *see also People v Lopez*, 71 NY2d 662, 665). This case does not fall within the rare exception to the preservation requirement because the plea colloquy did not "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666). In any event, we conclude that defendant's contention lacks merit.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1158

KA 09-02093

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRUCE W. JONES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered August 31, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that said appeal is unanimously dismissed as moot (*see People v Griffin*, 239 AD2d 936).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1159

KAH 13-00122

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DARRELL G. CLINTON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered July 13, 2012 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: On appeal from a judgment denying his petition for a writ of habeas corpus, petitioner, an inmate serving an indeterminate term of imprisonment of eight years to life, contends that he is entitled to immediate release because he never received a written decision from a parole commissioner revoking his release following his parole revocation hearing in 2006. More specifically, petitioner contends that the determination of the Administrative Law Judge (ALJ) who presided over the hearing was merely a recommendation that had to be confirmed by a commissioner. We reject that contention. Pursuant to Executive Law § 259-i (3), the ALJ, upon finding that petitioner violated the conditions of his parole, was authorized to "direct [petitioner's] reincarceration and fix a date for consideration by the board for re-release" (§ 259-i [3] [f] [x] [C]). In fact, as respondent points out, the Parole Board lacked the authority to consider the ALJ's determination to be a mere recommendation, and the ALJ's written determination was final when petitioner received it (*see Matter of Mayfield v Evans*, 93 AD3d 98, 102-107).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1161

CAF 13-00181

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

IN THE MATTER OF TYLER J. AND BRODY M.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLANT; MEMORANDUM AND ORDER

DAVID M. AND SHANA M., RESPONDENTS-RESPONDENTS.

RUTH A. CHAFFEE, BATH, FOR PETITIONER-APPELLANT.

HUNT & BAKER, HAMMONDSPORT (TRAVIS J. BARRY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

ANDREW ROBY, ATTORNEY FOR THE CHILDREN, CANISTEO.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered January 24, 2013 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion with respect to respondent Shana M. and reinstating that part of the petition, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Steuben County, for further proceedings.

Memorandum: Petitioner appeals from an order granting respondents' motion to dismiss the neglect petition at the close of petitioner's case during a fact-finding hearing. Petitioner's contention that Family Court erred in dismissing the petition is limited to the allegation that the children are neglected children based upon the misuse of alcohol by respondent mother, Shana M., and thus petitioner has abandoned its contention with respect to respondent father/stepfather, David M. (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). With respect to the allegation of neglect against the mother, her 16-year-old son testified that she drinks beer nearly every day and that she often drinks beer all day and evening. A caseworker testified that the younger son told her that his mother starts drinking before he goes to school and is still drinking when he goes to bed. Viewing the evidence in the light most favorable to petitioner, we conclude that petitioner established a prima facie case of neglect based on the evidence that the mother "repeatedly misuses . . . alcoholic beverages . . . to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of . . . intoxication" (Family Ct Act § 1046 [a]

[iii]; *see Matter of Alfonzo H. [Cassie L.]*, 77 AD3d 1410, 1411). We thus conclude that the court erred in granting the motion to dismiss with respect to the mother.

We reject petitioner's contention that the court abused its discretion in precluding the testimony of a witness that petitioner failed to identify in response to respondents' demand for a list of petitioner's witnesses (*see generally McCarter v Woods*, 106 AD3d 1540, 1541).

We therefore modify the order accordingly, and we remit the matter to Family Court for further proceedings on the petition with respect to the mother.

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1163

CA 13-00101

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

IN THE MATTER OF TERRENCE JONES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered July 5, 2012 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, denied the amended petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. We conclude that Supreme Court properly denied the amended petition. Contrary to the contention of petitioner, the inmate misbehavior reports provided him with adequate notice of the charges as required by 7 NYCRR 251-3.1 (c). The misbehavior reports contained a written specification of the particulars of the alleged incidents of misbehavior; a reference to the inmate rule numbers allegedly violated by petitioner and a description of those rules; and the date, time, and place of the alleged incidents (*see id.*). The misbehavior reports were therefore sufficiently specific to enable petitioner to prepare a defense (*see Matter of Gray v Kirkpatrick*, 59 AD3d 1092, 1093; *Matter of Dingle v Goord*, 244 AD2d 938, 938).

Petitioner failed to preserve for our review his contention that the Hearing Officer improperly took unrecorded testimony from a correction officer outside of petitioner's presence inasmuch as he "failed to object at the hearing to the Hearing Officer's alleged off-the-record investigation" (*Matter of Martinez v Johnson*, 255 AD2d 967, 967; *see Matter of Britt v Evans*, 100 AD3d 1408, 1409). In any event, that contention is without merit (*see generally Matter of Abdur-Raheem*

v Mann, 85 NY2d 113, 124). Contrary to petitioner's further contention, even assuming, arguendo, that there was a violation of 7 NYCRR 251-4.2 based on the failure of petitioner's employee assistant to obtain requested evidence and to interview a certain witness, we conclude that the Hearing Officer remedied any alleged defect in the prehearing assistance by obtaining a copy of the evidence and taking the testimony of the witness at the hearing (*see Matter of Melendez v Berbary*, 89 AD3d 1524, 1525, *lv denied* 19 NY3d 804; *Gray*, 59 AD3d at 1092-1093).

