SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 2, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

692

KA 12-01676

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON E. HARPER, DEFENDANT-APPELLANT.

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

BRANDON E. HARPER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 4, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the first degree, murder in the second degree (two counts) and attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice and on the law by reversing the conviction of attempted robbery in the first degree, vacating the sentence imposed thereon, and dismissing that count of the indictment.

Memorandum: On appeal from a judgment convicting him, following a jury trial, of one count of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]), two counts of murder in the second degree (§ 125.25 [1], [3]) and one count of attempted robbery in the first degree (§§ 110.00, 160.15 [2]), defendant contends, inter alia, that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. With respect to the sufficiency of the evidence, defendant contends that there is insufficient evidence that the killing was in furtherance of an attempted robbery or that an attempted robbery even occurred. Specifically, defendant contends that there was no proof to corroborate defendant's admission that the homicide occurred during an attempted robbery. Inasmuch as defendant did not move to dismiss the first count of the indictment, charging defendant with murder in the first degree, on the ground that there was insufficient evidence of an attempted robbery and did not move to dismiss the attempted robbery count on the ground that defendant's admission was not corroborated, defendant has failed to preserve for our review those contentions with

respect to those counts of the indictment (*see People v Gray*, 86 NY2d 10, 19). He did, however, preserve those contentions for our review with respect to the felony murder count of the indictment, and we exercise our power to review the unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

"A person may not be convicted of any offense solely upon evidence of a confession or admission made by him [or her] without additional proof that the offense charged has been committed" (CPL 60.50; *see generally People v Chico*, 90 NY2d 585, 589-590). With respect to the counts of murder in the first degree and felony murder, it is well settled that "CPL 60.50 does not require corroboration of defendant's confession to the underlying predicate felony" to sustain a conviction of murder in the first degree or felony murder, when the charge is based on a murder committed in the course of and in furtherance of one of many enumerated felonies (*People v Davis*, 46 NY2d 780, 781; *see People v Daley*, 47 NY2d 916, 917, *rearg denied* 48 NY2d 882; *People v Lytton*, 257 NY 310, 313-314; *People v Alexander*, 51 AD3d 1380, 1382, *lv denied* 11 NY3d 733). "The effect of the confession corroboration statute is to require proof of the corpus delicti" (*People v Murray*, 40 NY2d 327, 331, *rearg denied* 40 NY2d 1080, *cert denied* 430 US 948). With felony murder and murder in the first degree, the corpus delicti is a death resulting from someone's criminality, i.e., a death that did not occur by suicide, disease or accident (*see id.* at 332-333; *Lytton*, 257 NY at 313-314). The fact that the victim was found dead as the result of a gunshot wound is sufficient corroboration (*see People v Hamilton*, 121 AD2d 395, 396).

The same analysis does not apply to the underlying felony itself. Where, as here, there is no corroboration of a defendant's confession with respect to the underlying felony, that count of the indictment charging the defendant with the underlying felony must be dismissed (*see People v Velez*, 122 AD2d 178, 178-179, *lv denied* 70 NY2d 658; *see also Davis*, 46 NY2d at 781; *Murray*, 40 NY2d at 330-331). Here, as in *Velez*, there was no " 'additional proof that the offense [of attempted robbery] ha[d] been committed' " (*id.* at 178, quoting CPL 60.50). We therefore modify the judgment accordingly.

Contrary to defendant's further contention, the verdict is not against the weight of the evidence on the issues of his identity as the shooter and his intent to kill the victim (*see generally People v Bleakley*, 69 NY2d 490, 495). In our view, "there was ample circumstantial evidence establishing defendant's identity as the shooter" (*People v Moore* [appeal No. 2], 78 AD3d 1658, 1659, *lv denied* 17 NY3d 798; *see People v Rivera*, 112 AD3d 1288, 1289, *lv denied* 23 NY3d 1024), as well as his intent to kill. "[I]t should be obvious that the more the defendant shoots . . . the victim, the more clearly intentional is the homicide" (*People v Payne*, 3 NY3d 266, 272, *rearg denied* 3 NY3d 767). Here, the evidence established that there were multiple shots fired at the victim. We thus conclude that defendant's "criminal intent was readily inferable from his conduct" (*People v Guy*, 93 AD3d 877, 881, *lv denied* 19 NY3d 961; *see Payne*, 3 NY3d at 272).

Defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to move to preclude defendant's written confession and failure to raise certain contentions in moving to suppress defendant's statements. We reject that contention. There is no dispute that neither the initial CPL 710.30 notice nor the revised CPL 710.30 notice referenced defendant's written statement. While preclusion may have been warranted (*see People v Phillips*, 183 AD2d 856, 858, *lv denied* 80 NY2d 908), defense counsel made the strategic decision to pursue suppression of the statement, rendering the statement admissible at trial (*see People v Lane*, 132 AD2d 855, 856, *lv denied* 70 NY2d 801). We are "not prepared to say that [defense counsel's] decision to proceed with the motion to suppress [instead of a motion to preclude] deprived his client of the effective assistance of counsel" (*People v Borthwick*, 51 AD3d 1211, 1216, *lv denied* 11 NY3d 734). In any event, "[d]efendant's assertion of an ineffective assistance of counsel claim based on defense counsel's strategic decision to seek suppression of statements instead of moving to preclude the statements based on the People's failure to provide a CPL 710.30 notice require[s] a CPL 440.10 motion in order to afford defense counsel an opportunity to explain his strategy" (*People v Milsner*, 34 Misc 3d 150[A], 2011 NY Slip Op 52496[U], *2, *lv denied* 18 NY3d 884; *see People v Gross*, 21 AD3d 1224, 1225).

Defendant further contends in his main brief and his pro se supplemental brief that defense counsel was ineffective in failing to pursue suppression of the post-*Miranda* statements on the grounds that there was a single, continuous chain of events and that the statements were obtained as a result of a pretextual arrest for trespass. Those contentions lack merit. First, the evidence at the *Huntley* hearing established that there was a "definite, pronounced break in the interrogation" (*People v Chapple*, 38 NY2d 112, 115). There was over one hour between the initial *Miranda* violation and the issuance of *Miranda* warnings, which were followed by the post-*Miranda* statements. Different officers were involved, and there was a change in location (*see People v Paulman*, 5 NY3d 122, 130-131; *People v Heck*, 103 AD3d 1140, 1142, *lv denied* 21 NY3d 1074; *People v Parker*, 50 AD3d 1607, 1607, *lv denied* 11 NY3d 792; *cf. People v Bethea*, 67 NY2d 364, 366-368; *Chapple*, 38 NY2d at 115). Moreover, "the brevity of the initial exchange is significant" (*People v White*, 10 NY3d 286, 292, *cert denied* 555 US 897). Second, defendant's arrest for a minor offense "cannot be characterized as a 'sham' merely because, after [defendant] was taken into custody, the police were more interested in questioning him about a different and graver crime" (*People v Fulton*, 257 AD2d 774, 775, *lv denied* 93 NY2d 1018; *see People v Clarke*, 5 AD3d 807, 810, *lv denied* 2 NY3d 797; *cf. People v Burley*, 60 AD2d 973, 973-974). We thus conclude that defendant has failed to establish that defense counsel was ineffective in failing to seek suppression on those grounds, inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152).

Defendant contends that County Court erred in its charge to the

jury when it stated on one occasion that the murder had to occur in the course of *or* in furtherance of the attempted robbery. Defendant failed to object to that misstatement, however, and failed to preserve for our review his contention that the misstatement lessened the People's burden of proof (*see Gray*, 86 NY2d at 19; *People v Roman*, 190 AD2d 831, 831, *affd* 83 NY2d 866). In any event, defendant's contention lacks merit. The court repeatedly instructed the jury that the murder had to occur in the course of *and* in furtherance of the attempted robbery, and we conclude that "the charge as a whole adequately conveyed the required standard" (*People v Samuels*, 99 NY2d 20, 26).

Defendant waived any challenge to the court's annotation of the verdict sheet inasmuch as he requested the annotation (*see People v Cipollina*, 94 AD3d 1549, 1550, *lv denied* 19 NY3d 971). In addition, by failing to object to the prosecutor's summation, defendant failed to preserve for our review his contention that he was denied a fair trial when the prosecutor misstated the law concerning felony murder (*see People v Waterford*, 124 AD3d 1246, 1247-1248; *People v Goodman*, 190 AD2d 862, 862, *lv denied* 81 NY2d 971). In any event, that contention lacks merit. "To the extent that a portion of the prosecutor's summation could be viewed as containing a misstatement of law, . . . any prejudice was avoided by the court's instructions, which the jury is presumed to have followed" (*People v Padin*, 121 AD3d 628, 629; *see Waterford*, 124 AD3d at 1247-1248).

Contrary to defendant's contention, the court properly allowed the girlfriend of a codefendant to testify concerning statements made by defendant and the codefendant immediately after the incident. Those statements qualified as both excited utterances (*see People v Johnson*, 1 NY3d 302, 305-306; *People v Edwards*, 47 NY2d 493, 497), and adoptive admissions (*see People v Campney*, 94 NY2d 307, 311-312). Defendant further contends that the admission of the codefendant's statements made to and in front of the codefendant's girlfriend violated defendant's right of confrontation. That contention is not preserved for our review, and such a contention, whether based on *Bruton v United States* (391 US 123) or *Crawford v Washington* (541 US 36), requires preservation (*see People v Kello*, 96 NY2d 740, 744; *People v Gilocompo*, 125 AD3d 1000, 1001). In any event, we have reviewed defendant's contention and conclude that it lacks merit. There was no *Bruton* violation where, as here, defendant and the codefendant were not tried jointly (*see People v Baker*, 26 NY2d 169, 172-173), and there was no *Crawford* violation because the statements were "neither elicited in a formal manner nor elicited by an investigator" (*People v Paul*, 25 AD3d 165, 170, *lv denied* 6 NY3d 757).

Finally, we agree with defendant that the certificate of conviction incorrectly recites that he was convicted of murder in the first degree as a "murder of a police officer." The certificate of conviction must therefore be amended to reflect that he was convicted under Penal Law § 125.27 (1) (a) (vii) (*see e.g. People v Knighton*, 109 AD3d 1205, 1206; *People v Jackson*, 41 AD3d 1268, 1268-1269, *lv denied* 10 NY3d 812, *reconsideration denied* 11 NY3d 789).

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

895

KAH 14-01643

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JUNIOR COLLINS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), dated May 12, 2014 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: Petitioner commenced this proceeding seeking a writ of habeas corpus, contending that he was improperly sentenced as a persistent violent felony offender. We conclude that Supreme Court properly denied the petition. "Habeas corpus relief is unavailable where[, as here,] a claim could have been raised on direct appeal or in a CPL article 440 motion" (*People ex rel. Tislon v Rock*, 84 AD3d 1606, 1607, *lv denied* 17 NY3d 712; *see Matter of Caroselli v Goord*, 269 AD2d 706, 706, *lv denied* 95 NY2d 754). Indeed, we note that petitioner's contention was in fact raised and rejected on a prior CPL article 440 motion.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

896

KA 11-02455

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONOC ABON, ALSO KNOWN AS JONOL ABON,
DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered December 17, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1]; [2] [b]), defendant contends that the conviction is not supported by legally sufficient evidence and the verdict is contrary to the weight of the evidence because, inter alia, the prosecution's witnesses were not credible and the evidence does not establish that he participated in the crime. Defendant failed to preserve his sufficiency challenge for our review "inasmuch as his motion for a trial order of dismissal was not specifically directed at the same alleged shortcoming[s] in the evidence raised on appeal" (*People v Brown*, 96 AD3d 1561, 1562, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see generally People v Gray*, 86 NY2d 10, 19).

Viewing the evidence in light of the elements of the two counts of robbery as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is contrary to the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). With respect to the credibility of the witnesses, we note that their testimony "was not 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). "[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]), and we see no basis for disturbing the jury's credibility determinations in this case.

We reject defendant's further contention that County Court erred in denying his request for an expanded identification charge. "It cannot be said that this case involved a 'close question of identity' " (*People v Perez*, 77 NY2d 928, 929), and defendant did not present an alibi defense (*see People v Singleton*, 286 AD2d 877, 877, *lv denied* 97 NY2d 658). Indeed, we note that four eyewitnesses identified defendant as the perpetrator, and they had several opportunities to observe defendant at close range under good lighting conditions. In addition, one of the witnesses had met defendant before, and defendant and codefendant initially conversed at length with another witness during the drug sale that immediately preceded this incident. "In any event, the court properly charged the jury that the People were required to prove every element of the crime beyond a reasonable doubt, including that the defendant is the person who committed the crime" (*People v Willis*, 79 AD3d 1739, 1741, *lv denied* 16 NY3d 864 [internal quotation marks omitted]; *see generally People v Whalen*, 59 NY2d 273, 279).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

897

KA 14-01557

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD FOOSE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MEGHAN E. LEYDECKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered July 8, 2014. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony.