Finally, contrary to petitioner's further contention, due process does not require that the Hearing Officer obtain testimony from the correction officers who wrote the misbehavior reports (*see People ex rel. Vega v Smith*, 66 NY2d 130, 141; *Matter of Johnson v Jones*, 119 AD2d 906, 906).

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1165

CA 13-00731

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

TODD LAIRD, PLAINTIFF-RESPONDENT,

V ORDER

PBS HOSPITALITY, INC., DEFENDANT-APPELLANT,
CHAMPION OF GENEVA, LLC AND SERENITY MANOR
APARTMENTS, DEFENDANTS-RESPONDENTS.

KNYCH & WHRITENOUR, LLC, SYRACUSE (BRENDAN J. REAGAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

LECLAIR KORONA GIORDANO & COLE, LLP, ROCHESTER (LAURIE A. GIORDANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered January 7, 2013. The order, among other things, denied in part the motion of defendant PBS Hospitality, Inc. for summary judgment dismissing the complaint and all cross claims against it.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 21, 2013,

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1188

CA 13-00274

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

JOSEPH V. PARLATO, PLAINTIFF-APPELLANT,

V ORDER

BILL E. SPRINGER, DEFENDANT-RESPONDENT.

BURD & MCCARTHY, BUFFALO (TIMOTHY A. MCCARTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (DANIEL J. CAFFREY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), entered August 23, 2012. The order affirmed an order and judgment of the Buffalo City Court dated October 17, 2011 and November 3, 2011, respectively.

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

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

1190

CA 13-00578

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

FRIEDA DIAMOND AND ALAN DIAMOND, INDIVIDUALLY AND ON BEHALF OF MINOR, JUSTIN DIAMOND, AN INFANT OVER THE AGE OF 14 YEARS, PLAINTIFFS-RESPONDENTS,

V ORDER

CAMERON STONE, JEFFREY G. STONE AND MAURA M. STONE, DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

FRIEDA DIAMOND, ET AL., PLAINTIFFS,

V

BRAD WRIGHT AND DEBBIE WRIGHT, DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)

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

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN WARD WILLIAMS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered October 12, 2012. The order, inter alia, denied in part the motion of defendants Cameron Stone, Jeffrey G. Stone and Maura M. Stone for summary judgment dismissing the complaint and any cross claims against them.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on August 28 and September 19, 2013,

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

Entered: November 8, 2013

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1518/91) KA 04-00648. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BARRY ARKIM, ALSO KNOWN AS ED MASON, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Nov. 8, 2013.)

MOTION NO. (1991/00) KA 00-01659. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM CRENSHAW, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND WHALEN, JJ. (Filed Nov. 8, 2013.)

MOTION NO. (1213/05) KA 05-00468. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD W. TORTURICA, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Nov. 8, 2013.)

MOTION NO. (1214/05) KA 05-00471. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD W. TORTURICA, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Nov. 8, 2013.)

MOTION NO. (1122/06) KA 04-01775. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT D. MCLEE, DEFENDANT-APPELLANT. –- Motion for modification denied. PRESENT: SMITH, J.P., LINDLEY, SCONIERS, VALENTINO, AND WHALEN, JJ. (Filed Nov. 8, 2013.)

MOTION NO. (1548/10) KA 04-02941. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HOWARD HARRIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND WHALEN, JJ. (Filed Nov. 8, 2013.)

MOTION NO. (884/11) KA 09-02050. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEREMY SCHROO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND LINDLEY, JJ. (Filed Nov. 8, 2013.)

MOTION NO. (748.1/12) KA 05-00172. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CYRIL WINEBRENNER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Nov. 8, 2013.)

MOTION NO. (798/12) KA 10-02081. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LOUIS GEROYIANIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Nov. 8, 2013.)

MOTION NO. (626/13) CA 12-02211. -- ELECTRICAL WASTE RECYCLING GROUP, LIMITED, PLAINTIFF-RESPONDENT, V ANDELA TOOL & MACHINE, INC., FORMERLY KNOWN AS ANDELA PRODUCTS, LTD., DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT:

SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Nov. 8, 2013.)

KA 12-01816. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PHILLIP C. KAECHELE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, Craig J. Doran, J. - Course of Sexual Conduct Against a Child, 1st Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ. (Filed Nov. 8, 2013.)