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 felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). Defendant contends that the evidence is legally insufficient to establish that he was the operator of the vehicle because the witness was unable to identify him in court, and her testimony was incredible or unreliable as a matter of law. We reject that contention (*see People v Segatol-Islami*, 121 AD3d 1575, 1576, *lv denied* 24 NY3d 1221). The witness testified that she was outside at night when she heard a crash and observed that a vehicle had collided with a parked vehicle. The witness called 911, and watched the driver exit the vehicle, wander around the street, and get into arguments with other people. When the police arrived, she pointed out the driver, and a police officer testified that she arrested defendant. The witness's inability to identify defendant in court does not render her testimony regarding her observations and identification of the driver after the accident " 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Gaston*, 104 AD3d 1206, 1207, *lv denied* 22 NY3d 1156). The witness testified that, although she did not see the driver very well because of the dimly-lit street, she did not think that there was any chance that she pointed out the wrong person to the police inasmuch as she lost track of the person for only a second or two, and the person was wearing the same shirt as the one who exited the vehicle. In addition, the officer testified that

defendant was standing near the vehicle when she arrived at the scene. The officer further testified that defendant, who was yelling and exhibited signs of intoxication, stated that he had not "been driving that long."

Defendant next contends that he was deprived of effective assistance of counsel based on defense counsel's failure to move for a mistrial after certain conduct by a prospective juror during voir dire (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant further contends that Supreme Court should have granted a mistrial sua sponte. We reject those contentions. When the prospective jurors were asked whether they could not be fair and impartial on the case, one prospective juror indicated that her father had been killed in an alcohol-related accident, and the court excused the prospective juror upon seeing that she was "upset." Defendant's contention that the remaining jury panel was tainted by the prospective juror's response "is purely speculative" (*People v Clark*, 262 AD2d 233, 234, *lv denied* 93 NY2d 1016). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

899

KA 13-00584

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN FARMER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered February 15, 2006. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that his plea was not knowingly, voluntarily, and intelligently entered. We note at the outset that we agree with defendant that his waiver of the right to appeal was invalid because, inter alia, County Court "improperly conflate[d] the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Bentley*, 63 AD3d 1624, 1625, *lv denied* 13 NY3d 742; *see People v Moyett*, 7 NY3d 892, 893; *People v Campbell*, 62 AD3d 1265, 1266, *lv denied* 13 NY3d 795). Nevertheless, "[a]lthough defendant's contention that the plea was not knowingly, voluntarily, and intelligently entered thus is not precluded by the invalid waiver, he failed to preserve that contention for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction" (*People v Jones*, 118 AD3d 1354, 1354, *lv denied* 24 NY3d 961; *see People v Wilson*, 117 AD3d 1476, 1477). Defendant likewise failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665), and this case does not fall within the rare exception to the preservation rule (*see id.* at 666). In addition, defendant failed to preserve for our review his contention that the court erred in failing to assign him new counsel inasmuch as defendant informed the court that he was attempting to retain new counsel but never sought substitution of his assigned counsel (*see* CPL 470.05 [2]). In any event, defendant failed to show good cause for substitution of his assigned attorney inasmuch

as his objections to his assigned counsel were vague and unsubstantiated (*see People v Linares*, 2 NY3d 507, 511; *see also People v Santiago*, 111 AD3d 1383, 1384, *lv denied* 23 NY3d 1025).

Finally, although defendant's invalid waiver of the right to appeal does not encompass his challenge to the severity of his sentence (*see e.g. People v Davis*, 114 AD3d 1166, 1167, *lv denied* 23 NY3d 1035; *People v Williams*, 46 AD3d 1424, 1425), we reject that challenge.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

900

KA 11-00411

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARDELL RICHARDSON, ALSO KNOWN AS "C,"
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered January 14, 2011. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree, attempted criminal possession of a weapon in the third degree and pedestrian on roadway.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of, inter alia, assault in the second degree (Penal Law § 120.05 [3]) and attempted criminal possession of a weapon in the third degree (§§ 110.00, 265.02 [1]), defendant contends that the evidence is legally insufficient to support the assault conviction. We agree. A person is guilty of assault in the second degree under Penal Law § 120.05 (3) when, "[w]ith intent to prevent . . . a police officer . . . from performing a lawful duty . . . , he or she causes physical injury to such . . . police officer" (*id.*). Here, a police officer stopped defendant for walking in the middle of a roadway in violation of Vehicle and Traffic Law § 1156 (a), and the suppression court found that the search of defendant's person by another officer was not lawful (*see People v Adams*, 32 NY2d 451, 455; *People v Marsh*, 20 NY2d 98, 101; *cf. People v Troiano*, 35 NY2d 476, 477-478). We have previously held that even the more limited pat-down search of a traffic offender "is not authorized 'unless, when the [person or] vehicle is stopped, there are reasonable grounds for suspecting that the officer is in danger or there is probable cause for believing that the offender is guilty of a crime rather than merely a simple traffic infraction' " (*People v Everett*, 82 AD3d 1666, 1666, quoting *Marsh*, 20

NY2d at 101). Here, as in *Everett*, the search of defendant was unauthorized, and the officer was injured only after he attempted to perform the unlawful search (*see id.*). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we thus conclude that the evidence is legally insufficient to establish that the officer was injured while undertaking a lawful duty (*see Everett*, 82 AD3d at 1667; *see generally People v Bleakley*, 69 NY2d 490, 495). We therefore modify the judgment by reversing that part convicting defendant of assault in the second degree and dismissing count four of the indictment.

In light of our conclusion, we do not reach defendant's contention that County Court should have dismissed the assault count under the theory of law of the case.

We reject defendant's contention that the evidence is legally insufficient to support the conviction of attempted criminal possession of a weapon in the third degree. During a struggle with police officers after the unlawful search, defendant grabbed and held onto an officer's service weapon, which was secured in her holster. The testimony of the officers concerning defendant's attempts to grab that officer's weapon and remove it from the holster is sufficient to establish that defendant intended to possess the weapon and "engage[d] in conduct which tend[ed] to effect the commission of [the] crime" of criminal possession of a weapon in the third degree (Penal Law § 110.00). Contrary to defendant's contention, the People were not required to establish the operability of the officer's service weapon because the operability of a weapon is not a necessary element of the crime of attempted criminal possession of a weapon in the third degree (*see People v Saunders*, 85 NY2d 339, 342-343). Furthermore, viewing the evidence in light of the elements of that crime as well as the traffic infraction in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict on those two counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, the grand jury proceeding was not defective, and the court thus did not err in refusing to dismiss the indictment on that ground (*see* CPL 210.20 [1] [c]). One of the grand jurors indicated that he knew the officer who had been injured in the assault. At that point, the prosecutor engaged the grand juror in the requisite "further inquiry" outside the presence of the other grand jurors (*People v Cullen*, 175 AD2d 658, 659, *lv denied* 78 NY2d 1010). That inquiry revealed that the relationship between the grand juror and the officer, who saw each other at social outings one to two times a year, "was a nominal and relatively inconsequential relationship" (*People v Dykeman*, 47 Misc 3d 689, 691), i.e., the grand juror and the officer did not have a " 'close relationship' " that would " 'raise[] the real risk of potential prejudice' " (*People v Connolly*, 63 AD3d 1703, 1705). Moreover, the grand juror specifically affirmed that he would be able to remain fair and impartial (*cf. People v Revette*, 48 AD3d 886, 888). We thus conclude that "the prosecutor's voir dire of the grand juror was appropriate and sufficient to ensure such juror's impartiality"

(*People v Farley*, 107 AD3d 1295, 1296, *lv denied* 21 NY3d 1073).

Finally, we conclude that the sentence imposed on the remaining counts of the indictment is not unduly harsh or severe.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

901

KA 13-01008

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN SANTORO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered February 28, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree and criminal contempt in the first degree.

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

Memorandum: In these consolidated appeals, defendant appeals, in appeal No. 1, from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]), and criminal contempt in the first degree (§ 215.51 [b] [iv]). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of escape in the first degree (§ 205.15 [1]). Contrary to defendant's contention in both appeals, we conclude that he knowingly, intelligently, and voluntarily waived his right to appeal as a condition of the plea (*see generally People v Lopez*, 6 NY3d 248, 256). " 'County Court's plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Arney*, 120 AD3d 949, 949).

Defendant's valid waiver of the right to appeal encompasses his challenge in appeal No. 1 to the severity of his bargained-for sentence (*see Lopez*, 6 NY3d at 256). Although defendant raised several additional issues in his brief on appeal, his attorney withdrew those challenges at oral argument of these appeals, with defendant's consent, and thus we limit our review to the contentions discussed above (*see People v Kellar*, 174 AD2d 848, 848 n, *lv denied*

78 NY2d 1128; *see generally People v Miller*, 110 AD3d 1150, 1150).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

902

KA 13-01010

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN SANTORO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered February 28, 2013. The judgment convicted defendant, upon his plea of guilty, of escape in the first degree.

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

Same memorandum as in *People v Santoro* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

903

KA 11-02367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID LOFTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered August 9, 2011. The judgment convicted defendant as a juvenile offender, upon a jury verdict, of criminal sexual act in the first degree and burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the surcharge and DNA databank fee and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him as a juvenile offender, following a jury trial, of criminal sexual act in the first degree (Penal Law § 130.50 [1]) and burglary in the second degree (§ 140.25 [2]). Defendant contends that the prosecutor's remarks on summation shifted the burden of proof and denied him a fair trial. We reject that contention. "The prosecutor's comments on summation did not shift the burden of proof to defendant, and they constituted either fair comment on the evidence or a fair response to defense counsel's summation" (*People v Coleman*, 32 AD3d 1239, 1240, *lv denied* 8 NY3d 844; *see People v Miller*, 104 AD3d 1223, 1224, *lv denied* 21 NY3d 1017). In any event, any misconduct that may have occurred "was not so egregious as to deprive defendant of a fair trial" (*People v Tolliver*, 267 AD2d 1007, 1008, *lv denied* 94 NY2d 908; *see People v Walker*, 117 AD3d 1441, 1442, *lv denied* 23 NY3d 1044).

Contrary to defendant's contention, Supreme Court made a determination on the record that defendant was not an eligible youth for youthful offender treatment (*see* CPL 720.10 [2] [a] [iii]; [3]; *People v Middlebrooks*, 25 NY3d 516, 527), and the sentence is not unduly harsh or severe. As the People correctly concede, however, the surcharge and DNA databank fee are illegal and must be vacated because defendant was sentenced as a juvenile offender (*see* Penal Law §§ 60.00

[2]; 60.10; *People v Stump*, 100 AD3d 1457, 1458, *lv denied* 20 NY3d 1104). We therefore modify the judgment accordingly.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

907

CAF 14-01583

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

IN THE MATTER OF CRAIG PROCOPIO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KELLY PROCOPIO, RESPONDENT-APPELLANT.

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

GERMAIN & GERMAIN, LLP, SYRACUSE (GALEN F. HAAB OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA M. FAHEY, ATTORNEY FOR THE CHILDREN, EAST SYRACUSE.

Appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered June 18, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner Craig Procopio sole custody of the subject children and directed that respondent Kelly Procopio's visitation with the children be supervised.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order modifying the parties' existing custody/visitation arrangement by directing that she have supervised visitation with the parties' children. "Courts have broad discretion in determining whether visits should be supervised" (*Matter of Campbell v January*, 114 AD3d 1176, 1177, *lv denied* 23 NY3d 902), and that determination "will not be disturbed as long as there is a sound and substantial basis in the record to support it" (*Matter of Chilbert v Soler*, 77 AD3d 1405, 1406, *lv denied* 16 NY3d 701 [internal quotation marks omitted]). Here, Supreme Court's determination to impose supervised visitation is supported by a sound and substantial basis in the record. The record establishes that the mother, who struggled with substance abuse and various mental health issues, including bipolar disorder, had difficulty controlling her reactive behavior, which largely consisted of verbal abuse and inappropriate text messages and included some physical abuse. As a result, she engaged in erratic and abusive behavior toward the children, who struggled emotionally and required counseling. The mother's therapist testified that the mother's relationship with the

children and her visitation with them was a trigger for her reactive behavior, and that supervised visitation was appropriate in order to provide the stability and consistency that the mother needed as she continued to work on her mental health issues (*see Matter of Green v Bontzolakes*, 111 AD3d 1282, 1284*; Matter of Westfall v Westfall*, 28 AD3d 1229, 1229-1230, *lv denied* 7 NY3d 706; *Matter of Simpson v Simrell*, 296 AD2d 621, 621-622).

We reject the mother's contention that the court abused its discretion in relying on the testimony of the children's counselor because she was not qualified as an expert and admitted that she was biased. The counselor was permitted to testify as a fact witness, and "[w]e give due deference to the factual findings of [the court], which had the opportunity to observe the [counselor] and assess [her] credibility" (*Matter of Mikolinski v Farnsworth*, 249 AD2d 956, 956, *lv denied* 92 NY2d 807).

The mother further contends that the court erred in ordering that visitation be supervised by the Children's Consortium or the Salvation Army due to financial and safety concerns. Contrary to the mother's contention, the order permitted the parties to use any other "comparable supervised visitation program," and thus the parties were not required to use the Children's Consortium or the Salvation Army for supervised visitation. We note in any event that the record establishes that it is in the children's best interests to continue supervised visitation at one of those facilities (*see Matter of Brown v Gandy*, 125 AD3d 1389, 1390). The mother's contention that the court erred in ordering that some visitation be supervised by her family is belied by the record. The mother's brother testified that he was not opposed to the mother bringing the children when she visited him every week or two and that the maternal grandfather was available to supervise visitation in his home as well.

Finally, we reject the mother's contention that the court erred in ordering her to refrain from sending text messages to the children. "[T]he evidence in the record supports a determination that . . . [prohibiting text messaging] contact with the [mother] would be in the children's best interests" (*Matter of Fletcher v Fletcher*, 29 AD3d 908, 909; *see Matter of Shockome v Shockome*, 53 AD3d 618, 619, *lv denied* 11 NY3d 712), and she was not precluded from communicating with the children in any other manner (*cf. Posporelis v Posporelis*, 41 AD3d 986, 991).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

908

CAF 14-01645

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

IN THE MATTER OF JAIMYCE L. MCCLINTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BARSUN U. KIRKMAN, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN M. WESLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

CHRISTOPHER E. BURKE, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered August 4, 2014 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, granted the motion of respondent to dismiss and dismissed the amended petition.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the amended petition is reinstated, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: Petitioner mother commenced this proceeding seeking, inter alia, to modify a prior order pursuant to which respondent father had sole custody of the parties' child. We agree with the mother that Family Court erred in granting the father's motion to dismiss the amended petition at the close of the mother's case.

"It is well established that alteration of an established custody arrangement will be ordered only upon a showing of a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Irwin v Neyland*, 213 AD2d 773, 773; *see Matter of Moore v Moore*, 78 AD3d 1630, 1630, *lv denied* 16 NY3d 704). "Where, as here, 'a respondent moves to dismiss a modification proceeding at the conclusion of the petitioner's proof, the court must accept as true the petitioner's proof and afford the petitioner every favorable inference that reasonably could be drawn therefrom' " (*Matter of Walters v Francisco*, 63 AD3d 1610, 1611; *see Matter of Gelster v Burns*, 122 AD3d 1294, 1295, *lv denied* 24 NY3d 915). Here, accepting the mother's proof as true and affording her the benefit of every favorable inference, we conclude that she "presented sufficient prima facie evidence of a change of circumstances [that] might warrant modification of custody in the best interests of the child" (*Matter of James R.O. v Cond-Arnold*, 99 AD3d

801, 801-802; *see Matter of Maher v Maher*, 1 AD3d 987, 988).

First, the mother established through her testimony and documentary exhibits that, for a significant period of time, the child resided with the paternal grandmother in Syracuse while the father "live[d] out of Syracuse." Such evidence establishes that the father "abdicated [his] role as the child's primary caregiver, at least temporarily, by leaving the child with the grandmother" (*Matter of Hetherton v Ogden*, 79 AD3d 1172, 1173; *see Matter of Blasdell v DeGolier*, 303 AD2d 1045, 1047; *cf. Matter of Williams v Williams*, 188 AD2d 906, 908). Second, the mother established that her "work schedule had changed substantially since the entry of the prior custody order" (*Matter of Porter v Nesbitt*, 74 AD3d 1786, 1787; *cf. Matter of Gross v Gross*, 119 AD3d 1453, 1453-1454), inasmuch as her status in the Army Reserves had changed to inactive and thus she would not be called to active duty training or deployed.

Based on the foregoing, we conclude that the mother "met [her] burden of demonstrating a sufficient change in circumstances to require consideration of the welfare of the child[ ]" (*Maher*, 1 AD3d at 988). Because the court did not proceed with a full hearing, we do not have an adequate record upon which to make our own determination in the interest of judicial economy (*cf. id.*). We therefore reinstate the amended petition and remit the matter to Family Court for a hearing and determination of custody based on the best interests of the child before a different judge, and we agree with the mother that she is entitled to a ruling on merits of her motion for discovery sanctions.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

909

CAF 14-00442

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

IN THE MATTER OF PATRICK ORDONA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PAMELA CAMPBELL, RESPONDENT-APPELLANT,
AND JENNIFER COTHERN, RESPONDENT-RESPONDENT.

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

AVERY S. OLSON, JAMESTOWN, FOR PETITIONER-RESPONDENT.

JILL A. SPAYER, ATTORNEY FOR THE CHILD, DUNKIRK.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILD, FREDONIA.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered February 13, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, terminated respondent Pamela Campbell's visitation with the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent Pamela Campbell (grandmother) appeals from an order that, inter alia, terminated her visitation with the two subject children. Contrary to the grandmother's contention, Family Court properly determined that it is not in the children's best interests to continue visitation with the grandmother (*see generally Matter of Wilson v McGlinchey*, 2 NY3d 375, 382; *Matter of Schillaci v Forbes*, 70 AD3d 1444, 1445). We also reject the grandmother's contention that the court erred in admitting hearsay statements of the subject children in evidence at the hearing on the petition. "It is well settled that there is 'an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family [Court] Act § 1046 (a) (vi)' . . . , where, as here, the statements are corroborated" (*Matter of Mateo v Tuttle*, 26 AD3d 731, 732; *see Matter of Sutton v Sutton*, 74 AD3d 1838, 1840; *cf. Matter of Hall v Hawthorne*, 99 AD3d 1237, 1238). The statement of each child "tend[s] to support the statement[] of the other[] and, viewed together, [the statements] give sufficient indicia of

reliability to each [child's] out-of-court statement[]" (*Matter of Nicole V.*, 71 NY2d 112, 124; *see Matter of Aimee J.*, 34 AD3d 1350, 1351). Moreover, there is additional corroboration from other witnesses who testified at the hearing.

The record does not support the grandmother's contention that the change in visitation will eliminate contact between the subject children and their half-siblings. In any event, we note that, "although sibling relationships should not be disrupted unless there is some overwhelming need to do so" (*Matter of O'Connell v O'Connell*, 105 AD3d 1367, 1368 [internal quotation marks omitted]), here there is such a need. The record supports the court's determination that it is in the best interests of the subject children to eliminate the grandmother's visitation in view of the grandmother's failure to abide by court orders, the grandmother's animosity toward the father, with whom the children reside, and the fact that the grandmother frequently engaged in acts that undermined the subject children's relationship with their father (*see Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1433; *see generally Matter of E.S. v P.D.*, 8 NY3d 150, 157-158).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

910

CAF 13-01813

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

IN THE MATTER OF AMIYAH F., AJANE B. AND MARKELL W.

---------- ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

TRENESHA B., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered October 4, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused Markell W. and derivatively neglected Amiyah F. and Ajane B.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

911

CA 14-01576

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

EDWARD MELIA, PLAINTIFF-RESPONDENT,

V ORDER

ZENHIRE, INC., ROBERT H. FRITZINGER AND
DEBORAH FRITZINGER, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

BLAIR & ROACH, LLP, TONAWANDA (DAVID L. ROACH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 6, 2013. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the complaint and granted the cross motion of plaintiff for summary judgment.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

912

CA 14-00986

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

EDWARD MELIA, PLAINTIFF-RESPONDENT,

V ORDER

ZENHIRE, INC., ROBERT H. FRITZINGER AND
DEBORAH FRITZINGER, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

BLAIR & ROACH LLP, TONAWANDA (DAVID L. ROACH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY PHILIP SANDERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 12, 2013. The amended order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the complaint and granted the cross motion of plaintiff for summary judgment.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

913

CA 14-00987

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

EDWARD MELIA, PLAINTIFF-RESPONDENT,

V ORDER

ZENHIRE, INC., ROBERT H. FRITZINGER AND
DEBORAH FRITZINGER, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

BLAIR & ROACH LLP, TONAWANDA (DAVID L. ROACH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY PHILIP SANDERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 13, 2014. The judgment awarded plaintiff money damages.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

914

CA 15-00256

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

PAUL K. ISAAC AND PARAMOUNT SETTLEMENT PLANNING, LLC, PLAINTIFFS-APPELLANTS,

V ORDER

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY, RINGLER ASSOCIATES, INC., BLACK, HOLCOMB, SMITH & ASSOCIATES, INC., KIPNES CROWLEY GROUP, LLC, THE PENSION COMPANY, AND JMW SETTLEMENTS, INC., DEFENDANTS-RESPONDENTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MANATT, PHELPS & PHILLIPS, LLP, NEW YORK CITY (RONALD G. BLUM OF COUNSEL), FOR DEFENDANT-RESPONDENT MEDICAL LIABILITY MUTUAL INSURANCE COMPANY.

HODGSON RUSS LLP, BUFFALO (RYAN J. LUCINSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BLACK, HOLCOMB, SMITH & ASSOCIATES, INC. AND KIPNES CROWLEY GROUP, LLC.

CONNORS & VILARDO, LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT THE PENSION COMPANY.

LANDMAN CORSI BALLAINE & FORD P.C., NEW YORK CITY (MARK S. LANDMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT JMW SETTLEMENTS, INC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 23, 2014. The order granted the motions of defendants to dismiss the second amended complaint.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

915

CA 14-01285

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

IN THE MATTER OF THE ESTATE OF DAVID C. PETERS,
DECEASED.

COREEN N. THOMPSON, ADMINISTRATRIX CTA,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOAN PETERS, OBJECTANT-APPELLANT.
(APPEAL NO. 1.)

COLUCCI & GALLAHER, P.C., BUFFALO (MOLLY M. KRAUZA OF COUNSEL), FOR OBJECTANT-APPELLANT.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Genesee County (Robert C. Noonan, S.), entered May 5, 2014. The order, among other things, determined that the Arrowhawk Smoke and Gas Shop business is an asset of the estate of David C. Peters.

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

Same memorandum as in *Matter of Peters* ([appeal No. 3] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

916

CA 14-01286

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

IN THE MATTER OF THE ESTATE OF DAVID C. PETERS,
DECEASED.

COREEN N. THOMPSON, ADMINISTRATRIX CTA,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOAN PETERS, OBJECTANT-APPELLANT.
(APPEAL NO. 2.)

COLUCCI & GALLAHER, P.C., BUFFALO (MOLLY M. KRAUZA OF COUNSEL), FOR OBJECTANT-APPELLANT.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Genesee County (Robert C. Noonan, S.), entered June 4, 2014. The decree directed Joan Peters to disgorge and release certain property and ordered that all bequests not yet received by Joan Peters under the last will and testament of David C. Peters are revoked and forfeited.

It is hereby ORDERED that the decree so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Surrogate's Court, Genesee County, for further proceedings on the petition.

Same memorandum as in *Matter of Peters* ([appeal No. 3] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

917

CA 14-01287

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

IN THE MATTER OF THE ESTATE OF DAVID C. PETERS,
DECEASED.

COREEN N. THOMPSON, ADMINISTRATRIX CTA,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOAN PETERS, OBJECTANT-APPELLANT.
(APPEAL NO. 3.)

COLUCCI & GALLAHER, P.C., BUFFALO (MOLLY M. KRAUZA OF COUNSEL), FOR OBJECTANT-APPELLANT.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Genesee County (Robert C. Noonan, S.), entered June 4, 2014. The decree determined that the business of Arrowhawk Smoke and Gas Shop, its related businesses and the tangible and intangible assets of the businesses are assets of the estate of David C. Peters.

It is hereby ORDERED that the decree so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Surrogate's Court, Genesee County, for further proceedings on the petition.

Memorandum: In his last will and testament (will), David C. Peters (decedent), who was a citizen of the Tonawanda Seneca Nation (Nation), attempted to devise real property located within the Tonawanda Seneca Nation Territory or Reservation (Territory) to petitioner, and to bequeath a business known as Arrowhawk Smoke and Gas Shop and all of its assets (hereafter, businesses), to petitioner and Thomas Peters. Objectant, however, claimed ownership of the real property and the businesses. Petitioner is decedent's daughter, objectant is decedent's mother, and Thomas Peters is decedent's brother. The will also contained an in terrorem clause, directing that if anyone named in the will acted in any manner to oppose the probate of the will or "to impair, invalidate or set aside the [will] or any of its provisions," any provisions for the benefit of that person would be revoked and that person would cease to have any "right, title, or interest in or to any portion of [decedent's] estate." Following decedent's death, multiple petitions and/or complaints related to the probate of decedent's will were filed in

Surrogate's Court, federal court, and this Court (*see e.g. Matter of Peters*, 124 AD3d 1266; *Matter of Tonawanda Seneca Nation v Noonan*, 122 AD3d 1334, *lv granted* 25 NY3d 903; *Peters v Noonan*, 871 F Supp 2d 218). The focus of many of the court proceedings was the issue whether the Surrogate could exercise jurisdiction over property and businesses located in the Territory and objectant's claims that she owned the real property and businesses.

Insofar as relevant to this appeal, petitioner, who was appointed administratrix, C.T.A., after the coexecutors were removed, filed a petition (Petition I) seeking forfeiture and disgorgement of any bequests to objectant based on objectant's alleged violation of the in terrorem clause. Petitioner also filed a petition (Petition L) seeking a declaration of estate assets and, in particular, seeking a declaration that the businesses discussed in the will were assets of decedent's estate. Objectant objected to Petition I and filed a motion seeking to dismiss Petition L and to intervene in that proceeding.

In appeal No. 1, objectant appeals from an order in which Surrogate's Court granted Petitions I and L, thereby determining that the businesses were assets of the estate and that objectant had violated the in terrorem clause of the will by claiming ownership of the businesses. Appeal Nos. 2 and 3 are appeals from the Surrogate's ensuing decrees related to that order.

As a preliminary matter, we note that the appeal from the order in appeal No. 1 "must be dismissed because the right of direct appeal therefrom terminated with the entry of the decree[s] in the proceeding" (*Matter of Winters*, 84 AD3d 1388, 1388; *see Matter of Beiny*, 16 AD3d 221, 222, *lv denied* 5 NY3d 710).

With respect to appeal Nos. 2 and 3, we agree with objectant that the Surrogate erred in summarily granting the petitions. All Surrogate's Court proceedings are special proceedings (*see* SCPA 203) and, in special proceedings, the court or Surrogate "shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court [or Surrogate] may make any orders permitted on a motion for summary judgment" (CPLR 409 [b]; *see* SCPA 102). Thus, if no triable issues of fact are raised, the Surrogate "must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it" (*Matter of Korotun v Laurel Place Homeowner's Assn.*, 6 AD3d 710, 712; *see Matter of Bahar v Schwartzreich*, 204 AD2d 441, 443). Even assuming, arguendo, that petitioner met her initial burden of proof with respect to both petitions, we conclude that objectant raised triable issues of fact whether the businesses were assets of the estate and whether, by claiming ownership of the businesses, objectant violated the in terrorem clause.

Petitioner submitted documentary evidence establishing that decedent was the owner, sole incorporator, and/or sole proprietor of the businesses. In support of her answer to the petitions, objectant submitted her deposition testimony. In that deposition, objectant

stated that she did not contribute to development of the buildings in which the businesses were located, and that her claims to own the businesses were based solely on the fact that they were situated "on [her] land." Objectant also admitted that decedent had owned the "doing business as" name as well as the corporation associated with those businesses and that decedent never paid her any money from the businesses. Despite those statements, objectant also testified that she "[a]lways owned" the businesses and that she "never signed any papers over to [decedent] as ownership of it." Also in opposition to the petitions and in support of her answer to the petitions, objectant submitted affidavits in which she averred that she was the owner of the businesses and that she had funded the businesses by liquidating her private pensions. While there were times in her deposition testimony that objectant wavered on why or how she owned the businesses, we conclude that "[a]ny inconsistences between the deposition testimony of [objectant] and [her] affidavits submitted in opposition to the [petitions] present[ed] credibility issues for trial" (*Knepka v Tallman*, 278 AD2d 811, 811; *see Godlewski v Carthage Cent. Sch. Dist.*, 83 AD3d 1571, 1572; *see generally Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441). In addition, objectant submitted an affidavit of petitioner's attorney from a 2001 proceeding in which petitioner's attorney averred that objectant and decedent built the businesses "at their own great expense." With respect to the in terrorem clause, we note that, "while in terrorem clauses are enforceable, they are 'not favored and [must be] strictly construed' " (*Matter of Singer*, 13 NY3d 447, 451, *rearg denied* 14 NY3d 795). Here, the in terrorem clause applied to anyone who challenged the probate of the will or who sought to impair, invalidate or set aside the will or any of its provisions. In discussing the distribution of the businesses in his will, decedent wrote, "If at the time of my demise, I own and operate [the businesses] . . . , such business[es] and assets shall pass to my heirs as set forth in this Article." Inasmuch as there are issues of fact whether decedent owned the businesses at the time of his death, we conclude that there are issues of fact whether objectant's claims of ownership constitute an attempt "to impair, invalidate or set aside" a provision of the will (*see Matter of Robbins*, 144 Misc 2d 510, 512-513).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

918

CA 14-02122

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

JOSETTE MARCELLO, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 116793.)

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR CLAIMANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renée Forgensi Minarik, J.), entered February 6, 2014. The order granted the motion of defendant for summary judgment and dismissed the claim.

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

Memorandum: Claimant commenced this Labor Law action seeking damages for injuries she sustained when she was struck by a backhoe that was backing up at a road construction site. The Court of Claims granted defendant's motion for summary judgment dismissing the claim, and claimant contends on appeal only that the court erred in granting that part of the motion with respect to Labor Law § 241 (6) to the extent that it is premised on the alleged violation of 12 NYCRR 23-9.5 (g). We affirm. In the order on appeal, the court concluded that the last sentence of the regulation does not contain a specific, concrete standard that will support liability under Labor Law § 241 (6). "In order to support a claim under section 241 (6), . . . the particular provision relied upon by a [claimant] must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505). Thus, section 241 (6) imposes a nondelegable duty on a defendant "only where the regulation in question contains a 'specific, positive command[]' " (*Morris v Pavarini Constr.*, 9 NY3d 47, 50, quoting *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 297, *rearg denied* 45 NY2d 776). The regulation at issue here states that "[e]very mobile power-operated excavating machine . . . shall be provided with an approved warning device so installed as to automatically sound a warning signal when such machine is backing," and the last sentence states that "[s]uch warning signal shall be audible to all persons in

the vicinity of the machine above the general noise level in the area" (12 NYCRR 23-9.5 [g]). We agree with the court that the "regulation sets forth a general standard of care and is not sufficiently specific to support a section 241 (6) claim" (*Wilson v Niagara Univ.*, 43 AD3d 1292, 1293; *see generally McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1583; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 1105).

In view of our determination, we do not address claimant's remaining contentions.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

924

KA 11-00791

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SYLVESTER BRITT, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered February 16, 2011. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree, resisting arrest and petit larceny (two counts).

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, inter alia, assault in the second degree (Penal Law § 120.05 [3]), defendant contends that the evidence is legally insufficient to establish that he intended to prevent the police officer from performing a lawful duty. We reject that contention inasmuch as there was ample evidence that defendant was aware that he was being pursued by the police after shoplifting from two stores and intended to prevent the police officer from arresting him by fleeing in a vehicle and on foot (*see People v Sparrow*, 117 AD3d 1563, 1563-1564, *lv denied* 23 NY3d 1043; *People v Foster*, 52 AD3d 957, 959, *lv denied* 11 NY3d 788; *People v Coulanges*, 264 AD2d 853, 853, *lv denied* 94 NY2d 878). Further, we conclude that County Court did not fail to give the evidence the weight it should be accorded on the element of intent (*see People v Hicks*, 128 AD3d 1221, 1222-1223; *People v Bouwens*, 128 AD3d 1393, 1393; *see generally People v Danielson*, 9 NY3d 342, 349). Any inconsistencies in the police officers' testimony raised issues of credibility, and we decline to disturb the court's credibility determination (*see People v Collins*, 70 AD3d 1366, 1367, *lv denied* 14 NY3d 839; *People v Gritzke*, 292 AD2d 805, 805-806, *lv denied* 98 NY2d 697).

We similarly conclude that the evidence is legally sufficient to establish that defendant caused the police officer to sustain a physical injury inasmuch as "[i]t is well settled that, 'where a

defendant's flight naturally induces a police officer to engage in pursuit, and the officer is killed [or injured] in the course of that pursuit, the causation element of the crime will be satisfied' " (*People v Cipollina*, 94 AD3d 1549, 1550, *lv denied* 19 NY3d 971, quoting *People v Carncross*, 14 NY3d 319, 325). Finally, the sentence is not unduly harsh or severe.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

925

KA 13-01483

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSIE MEDLEY, 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 (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered June 11, 2013. The judgment convicted defendant, upon a jury verdict, of robbery in the first 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 robbery in the first degree (Penal Law § 160.15 [3]), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Viewing the evidence in the light most favorable to the People, as we must (*see People v Williams*, 84 NY2d 925, 926; *People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Although there were some inconsistencies in the victim's testimony, she was steadfast in her account that defendant robbed her while he had a knife in his hand and threatened to stab her, and the jury was entitled to credit that testimony (*see People v Kelly*, 34 AD3d 1341, 1342, *lv denied* 8 NY3d 847). In addition, a surveillance video admitted in evidence depicts the victim backing away from defendant's outstretched hand, and a witness who responded to the victim's plea for help testified that defendant had something in his hand and that the victim screamed that defendant had tried to stab her. 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 likewise conclude that, although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495). We note that "[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]), and we perceive no reason to disturb the jury's resolution of those issues in this case.

Although County Court initially overruled defendant's objection to certain portions of the hearsay testimony from the driver of the bus from which defendant was apprehended, it thereafter gave the jury a prompt curative instruction to "disregard what somebody else told him[;] [t]hat's not evidence." Defendant did not object to that instruction, nor did he object further or seek a mistrial, and he thus failed to preserve for our review his further contention that introduction of the testimony deprived him of his right to confront the bus driver or his right to a fair trial (*see People v Kello*, 96 NY2d 740, 744). Under the circumstances, the court's "instruction[] must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944; *People v Lane*, 106 AD3d 1478, 1480-1481, *lv denied* 21 NY3d 1043). Defendant also contends that the court erred in admitting alleged hearsay during the testimony of two police witnesses. We reject that contention and conclude that, "[e]ven assuming that this testimony conveyed an implicit assertion by a nontestifying declarant, it was not received for its truth, but as background evidence to complete the narrative of events and explain why the officer[s] looked in the [back of the bus]" (*People v Newland*, 6 AD3d 330, 330, *lv denied* 3 NY3d 679, *reconsideration denied* 3 NY3d 759). Defendant failed to preserve for our review his remaining contentions concerning his right of confrontation and his right to a fair trial (*see People v Irvin*, 111 AD3d 1294, 1295, *lv denied* 24 NY3d 1044). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we reject defendant's remaining contention that he was denied effective assistance of counsel owing to counsel's failure to raise certain arguments or make a certain motion inasmuch as such arguments and motion had little or no chance of success (*see People v Caban*, 5 NY3d 143, 152). We conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

926

KA 12-01658

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCO D. COLES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered July 12, 2012. 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: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. "Although defendant executed a written waiver of the right to appeal, there was no colloquy between [County] Court and defendant regarding the written waiver to ensure that defendant read and understood it and that he was waiving his right to challenge the length of the sentence" (*People v Mack*, 124 AD3d 1362, 1363). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

927

KA 14-01543

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

MARCOS A. MUESES, DEFENDANT-RESPONDENT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (M. William Boller, A.J.), dated April 17, 2014. The order granted defendant's motion to suppress physical evidence.

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

Memorandum: The People appeal from an order in which Supreme Court granted that part of defendant's omnibus motion seeking suppression of physical evidence on the ground that the police lacked probable cause to arrest defendant for disorderly conduct (Penal Law § 240.20 [5]). We affirm.

The suppression hearing testimony established that defendant ran across a street, causing a car to stop abruptly to avoid hitting him, and that two police officers chased defendant with the intention of charging him with disorderly conduct. The officers observed that defendant was running with a bulky object that he held in his shirt with both hands. The officers lost sight of defendant for approximately two to three minutes after he entered a yard over a locked gate, but they apprehended him on another street when he exited a vacant lot. Defendant was charged with disorderly conduct, and the officers searched the vacant lot for the bulky object and found a loaded gun wedged under a rock. Defendant admitted to the police that the gun was his. Defendant was thereafter indicted for criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). The People correctly concede that the pursuit of defendant by the police was unlawful inasmuch as defendant's actions did not constitute disorderly conduct, and they do not contest on appeal the court's determination suppressing cocaine that was retrieved from defendant's pocket. The only issue before us,

therefore, is whether the court erred in suppressing the gun. The People contend that because defendant had abandoned the gun, the court should not have suppressed it. We reject that contention.

It is well established that property seized as a result of an unlawful pursuit must be suppressed, unless that property was abandoned (*see People v Howard*, 50 NY2d 583, 592, *cert denied* 449 US 1023). "Property which has in fact been abandoned is outside the protection of the constitutional provisions . . . There is a presumption against the waiver of constitutional rights . . . [and, thus,] [t]he proof supporting abandonment should 'reasonably beget the exclusive inference of . . . throwing away' " (*Howard*, 50 NY2d at 592-593). "The test to be applied is whether defendant's action . . . was spontaneous and precipitated by the illegality or whether it was a calculated act not provoked by the unlawful police activity and was thus attenuated from it" (*People v Wilkerson*, 64 NY2d 749, 750). Here, the court properly concluded that defendant's action was spontaneous and precipitated by the unlawful pursuit by the police (*see Howard* 50 NY2d at 593; *People v Hooper*, 245 AD2d 1020, 1021, abrogated on other grounds *People v Hunter*, 17 NY3d 725, 727; *cf. People v Boodle*, 47 NY2d 398, 402, *cert denied* 444 US 969; *People v Johnson*, 93 AD3d 1317, 1318; *People v Sisnett*, 217 AD2d 911, 911, *lv denied* 86 NY2d 846). The court thus properly determined that the People failed to establish that defendant had abandoned the gun and, consequently, properly suppressed the gun. We therefore dismiss the indictment.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

931

CA 15-00357

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

DEANNA ZEGARELLI-PECHEONE, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF THOMAS ZEGARELLI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW HARTFORD CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered June 10, 2014. The order, insofar as appealed from, denied in part defendant's motion for summary judgment.

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

Memorandum: Defendant appeals from an order denying in part its motion for summary judgment dismissing the complaint. Defendant's employees questioned plaintiff's son during an investigation of an incident that had occurred a few days earlier during a football game on school grounds. Plaintiff thereafter commenced this action alleging, among other things, that defendant's confinement of her son to an administrator's office and the nurse's office during the investigation constituted false imprisonment. In her bill of particulars, plaintiff alleged in further detail that her son's confinement was for an unreasonable and excessive period of time, during which he was threatened, verbally harassed, and given misleading information, with the result that he made a false admission of wrongdoing. Supreme Court denied defendant's motion for summary judgment dismissing the cause of action for false imprisonment but granted the motion with respect to two other causes of action. We affirm.

To establish a cause of action for false imprisonment, a "plaintiff must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged" (*Broughton v State of New York*, 37 NY2d 451, 456, *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929). Defendant contends that the court erred in denying that part of its motion seeking dismissal of the cause of action for false imprisonment

inasmuch as defendant's confinement of plaintiff's son was privileged. We reject that contention. A confinement such as the one at issue herein is privileged only if it is reasonable under the circumstances, including its duration and manner (*see Barrett v Watkins*, 82 AD3d 1569, 1571-1572; *see generally Sindle v New York City Tr. Auth.*, 33 NY2d 293, 297). We conclude on this record that defendant's submissions failed to establish that its confinement of plaintiff's son was reasonable as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562; *Peters v Rome City Sch. Dist.* [appeal No. 2], 298 AD2d 864, 865).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

932

CA 15-00356

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

THOMAS O. FITZGERALD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SMS/800, INC., DEFENDANT-APPELLANT.

LITTLER MENDELSON, P.C., ROCHESTER (IVAN NOVICH OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (JEFFREY J. CALABRESE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 15, 2014. The order denied defendant's motion to, inter alia, dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking dismissal of the second cause of action insofar as it seeks a declaration, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action following his termination as President and Chief Executive Officer of defendant. In the original complaint, plaintiff alleged a single cause of action for breach of the parties' employment agreement (Agreement). Defendant moved to dismiss the complaint or stay the action pending arbitration based upon the arbitration provision of the Agreement. Supreme Court denied the motion. Plaintiff amended the complaint to add three causes of action, and defendant moved for leave to renew its motion to dismiss the breach of contract cause of action based upon evidence relating to the negotiation of the Agreement. Defendant also sought to dismiss the three causes of action added in the amended complaint and to compel arbitration. The court's denial of that second motion (hereafter, motion) is the subject of this appeal.

The court properly denied that part of the motion seeking leave to renew inasmuch as defendant failed to provide a reasonable justification for its failure to present facts relating to the negotiation of the Agreement in support of the original motion (*see* CPLR 2221 [e] [3]; *Robinson v Consolidated Rail Corp.*, 8 AD3d 1080, 1080). Further, defendant's submissions in support of renewal were not "new facts . . . that would change the prior determination" (CPLR 2221 [e] [2]; *see People ex rel. Seals v New York State Dept. of Corr. Servs.*, 32 AD3d 1262, 1263).

With respect to that part of the motion seeking dismissal of the causes of action added in the amended complaint, we agree with defendant that the second cause of action, insofar as it seeks declaratory relief, is duplicative of the breach of contract cause of action (*see Apple Records v Capital Records*, 137 AD2d 50, 54). We therefore modify the order by dismissing that part of the second cause of action. Contrary to defendant's further contention, however, we conclude that the court properly denied that part of the motion seeking dismissal of the second cause of action insofar as it seeks specific performance of the Agreement. Although under the law of Delaware, which governs the interpretation of the Agreement, contracts for personal services generally will not be specifically enforced (*see Northern Delaware Indus. Dev. Corp. v E.W. Bliss Co.*, 245 A2d 431, 434 [Del Ch]), plaintiff has asserted a claim for specific performance sufficient to survive defendant's motion to dismiss (*see generally NAMA Holdings, LLC v Related World Mkt. Ctr., LLC*, 922 A2d 417, 437-438 [Del Ch]). In addition, accepting the facts alleged in the amended complaint to be true and affording plaintiff the benefit of every favorable inference (*see J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334), we conclude that the court properly denied that part of the motion seeking dismissal of the causes of action alleging defamation (*see Kamchi v Weissman*, 125 AD3d 142, 157-159), and seeking injunctive relief (*see Elow v Svenningsen*, 58 AD3d 674, 675).

Finally, we conclude that the court properly denied that part of the motion seeking to compel arbitration. Although the Agreement contains a provision reflecting the parties' intention to arbitrate, it also makes repeated references to courts and judicial remedies. We agree with plaintiff, therefore, that if the parties intended to arbitrate all of their disputes, the references to judicial intervention in the Agreement "either mean[] nothing or mislead[]" (*Kuhn Constr., Inc. v Diamond State Port Corp.*, 990 A2d 393, 397 [Del]). Thus, the court properly declined to enforce the Agreement inasmuch as it "unclearly or ambiguously reflects the intention to arbitrate" (*id.* at 396).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

933

OP 15-00258

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

IN THE MATTER OF PAUL BECALLO, PETITIONER,

V MEMORANDUM AND ORDER

JESSICA ZAMBRANO, SUPERVISOR, TOWN OF CICERO, ONONDAGA COUNTY, RESPONDENT.

PAUL BECALLO, PETITIONER PRO SE.

LISA DIPOALA HABER, SYRACUSE, FOR RESPONDENT.

Proceeding pursuant to Public Officers Law § 36 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department on February 10, 2015) for the removal of respondent from the public office of Supervisor for the Town of Cicero.

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

Memorandum: Petitioner, a citizen in the Town of Cicero (Town), commenced this original proceeding pursuant to Public Officers Law § 36 seeking the removal of respondent as the Town Supervisor. In her answer and responding affidavit, respondent admitted many of the factual allegations of the petition, particularly that she had a romantic relationship with an employee of the engineering firm (employee) that was hired by the Town and that she signed the contract with the engineering firm and approved invoices for work completed by the employee; that she purchased a one-half interest in the employee's residence and that he held a mortgage from her; and that she used campaign funds to pay for a bulk mailing of a Town newsletter to senior citizens. She denied, however, that the above acts created a conflict of interest or constituted wrongdoing and sought dismissal of the petition. In addition, respondent submitted documentary evidence refuting the remaining allegation that she altered the date on a shared services agreement with another Town. We conclude that the petition must be dismissed.

Respondent established that she began a romantic relationship with the employee in the fall of 2011 while she was a Town councilperson and that she sought an opinion from the Town Attorney in February 2012 whether there was a conflict of interest as a result of that relationship. The Town Attorney advised her in a written opinion that there was no conflict of interest. The Town Attorney reiterated that opinion at a Town Board meeting in April 2014, when respondent

was Town Supervisor. General Municipal Law § 801 provides that "no municipal officer . . . shall have an interest in any contract with the municipality of which [she] is an officer . . . when such officer . . . has the power or duty to . . . approve the contract . . . or approve payment thereunder." "Interest" is defined in section 800 (3), in relevant part, as "a direct or indirect pecuniary or material benefit accruing to a municipal officer . . . as a result of a contract with the municipality which such officer . . . serves . . . [A] municipal officer . . . shall be deemed to have an interest in the contract of . . . [her] spouse, minor children and dependent." Those provisions do not apply here.

With respect to the financial arrangement between respondent and the employee regarding her purchase of a one-half interest in his residence, we conclude that it cannot "reasonably be inferred that the [financial arrangement] was intended to influence [respondent], or could reasonably be expected to influence [her], in the performance of [her] official duties or was intended as a reward for any official action on [her] part" (General Municipal Law § 805-a [1]). Thus, we conclude that petitioner has failed to establish a conflict of interest with respect to respondent's personal relationship with the employee (*see Matter of Hedman v Town Bd. of Town of Howard*, 56 AD3d 1287, 1288). With respect to petitioner's allegation concerning campaign funds, even assuming, arguendo, that the use of those funds to pay for a bulk mailing of a Town newsletter to senior citizens was improper, such impropriety does "not remotely rise to the level required for removal pursuant to Public Officers Law § 36" (*Matter of Salvador v Ross*, 61 AD3d 1163, 1164). Finally, petitioner has failed to come forward with evidence raising an issue of fact with respect to the allegation concerning the shared services agreement (*see Matter of Reszka v Collins*, 109 AD3d 1134, 1134-1135)

"Public Officers Law § 36 was enacted to enable a town . . . to rid itself of an unfaithful or dishonest public official" (*Reszka*, 109 AD3d at 1134 [internal quotation marks omitted]), and petitioner has failed to establish that respondent is either unfaithful or dishonest in the performance of her duties as Town Supervisor. "[T]he petition does not set forth a single act of unscrupulous conduct or intentional wrongdoing, let alone evidence of any gross dereliction of duties or a pattern of misconduct" (*Salvador*, 61 AD3d at 1164-1165). We therefore dismiss the petition (*see Hedman*, 56 AD3d at 1287-1288).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

937

TP 15-00390

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

IN THE MATTER OF CARL A. MONTI, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
SERVICE EMPLOYEES INTERNATIONAL UNION, ALF-CIO,
LOCAL 200 UNITED, RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (CHARLES L. MILLER OF COUNSEL), FOR PETITIONER.

LAW OFFICES OF MAIREAD E. CONNOR, PLLC, SYRACUSE (MAIREAD E. CONNOR OF COUNSEL), FOR RESPONDENT SERVICE EMPLOYEES INTERNATIONAL UNION, ALF-CIO, LOCAL 200 UNITED.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Shirley Troutman, J.], entered March 4, 2015) to review a determination of respondent New York State Division of Human Rights. The determination adopted the recommended order of the Administrative Law Judge dismissing petitioner's complaint.

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

Memorandum: In this proceeding pursuant to Executive Law § 298, petitioner seeks to annul the determination of respondent New York State Division of Human Rights dismissing his complaint following a public hearing. Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing, is limited to the issue whether substantial evidence supports the determination (*see Matter of Bowler v New York State Div. of Human Rights*, 77 AD3d 1380, 1381, *lv denied* 16 NY3d 709). The assessment of credibility by the ALJ, moreover, is "unassailable," and the determination must be confirmed if the testimony credited by the ALJ provides substantial evidence to support it (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443; *see Matter of Jones v New York State Div. of Human Rights*, 122 AD3d 1387, 1387-1388). We conclude that substantial evidence supports the ALJ's determination that petitioner failed to establish a prima facie case of retaliation (*see Jones*, 122 AD3d at 1387-1388), and that petitioner's termination was based upon legitimate, nondiscriminatory reasons (*see Matter of Pace Univ. v New*

York City Commn. on Human Rights, 85 NY2d 125, 128-129).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

938

CA 14-00967

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

CAYUGA NATION, LAKESIDE ENTERPRISES, INC., CLINT HALFTOWN, TIM TWOGUNS, GARY WHEELER, RICHARD N. LYNCH AND B.J. RADFORD, PLAINTIFFS-APPELLANTS,

V ORDER

WILLIAM JACOBS, SAMUEL GEORGE, BERNADETTE HILL, BRENDA BENNETT, KARL HILL, ALAN GEORGE, PAMELA ISAAC, CHESTER ISAAC, DANIEL HILL, JUSTIN BENNETT, SAMUEL CAMPBELL, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS, COUNTY OF SENECA, INTERVENOR-RESPONDENT. (APPEAL NO. 1.)

FRENCH-ALCOTT, PLLC, SYRACUSE (DANIEL J. FRENCH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

JOSEPH J. HEATH, SYRACUSE, FOR DEFENDANTS-RESPONDENTS.

FRANK R. FISHER, WATERLOO, FOR INTERVENOR-RESPONDENT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered May 19, 2014. The judgment, inter alia, granted the motion of defendants to dismiss the complaint for lack of subject matter jurisdiction.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 1 and 24, 2015,

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

939

CA 14-01544

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

CAYUGA NATION, LAKESIDE ENTERPRISES, INC., CLINT HALFTOWN, TIM TWOGUNS, GARY WHEELER, RICHARD N. LYNCH AND B.J. RADFORD, PLAINTIFFS-APPELLANTS,

V ORDER

WILLIAM JACOBS, SAMUEL GEORGE, BERNADETTE HILL, BRENDA BENNETT, KARL HILL, ALAN GEORGE, PAMELA ISAAC, CHESTER ISAAC, DANIEL HILL, JUSTIN BENNETT, SAMUEL CAMPBELL, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

FRENCH-ALCOTT, PLLC, SYRACUSE (DANIEL J. FRENCH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

JOSEPH J. HEATH, SYRACUSE, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered June 25, 2014. The order, inter alia, granted the motion of defendants to dismiss the complaint for lack of subject matter jurisdiction.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 1 and 24, 2015,

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

941

CA 15-00406

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

CORY ANDERSON, PLAINTIFF-RESPONDENT,

V ORDER

PHILIP E. PECK, DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT.

PUGATCH & NIKOLIS, MINEOLA (PHILLIP P. NIKOLIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered July 17, 2014. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

943.1

KA 13-00189

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ODELL WILKENS, ALSO KNOWN AS ODELL WILKINS,
DEFENDANT-APPELLANT.

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

ODELL WILKENS, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Thomas P. Franczyk, J.), dated December 11, 2012. The appeal was held by this Court by order entered March 20, 2015, the decision was reserved and the matter was remitted to Erie County Court for further proceedings (126 AD3d 1293).

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on July 7, 2015, and by the attorneys for the parties on July 7 and 23, 2015,

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

943

TP 15-00391

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

IN THE MATTER OF CORINNE ZAJAC, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200 UNITED, RESPONDENTS.

LAW OFFICE OF LINDAY KORN, PLLC, BUFFALO (CHARLES L. MILLER OF COUNSEL), FOR PETITIONER.

LAW OFFICES OF MAIREAD E. CONNOR, PLLC, SYRACUSE (MAIREAD E. CONNOR OF COUNSEL), FOR RESPONDENT SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200 UNITED.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Deborah A. Chimes, J.], entered March 4, 2015) to review a determination of respondent New York State Division of Human Rights. The determination adopted the recommended order of the Administrative Law Judge dismissing petitioner's complaint.

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

Memorandum: In this proceeding pursuant to Executive Law § 298, petitioner seeks to annul the determination of respondent New York State Division of Human Rights dismissing her complaint following a public hearing. The determination adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing. Substantial evidence supports the ALJ's determination that petitioner failed to meet her burden of establishing that respondent Service Employees International Union, Local 200 United (Local 200), engaged in unlawful discrimination by terminating her employment in retaliation for filing an age discrimination complaint (*see Matter of Yu Zhang v New York State Div. of Human Rights*, 70 AD3d 1414, 1415, *lv denied* 14 NY3d 711). Inasmuch as petitioner failed to submit evidence establishing that Local 200 further retaliated against her by denying her severance benefits, or even to make any allegation with respect thereto, we conclude that, contrary to petitioner's contention, the ALJ properly declined to consider such further retaliation in his decision (*see Matter of Bowler v New York State Div. of Human Rights*, 77 AD3d 1380, 1382, *lv denied* 16 NY3d 709; *see also Edwards v Board of*

Trustees of Colgate Rochester Divinity School/Bexley Hall/Crozier Theol. Seminary, 254 AD2d 709, 710).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

944

TP 15-00395

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

IN THE MATTER OF MICHAEL ALLEN, PETITIONER,

V ORDER

ROBINSON, FIRST DEPUTY, RESPONDENT.

MICHAEL ALLEN, PETITIONER PRO SE.

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, Cayuga County [Mark H. Fandrich, A.J.], entered February 27, 2015) 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: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

946

TP 15-00354

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

IN THE MATTER OF HECTOR LAPORTE, PETITIONER,

V ORDER

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

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

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 [Michael M. Mohun, A.J.], entered February 26, 2015) 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: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

949

KA 10-00695

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN C. HOWARD, ALSO KNOWN AS JOHN HOWARD, JR., DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (David D. Egan, J.), rendered July 16, 2009. The judgment convicted defendant, upon a jury verdict, of resisting arrest.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of resisting arrest (Penal Law § 205.30), defendant contends that the verdict is against the weight of the evidence. We agree. The conviction arose from an incident in which defendant was arrested for disorderly conduct because he was standing on a sidewalk, and he was convicted of resisting that arrest.

"[B]ased on all the credible evidence[, we conclude that] a different finding would not have been unreasonable," and we therefore conduct an independent review of the trial evidence (*People v Bleakley*, 69 NY2d 490, 495). "The Court of Appeals has recently reiterated that, in reviewing the weight of the evidence, we must 'affirmatively review the record; independently assess all of the proof; substitute [our] own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if [we are] not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt' " (*People v Oberlander*, 94 AD3d 1459, 1459, quoting *People v Delamota*, 18 NY3d 107, 116-117). After conducting that review, we conclude that the verdict is contrary to the weight of the evidence.

As the People correctly concede, the evidence fails to establish beyond a reasonable doubt that the arrest of defendant for disorderly conduct was authorized. The Court of Appeals has "made clear that evidence of actual or threatened public harm ('inconvenience, annoyance or alarm') is a necessary element of a valid disorderly conduct charge" (*People v Johnson*, 22 NY3d 1162, 1164; *cf. People v Weaver*, 16 NY3d 123, 127-129), and there is no evidence of such actual or threatened harm here. Inasmuch as it "is not disorderly conduct . . . for a small group of people, even people of bad reputation, to stand peaceably on a street corner" (*Johnson*, 22 NY3d at 1164), the arrest of defendant for engaging in that conduct was not authorized. "There being no probable cause that authorized defendant's arrest, [he] cannot be guilty of resisting arrest" (*People v Peacock*, 68 NY2d 675, 677; *see People v Stevenson*, 31 NY2d 108, 111; *see generally People v Finch*, 23 NY3d 408, 416-417). Thus, we conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495).

Because we conclude that the verdict is against the weight of the evidence, we reverse the judgment and dismiss the indictment (*see Delamota*, 18 NY3d at 117-118). In light of our determination, we need not address defendant's remaining contentions.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

950

KA 12-01128

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAMEIL GREEN, ALSO KNOWN AS MARCUS TRUITT,
ALSO KNOWN AS ALFRED PARKER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN 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 (John L. Michalski, A.J.), rendered November 21, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (§ 130.35 [1]), and predatory sexual assault (§ 130.95 [2]).

Initially, we agree with defendant in each appeal that his waiver of the right to appeal was invalid because " 'the minimal inquiry made by [Supreme] Court was insufficient to establish that the court engage[d] defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Carrasquillo*, 130 AD3d 1498, 1498; *see People v Harris*, 121 AD3d 1423, 1424, *lv denied* 25 NY3d 989). Nevertheless, we reject defendant's contention in each appeal that the sentence is unduly harsh and severe.

Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution in appeal No. 1, because "defendant's motion to withdraw his plea was made on clearly different grounds" (*People v Carter*, 254 AD2d 202, 202, *lv denied* 93 NY2d 871; *see People v Spears*, 106 AD3d 1534, 1535, *affd* 24 NY3d 1057). This case does not fall within the narrow exception to the preservation rule (*see People v Lopez*, 71 NY2d 662, 666).

With respect to appeal Nos. 1 and 2, we reject defendant's contention that the court erred in denying his motion to withdraw his plea. Although defendant contends that his plea was not knowing, voluntary, and intelligent because the court failed to inquire whether he was under the influence of psychotropic medications, we note that, here, defendant "was by all indications perfectly lucid while the plea proceedings were in progress" (*People v Royster*, 40 AD3d 885, 887, *lv denied* 9 NY3d 881; *see People v Lear*, 19 AD3d 1002, 1002, *lv denied* 5 NY3d 807; *People v McCann*, 289 AD2d 703, 703-704). Defendant's further contention that his plea of guilty was coerced by defense counsel is "belied by [his] statement during the plea proceeding that [he] was not threatened, coerced or otherwise influenced against [his] will into pleading guilty" (*People v Irvine*, 42 AD3d 949, 949, *lv denied* 9 NY3d 962 [internal quotation marks omitted]). To the extent defendant contends that he was under the influence of psychotropic drugs when he entered his plea of guilty and that he was coerced into pleading guilty by defense counsel, those contentions are "based on matters outside the record and must therefore be raised by way of a motion pursuant to CPL article 440" (*People v Merritt*, 115 AD3d 1250, 1251).

Contrary to defendant's contention, he was not deprived of effective assistance of counsel at sentencing based on his attorney's refusal to incorporate the arguments raised by defendant at sentencing into the written motion to withdraw defendant's plea (*see e.g. People v Adams*, 66 AD3d 1355, 1356, *lv denied* 13 NY3d 858; *People v Klumpp*, 269 AD2d 798, 799, *lv denied* 94 NY2d 922). We also conclude that defense counsel did not take a position adverse to defendant at sentencing, or become a witness against him (*see People v Collins*, 85 AD3d 1678, 1679, *lv denied* 18 NY3d 993; *cf. People v Lawrence*, 27 AD3d 1091, 1091-1092). Indeed, we note that defense counsel urged the court to consider defendant's pro se arguments.

Finally, we note in appeal No. 2 that the certificate of conviction incorrectly reflects that defendant was convicted of predatory sexual assault under Penal Law § 131.95 (2), and it must therefore be amended to reflect that he was convicted under Penal Law § 130.95 (2) (*see People v Holmes*, 104 AD3d 1288, 1290, *lv denied* 22 NY3d 1041).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

951

KA 12-01127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL ROGERS, ALSO KNOWN AS TRAMEIL GREEN,
ALSO KNOWN AS ALFRED PARKER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN 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 (John L. Michalski, A.J.), rendered November 21, 2011. The judgment convicted defendant, upon his plea of guilty, of predatory sexual assault and rape in the first degree.

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

Same memorandum as in *People v Green* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

959

CA 15-00116

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

MONICA HARRIS AND DEMAR HARRIS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

EVAN CAMPBELL, DEFENDANT-RESPONDENT.

RAMOS & RAMOS, BUFFALO (JOSHUA I. RAMOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 29, 2014. The order, insofar as appealed from, denied that part of the cross motion of plaintiffs seeking partial summary judgment on the issue of serious injury.

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 Monica Harris (plaintiff) when the vehicle she was driving was rear-ended by a vehicle owned and operated by defendant. Supreme Court granted that part of plaintiffs' cross motion for partial summary judgment on the issue of negligence and, contrary to plaintiffs' contention on appeal, properly denied that part of their cross motion on the issue of serious injury.

We note at the outset that plaintiffs have abandoned any contentions with respect to the 90/180-day category of serious injury set forth in their bill of particulars (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984), and thus the only categories at issue are the permanent consequential limitation of use and significant limitation of use categories of serious injury.

We conclude that the court properly denied plaintiffs' cross motion with respect to those categories. We reject plaintiffs' contention that plaintiff sustained a serious injury as a matter of law because she underwent "fusion surgery" that caused "permanent consequential and significant impairment of [her lumbar] spine." With respect to those two categories of injury, whether an injury qualifies as a serious injury " 'relates to medical significance and involves a comparative determination of the degree or qualitative nature of an

injury based on the normal function, purpose and use of the body part' " (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353). "Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, 4 NY3d 566, 574; *see Pugh v Tantillo*, 101 AD3d 1658, 1659). Although plaintiffs submitted some objective evidence of plaintiff's physical limitations related to the accident, they also submitted the report of the physician who examined plaintiff on defendant's behalf, wherein he concluded that plaintiff had preexisting conditions that were causing her physical limitations and pain and opined that plaintiff "did not suffer a significant or consequential disabling injury to her lumbar spine" as a result of the accident. Plaintiffs thus by their own submissions raised a triable issue of fact whether plaintiff sustained a qualifying injury to her lumbar spine under those two categories (*see Strong v ADF Constr. Corp.*, 41 AD3d 1209, 1210; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Contrary to plaintiffs' contention, the mere fact that plaintiff underwent post-accident fusion surgery does not establish the causation between the accident and the surgery, particularly in light of the report of defendant's examining physician submitted by plaintiffs in support of the cross motion (*see Cummings v Jiayan Gu*, 42 AD3d 920, 923).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

961

CA 15-00302

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

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC
AND BROADWING COMMUNICATIONS, LLC,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIE COUNTY, CITY OF BUFFALO, CITY OF
LACKAWANNA, VILLAGE OF NORTH COLLINS, CITY
OF LACKAWANNA SCHOOL DISTRICT, EDEN CENTRAL
SCHOOL DISTRICT, LAKE SHORE CENTRAL SCHOOL
DISTRICT AND NORTH COLLINS CENTRAL SCHOOL
DISTRICT, RESPONDENTS-DEFENDANTS-RESPONDENTS.

INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI, LLP, NEW YORK CITY (JOHN G. NICOLICH OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

MOSEY PERSICO, LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT ERIE COUNTY.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT CITY OF BUFFALO.

HARRIS BEACH PLLC, BUFFALO (J. RYAN WHITE OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT LAKE SHORE CENTRAL SCHOOL DISTRICT.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT NORTH COLLINS CENTRAL SCHOOL DISTRICT.

ANTONIO M. SAVAGLIO, CITY ATTORNEY, LACKAWANNA, FOR RESPONDENT-DEFENDANT-RESPONDENT CITY OF LACKAWANNA.

SCHAUS & SCHAUS, BUFFALO (RICHARD M. SCHAUS OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT VILLAGE OF NORTH COLLINS.

GOLDMAN ATTORNEYS PLLC, ALBANY (PAUL J. GOLDMAN OF COUNSEL), FOR TOWN OF RAMAPO, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 7, 2014 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment dismissed the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition-complaint

is reinstated and granted insofar as petitioners-plaintiffs seek to compel respondents-defendants City of Buffalo and City of Lackawanna School District to determine petitioners-plaintiffs' applications and to annul the remaining respondents-defendants' determinations denying their applications, and the matter is remitted to respondents-defendants for further proceedings in accordance with the following memorandum: This hybrid CPLR article 78 proceeding and declaratory judgment action concerns taxes imposed upon fiber optic cables by respondents-defendants. Petitioners-plaintiffs (petitioners), Level 3 Communications, LLC and Broadwing Communications, LLC, its corporate subsidiary, filed applications for correction of the tax rolls for the 2010, 2011 and 2012 tax years. The applications sought correction of alleged multiple-parcel errors on the ground that no real property tax was due on the subject properties. In addenda submitted with those applications, petitioners contended that their fiber optic cables did not conduct electricity, and thus those cables were unlawfully entered on the tax rolls because they were not taxable real property within the meaning of RPTL 102 (12) (i). Respondents-defendants City of Buffalo and City of Lackawanna School District (Lackawanna School District) did not respond, and the remaining respondents-defendants (respondents) denied the applications on the ground that "[v]aluation error[s are] not correctable under [the] RPTL." Petitioners then commenced this proceeding seeking, inter alia, relief in the nature of mandamus directing the City of Buffalo and the Lackawanna School District to determine the applications, and directing all respondents to remove the subject properties from the tax rolls and to refund the taxes. They now appeal from a judgment that dismissed the petition-complaint (hereafter, petition). Supreme Court did not expressly address respondents' determinations that valuation errors may not be corrected by the applications at issue. Nevertheless, we conclude on the record before us that, by relying on several other grounds in dismissing the petition, the court implicitly concluded that the grounds upon which respondents relied were incorrect.

We agree with petitioners that the court erred in dismissing the petition on grounds different from those on which respondents relied in denying the applications. It is well settled that "[a] reviewing court, in dealing with a determination . . . which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [internal quotation marks omitted]; *see Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368). Thus, the court was without power to uphold the administrative determinations on a different basis, no matter how sound that basis may be.

Contrary to petitioners' further contention, however, we may not grant the ultimate affirmative relief requested in the petition, i.e., removal of the subject properties from the tax rolls and a refund of the taxes paid. The Court of Appeals has noted that courts " 'regularly defer to the governmental agency charged with the

responsibility for administration of [a] statute' in those cases where interpretation or application 'involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom,' and the agency's interpretation 'is not irrational or unreasonable' " (*Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Envtl. Conservation*, 14 NY3d 161, 176, quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459). We conclude that "this case involves a question concerning the specific application of a broad statutory term, . . . and therefore is one in which the agency which administers the statute must determine it initially" (*Xerox Corp. v Department of Taxation & Fin. of State of N.Y.*, 140 AD2d 945, 946, *lv denied* 72 NY2d 809 [internal quotation marks omitted]), because in such a situation, " 'the reviewing court's function is limited' " (*Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400, *rearg denied* 62 NY2d 943; *see Matter of Easylink Servs. Intl., Inc. v New York State Tax Appeals Trib.*, 101 AD3d 1180, 1181-1182, *lv denied* 21 NY3d 858).

Here, respondents denied petitioners' applications solely on the ground stated above, and thus they did not address the issues upon which the court based its determination. Although we agree with the court insofar as it implicitly concluded that the ground cited by respondents was incorrect, and that respondents therefore erred in denying the applications on that ground, the deference due to respondents' administrative functions requires that they be permitted to make the initial determination of the remaining issues raised in the applications (*see generally Matter of Nye v Zoning Bd. of Appeals of the Town of Grand Is.*, 81 AD3d 1455, 1456). We therefore reverse the judgment and grant the petition insofar as it sought to annul respondents' determinations, and we remit the matter to respondents for reconsideration of petitioners' applications, including determining whether the applications are timely and procedurally proper, whether the taxes that petitioners paid may be recovered despite the lack of protest by them (*see Matter of Level 3 Communications, LLC v Essex County*, 129 AD3d 1255, 1256-1257), and whether the fiber optic cables at issue constitute taxable real property within the meaning of the RPTL.

Finally, we further grant the petition insofar as it sought to compel the City of Buffalo and the Lackawanna School District to determine petitioners' applications (*see generally Clostermann v Cuomo*, 61 NY2d 525, 540; *Matter of Matty's W. 49th St. Rest. v New York State Liq. Auth.*, 38 AD2d 815, 815), and we remit the matter to those two respondents to make those determinations.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

966

KA 15-00300

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM JONES, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered February 9, 2015. The judgment convicted defendant, upon his plea of guilty, of aggravated vehicular assault.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at suppression court, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 460.50 (5).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

969

KA 15-00309

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLAYTON L. BROWN, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Frederick G. Reed, A.J.), rendered May 14, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree, criminal possession of a weapon in the third degree and aggravated unlicensed operation of a motor vehicle in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count three of the indictment and imposing a definite sentence of 180 days of imprisonment on that count, to run concurrently with the sentences imposed on counts one and two, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]), criminal possession of a weapon in the third degree (§ 265.02 [1]) and aggravated unlicensed operation of a motor vehicle in the second degree (Vehicle and Traffic Law § 511 [2] [a] [ii]). As the People correctly concede, the sentence imposed on count three of the indictment, i.e., a one-year definite term of imprisonment for aggravated unlicensed operation of a motor vehicle in the second degree, is illegal (*see* § 511 [2] [b]). We therefore modify the judgment by vacating the sentence imposed on that count and imposing a definite sentence of 180 days of imprisonment, to run concurrently with the sentences on the remaining counts. We reject defendant's further contention that the sentences imposed on the remaining counts are unduly harsh and severe.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

971

KA 12-00287

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. GHENT, III, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered December 7, 2011. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [2]). 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). "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 Van Akin*, 197 AD2d 845, 845). County Court was entitled to reject defendant's version of the events "and, upon our review of the record, we cannot say that the court failed to give the evidence the weight that it should be accorded" (*People v Britt*, 298 AD2d 984, 984, *lv denied* 99 NY2d 556). We reject defendant's further contention that he received ineffective assistance of counsel because counsel failed to request a charge on the defense of intoxication. Defendant failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's failure to request" that charge (*People v Rivera*, 71 NY2d 705, 709; *see People v Taylor*, 1 NY3d 174, 177). Indeed, "[a] defense of intoxication would have been inconsistent with . . . defendant's [testimony] . . . that he" drank three or four beers that evening, which affected his judgment to a certain extent, but that he was not intoxicated (*People v Gary*, 299 AD2d 960, 961, *lv denied* 99 NY2d 582). Finally, the sentence is not unduly harsh or

severe.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

978

CAF 14-00648

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

IN THE MATTER OF AMIRA S.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MEGAN R., RESPONDENT-APPELLANT,
AND RAED S., RESPONDENT.

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

LORI H. TAROLLI, ACTING COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

KARIN H. MARRIS, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered March 10, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent Megan R.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

981

CAF 13-01637

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

IN THE MATTER OF MICHAEL J. MEAD, SR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LISA M. HORN, RESPONDENT-RESPONDENT.

KELIANN M. ARGY, ORCHARD PARK, FOR PETITIONER-APPELLANT.

SANFORD A. CHURCH, ATTORNEY FOR THE CHILDREN, ALBION.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered August 15, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner father filed a petition alleging that respondent mother violated an order of custody and visitation, and he also filed two petitions seeking modification of that order. On appeal, the father contends that Family Court improperly dismissed his modification petitions. Inasmuch as the order on appeal dismissed only the violation petition, the father's contention concerning the modification petitions is not properly before us (*see Matter of Price v Jenkins*, 99 AD3d 915, 915; *Matter of Nicole Lee B.*, 256 AD2d 1103, 1105). We reject the father's further contention that he was denied effective assistance of counsel based solely upon counsel's request to withdraw from representing him, which was denied (*see Matter of Gee v Brothers*, 267 AD2d 786, 788, *lv denied* 94 NY2d 764).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

989

CA 15-00138

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

SHAZAM INDARJALI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHABANA INDARJALI, DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (ALEX M. NEUROHR OF COUNSEL), FOR DEFENDANT-APPELLANT.

ALEXANDER & CATALANO, LLC, EAST SYRACUSE (PETER CATALANO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 29, 2014. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell on the steps of residential property owned by defendant. Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. We conclude that defendant failed to establish as a matter of law that there was a storm in progress at the time of plaintiff's accident (*see Korthals v LCB Capital, LLC*, 115 AD3d 1326, 1326-1327; *Verleni v City of Jamestown*, 66 AD3d 1359, 1360). Plaintiff's equivocal deposition testimony, which defendant submitted in support of her motion, was insufficient to establish that the snow on the steps "was the result of an ongoing storm as opposed to an accumulation of [snow] from . . . prior snowfalls" (*McBryant v Pisa Holding Corp.*, 110 AD3d 1034, 1036).

In addition, the court properly determined that, even assuming, arguendo, defendant was entitled to judgment based upon the storm in progress doctrine, there is an issue of fact whether the rotten and deteriorated condition of the boards on the staircase caused or contributed to plaintiff's injuries. Indeed, we note that defendant did not address that theory of liability in her motion (*see Valenti v Camins*, 95 AD3d 519, 522). In any event, we reject defendant's contention that plaintiff's opposing submissions in support of that theory of liability were "merely an attempt to raise a feigned issue of fact" to defeat the motion (*Schwartz v Vukson*, 67 AD3d 1398, 1400).

Plaintiff was not questioned at his deposition with respect to the allegedly unsafe condition of the stairs and, thus, his submissions did not contradict his deposition testimony on that issue.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

991

KA 13-00300

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CASEY M. HEATHERLY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 4, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, perjury in the first degree, criminally using drug paraphernalia in the second degree (two counts) and unlawful possession of marihuana.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is modified on the law by reversing that part convicting defendant of perjury in the first degree and dismissing the fourth count of the indictment without prejudice to the People to re-present any appropriate charges under that count to another grand jury and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting her following a jury trial of, inter alia, perjury in the first degree (Penal Law § 210.15) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that County Court erred in refusing to dismiss the perjury count of the indictment for lack of specificity. Contrary to the contention of the People, we conclude that defendant's contention is preserved for our review, and we agree with defendant that the perjury count of the indictment should have been dismissed because it was defectively vague, i.e., it failed to "set forth the particular falsehood with clarity along with the government's factual basis for asserting that it [was] false" (*United States v Serafini*, 7 F Supp 2d 529, 538, *affd* 167 F3d 812; *cf. People v Ribowsky*, 156 AD2d 726, 727, *affd* 77 NY2d 284). "An indictment for perjury must contain all of the essential elements of the offense . . . and must set forth the alleged false testimony so as to apprise the defendant of the particular offense with which he [or she] is charged" (35B NY Jur 2d, Criminal Law: Principles and Offenses § 1494; *see*

Serafini, 7 F Supp 2d at 538; *United States v Slawik*, 548 F2d 75, 83-84). Here, "[n]othing in the record before us gives any indication what the [grand] jury thought was false" (*Slawik*, 548 F2d at 83; *cf. People v Santmyer*, 255 AD2d 871, 872, *lv denied* 93 NY2d 902). Because the indictment failed to identify the particular falsehoods alleged to have been made by defendant, the indictment failed to provide her with the requisite "fair notice of the accusations made against [her], so that [she would] be able to prepare a defense" (*People v Iannone*, 45 NY2d 589, 594).

Moreover, despite numerous pretrial requests for particularization by defense counsel, the People never identified the particular falsehoods allegedly made by defendant (*cf. Ribowsky*, 156 AD2d at 727). Rather, the prosecutor identified particular subject "areas that [he] believe[d] [were] perjurious." " 'To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jur[ors] at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him [or her]' . . . The lack of specific allegations in the District Attorney's charge to the [g]rand [j]ury on the perjury count renders it impossible to determine which specific statement or statements of [defendant] the [g]rand [j]ury found to be false. It is impossible to determine what the [g]rand [j]ury intended when it voted on the perjury charge . . . Since the [g]rand [j]ury presentation and legal instructions do not answer these questions, the perjury count [should have been] dismissed" (*People v Harkins*, 152 Misc 2d 984, 988-989, quoting *Russell v United States*, 369 US 749, 770).

Defendant failed to preserve for our review her further contention that the evidence is not legally sufficient to support the conviction of the remaining counts of the indictment inasmuch as she failed to renew her motion to dismiss at the close of her proof (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we conclude that the conviction of the remaining counts is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, we dismiss the appeal to the extent that defendant challenges the severity of the sentence. Defendant has completed serving her sentence, including any period of postrelease supervision, and, therefore, that part of the appeal is moot (*see People v Boley*, 126 AD3d 1389, 1390, *lv denied* 25 NY3d 1159; *People v Middleton*, 110 AD3d 502, 503, *lv denied* 22 NY3d 1089).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

992

KA 15-00485

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH J. BARTHOLOMEW, DEFENDANT-RESPONDENT.

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

DANIEL J. MASTRELLA, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), dated July 7, 2014. The order granted the motion of defendant to suppress certain physical evidence.

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

Memorandum: In a prosecution arising from allegations that defendant possessed certain stolen property, the People appeal pursuant to CPL 450.20 (8) from an order granting defendant's motion to suppress evidence seized pursuant to a search warrant and an amended search warrant issued by County Court (Piampiano, J.). Contrary to the People's contention, County Court (Dinolfo, J.) properly suppressed the evidence.

The People contend that the court erred in concluding that the search warrant applications omitted material facts, and in further concluding that the issuing judge lacked probable cause to issue the initial warrant. We reject those contentions. Regardless of whether the sheriff's investigator who applied for the warrant omitted material facts, the court properly concluded that the issuing judge lacked probable cause to issue the first warrant. It is well settled that a search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur (*see generally People v Mercado*, 68 NY2d 874, 877, *cert denied* 479 US 1095), and there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched (*see People v Bigelow*, 66 NY2d 417, 423). It is equally well settled that, under New York law, "[p]robable cause may be supplied, in whole or part, through hearsay information . . . New York's present law applies the *Aguilar-Spinelli* rule for evaluating secondhand information and holds that if probable cause is based on hearsay statements, the police must establish that

the informant had some basis for the knowledge he [or she] transmitted to them and that he [or she] was reliable" (*id.*; *see People v Griminger*, 71 NY2d 635, 639). "Notably, where the information is based upon double hearsay, the foregoing requirements must be met with respect to each individual providing information" (*People v Mabeus*, 63 AD3d 1447, 1450; *see People v Ketcham*, 93 NY2d 416, 421; *People v Parris*, 83 NY2d 342, 347-348). Here, although an identified citizen is presumed to be reliable and thus the information submitted in support of the warrant application met that prong of the *Aguilar-Spinelli* test (*see Parris*, 83 NY2d at 349-350; *People v Holmes*, 115 AD3d 1179, 1180-1181, *lv denied* 23 NY3d 1038), the application failed to establish the basis of knowledge of the ultimate source of the information in the warrant application. The additional "Statement of Facts" submitted in support of the warrant is unsigned, and there is no information indicating who prepared it. Indeed it is impossible to tell from reading it who provided the information contained in it, and thus it does not "permit a reasonable inference that it was based upon [the purported affiant]'s personal knowledge" (*People v Jackson*, 235 AD2d 923, 924). Inasmuch as the warrant was not issued on the requisite showing of probable cause, the court properly suppressed all evidence seized pursuant to it, including the observations of the deputies who executed the warrant, regardless of their good faith in observing that information while executing the initial invalid warrant (*see generally Griminger*, 71 NY2d at 641; *Bigelow*, 66 NY2d at 426-427).

The People further contend that the amended warrant was properly issued because the deputy sheriffs who conducted the search properly observed certain stolen property in plain view during the execution of the initial warrant, and used that information to obtain the amended warrant. We likewise reject that contention. Because the initial warrant was not based on probable cause, and evidence obtained from it was used to obtain the amended warrant, the evidence seized pursuant to the amended warrant must also be suppressed (*see People v DelRio*, 220 AD2d 122, 131, *lv denied* 88 NY2d 983; *see also People v Perez*, 266 AD2d 242, 243, *lv dismissed* 94 NY2d 923).

Consequently, "the indictment must be dismissed [because] the unsuccessful appeal by the People precludes all further prosecution of defendant for the charges contained in the accusatory instrument" (*People v Felton*, 171 AD2d 1034, 1034, *affd* 78 NY2d 1063; *see* CPL 450.50 [2]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

997

KA 12-02050

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HARRY E. HARRIS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (CANDICE SENGILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 3, 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: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]), defendant contends that County Court erred in refusing to suppress certain physical evidence because he was subjected to an unlawful seizure and his consent to the search of his house was coerced. We reject those contentions.

Contrary to defendant's initial contention, the court properly determined that the police officers who removed defendant from his yard did not violate defendant's constitutional rights. The testimony at the suppression hearing established that police officers had responded to the area for reports of gunshots, and a woman informed the police that she had been struck by shotgun fire that came from the area of defendant's house. A police officer testified that, upon observing defendant in that area, he immediately directed defendant to move to a safe location and patted him down for weapons. It is well settled "that police officers serve many different functions within society and that the rules governing encounters with civilians will to a large extent depend upon the police officer's purpose in initiating the encounter" (*People v Hollman*, 79 NY2d 181, 189). "Police are required to serve the community in innumerable ways, from pursuing criminals to rescuing treed cats. While the Fourth Amendment's warrant requirement is the cornerstone of our protections against unreasonable searches and seizures, it is not a barrier to a police

officer seeking to help someone in immediate danger . . . Indeed, '[p]eople could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process' . . . Accordingly, 'what would be otherwise illegal absent an . . . emergency' becomes justified by the 'need to protect or preserve life or avoid serious injury' " (*People v Molnar*, 98 NY2d 328, 331-332; *see generally People v Doll*, 21 NY3d 665, 670-671, *rearg denied* 22 NY3d 1053, *cert denied* ___ US ___, 134 S Ct 1552). Here, we conclude that the evidence establishes that the officer acted to ensure defendant's safety and the safety of those in the area in detaining him briefly and removing him from the area in which the shots were fired (*see generally People v Edwards*, 52 AD3d 1266, 1267, *lv denied* 11 NY3d 736).

We also reject defendant's contention that he was seized in violation of his constitutional rights. The record supports the court's conclusion that defendant was not handcuffed and placed in a police vehicle until after the officers learned that there were shotguns in the basement of his house, one of defendant's daughters informed the officers that defendant had pointed a shotgun at her head earlier in the evening, and the officers were aware that the victim had been hit by a shotgun blast from that area. At that time, they had reasonable suspicion to detain defendant (*see generally People v De Bour*, 40 NY2d 210, 223).

Finally, we reject defendant's further contention that his consent to the search of his house was coerced because, inter alia, he was handcuffed when he agreed to permit that search. It is well settled that "[v]oluntariness is incompatible with official coercion, actual or implicit, overt or subtle," and that " '[w]here there is coercion there cannot be consent' " (*People v Gonzalez*, 39 NY2d 122, 128, quoting *Bumper v North Carolina*, 391 US 543, 550). Additionally, "the fact that a defendant was handcuffed has been considered a significant factor in determining whether his apparent consent was but a capitulation to authority" (*id.* at 129). Here, however, the court concluded that defendant was not handcuffed when he consented to the search, and it is well established that "the suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record" (*People v Esquerdo*, 71 AD3d 1424, 1424, *lv denied* 14 NY3d 887 [internal quotation marks omitted]; *see People v May*, 100 AD3d 1411, 1412, *lv denied* 20 NY3d 1063). There is support in the record for the court's conclusion, and we decline to disturb it.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

999

CAF 14-00859

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF JEREMIAH C. SCHOLL,
PETITIONER-APPELLANT,

V ORDER

BRANDI L. MITRI, RESPONDENT-RESPONDENT.

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT.

THE VALLONE LAW FIRM, PLLC, CHEEKTOWAGA (ERIC T. VALLONE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

KEITH I. KADISH, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered May 2, 2014 in a proceeding pursuant to Family Court Act article 6. The order directed that petitioner shall have supervised visitation with the subject child.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1001

CAF 14-00267

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF CHEREE N. CREEK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JACOB M. DIETZ, RESPONDENT-APPELLANT.

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

KATHLEEN M. MCDONALD, DEPEW, FOR PETITIONER-RESPONDENT.

JAMES A. KREUZER, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, R.), entered December 30, 2013 in a proceeding pursuant to Family Court Act article 6. The order directed that respondent's visitation with the subject child be supervised.

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

Memorandum: Respondent father appeals from an order modifying the existing custody and visitation order by, inter alia, directing that he have supervised visitation with the parties' child. Based on the record before us, we conclude that the Referee properly determined that petitioner mother "established a sufficient change in circumstances that reflects a genuine need for the modification so as to ensure the best interests of the child" (*Matter of Rice v Cole*, 125 AD3d 1466, 1467 [internal quotation marks omitted]; *see Matter of Vieira v Huff*, 83 AD3d 1520, 1521). The mother established that the father, who had a long history of substance abuse problems, was again using various illegal drugs, including cocaine, heroin and marihuana (*see Matter of Laware v Baldwin*, 42 AD3d 696, 696; *Matter of Brady v Schermerhorn*, 25 AD3d 1037, 1038). Indeed, the father admitted that he had used illegal drugs only a few weeks before the hearing on the mother's petition (*see Matter of LaFountain v Gabay*, 69 AD3d 994, 995). The mother also established that the father had demonstrated behavioral changes consistent with his behavior during prior periods of time in which he had been using illegal substances, such as missing visitation with the child for extended periods of time.

It is well settled that a determination "regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled

to great weight and will not be set aside unless it lacks an evidentiary basis in the record, i.e., is not supported by a sound and substantial basis in the record" (*Matter of Rulinsky v West*, 107 AD3d 1507, 1509 [internal quotation marks omitted]; *see Matter of Van Court v Wadsworth*, 122 AD3d 1339, 1340, *lv denied* 24 NY3d 916). Here, the Referee made specific findings concerning the potential harm the child faced if the father were to have unsupervised visitation (*cf. Laware*, 42 AD3d at 697), and we conclude that the Referee's "determination to impose supervised visitation is supported by the requisite sound and substantial basis in the record" (*Rice*, 125 AD3d at 1467 [internal quotation marks omitted]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1003

CAF 14-01301

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF JOHN A. SABATINO,
PETITIONER-APPELLANT,

V ORDER

CHRISTINE M. AUSMAN, RESPONDENT-RESPONDENT,
AND KAYLA FARMER, RESPONDENT.

JEREMY D. ALEXANDER, UTICA, FOR PETITIONER-APPELLANT.

MARIAN J. CERIO, CANASTOTA, FOR RESPONDENT-RESPONDENT.

PAUL A. NORTON, ATTORNEY FOR THE CHILD, CLINTON.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered June 10, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by appellant on June 2, 2015, by the attorneys for the parties on June 2 and 16, 2015, and by the Attorney for the Child on June 9, 2015,

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1006

CA 14-02208

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

TREVA CHILDS, PLAINTIFF-APPELLANT,

V ORDER

SHARON STERN-GERSTMAN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

LAW OFFICES OF WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ALAN J. DEPETERS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 29, 2014. The order, among other things, denied the motion of plaintiff for partial summary judgment against defendant Sharon Stern-Gerstman.

Now, upon reading and filing the stipulation of withdrawal signed by the attorneys for the parties on September 2, 2015,

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1010

CA 15-00295

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

TRAVELERS CASUALTY AND SURETY COMPANY, FORMERLY KNOWN AS THE AETNA CASUALTY AND SURETY COMPANY, AND THE TRAVELERS INDEMNITY COMPANY, AS SUCCESSOR IN INTEREST TO GULF INSURANCE COMPANY, PLAINTIFFS-RESPONDENTS,

V ORDER

CORNING INCORPORATED, FORMERLY KNOWN AS CORNING GLASS WORKS, CORNING OAK HOLDING INC., FORMERLY KNOWN AS OAK INDUSTRIES INC., OAKGRIGSBY, INC., DEFENDANTS-APPELLANTS,
AND H.W. HOLDING CO., FORMERLY KNOWN AS HARPER-WYMAN COMPANY, COUNTERCLAIMANT.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (KEVIN T. MERRIMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DENTONS US LLP, CHICAGO, ILLINOIS (DONNA J. VOBORNIK, OF THE ILLINOIS AND WISCONSIN BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Matthew A. Rosenbaum, J.), entered September 22, 2014. The judgment, among other things, granted the motion of plaintiffs for partial summary judgment and denied the motion of defendants for partial summary judgment.

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: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1013

KA 14-00257

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN C. WEAVER, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON 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 (Vincent M. Dinolfo, J.), rendered January 30, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree (five counts).

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 two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and five counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [3], [7]), defendant contends that his statements to the police should have been suppressed as the product of an illegal arrest. Defendant requested a probable cause hearing in his omnibus motion, which County Court denied "at this point." The court advised defense counsel that, if the facts adduced at the *Huntley* hearing raised an issue regarding probable cause, the court would consider the issue at that time. Defendant, however, never renewed his request for a probable cause hearing or raised any contention with respect to probable cause at the *Huntley* hearing. Under the circumstances, we conclude that defendant has abandoned his contention (*see People v Britton*, 113 AD3d 1101, 1102, *lv denied* 22 NY3d 1154; *see also People v Linder*, 114 AD3d 1200, 1200-1201, *lv denied* 23 NY3d 1022; *People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1015

KA 14-01814

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM K. BALL, DEFENDANT-RESPONDENT.

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

MARK D. GROSSMAN, NIAGARA FALLS (LEONARD G. TILNEY, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered July 17, 2014. The order granted the motion of defendant to suppress his statements to the police and certain physical evidence.

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

Memorandum: The People appeal from an order granting defendant's motion to suppress his statements to the police and certain physical evidence recovered after his vehicle was pulled over on the suspicion that he was driving while intoxicated. We affirm. On the record before us, we cannot conclude that Supreme Court's determination that the police lacked reasonable suspicion to stop defendant's vehicle was "clearly erroneous" (*People v Kelley*, 91 AD3d 1318, 1318, *lv denied* 19 NY3d 963 [internal quotation marks omitted]; *see generally People v Jones*, 9 AD3d 837, 838-839, *lv denied* 3 NY3d 708, *reconsideration denied* 4 NY3d 745). Moreover, because the granting of defendant's motion resulted in the suppression of all evidence of the crimes with which defendant was charged, the indictment must be dismissed (*see People v East*, 52 AD3d 1248, 1248, *lv denied* 11 NY3d 736).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1016

KA 10-01037

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLO J. BLOCKER, ALSO KNOWN AS MARLOW,
DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered January 13, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (four counts), criminal possession of a weapon in the third degree (two counts) and a traffic infraction.

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 four counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), two counts of criminal possession of a weapon in the third degree (§ 265.02 [1]), and a traffic infraction. We reject defendant's contention that he was denied effective assistance of counsel. Defendant failed to demonstrate that the alleged deficiencies in the pretrial suppression motion compromised his defense or his right to a fair trial, inasmuch as County Court addressed his challenge to the legality of the search of his vehicle (*see People v Hobot*, 84 NY2d 1021, 1024; *People v Clark*, 6 AD3d 1066, 1067, *lv denied* 3 NY3d 638). Defendant's contention that counsel was ineffective in failing to move to sever his trial from that of his codefendant is based on matters outside the record on appeal and therefore must be raised in a motion pursuant to CPL 440.10 (*see People v Fuentes*, 52 AD3d 1297, 1300, *lv denied* 11 NY3d 736). Similarly, a motion pursuant to CPL 440.10 is the proper procedural vehicle for defendant to raise his contention that counsel failed to conduct an adequate investigation (*see People v Conway*, 118 AD3d 1290, 1291, *lv denied* 9 NY3d 990). Further, although counsel failed to object to comments by the prosecutor that the People concede supported an improper "safe streets" argument, "it cannot be said that, viewing counsel's representation in totality, such error deprived defendant of meaningful representation" (*People v Brown*, 70

AD3d 1302, 1304, *affd* 17 NY3d 742; *see People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention that the warrantless search of his vehicle constituted an improper inventory search (*see* CPL 470.05 [2]; *People v Redden*, 27 AD3d 1173, 1174, *lv denied* 7 NY3d 793), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that the court erred in charging the jury on accessorial liability (*see People v Rosario*, 277 AD2d 943, 944, *affd* 96 NY2d 857).

Finally, viewing the evidence in light of the elements of the crimes of criminal possession of a weapon in the second and third degrees 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). The jury was entitled to reject the evidence that the weapons recovered from the vehicle were possessed solely by one of the codefendants, and to find, based upon the automobile presumption (*see* Penal Law § 220.25 [1]), that defendant knowingly possessed those weapons (*see People v Washington*, 50 AD3d 1539, 1539, *lv denied* 11 NY3d 742). The jury was also entitled to find, based upon the testimony of the firearms examiner, that the sawed-off shotgun recovered from the vehicle constituted a "firearm" under Penal Law § 265.00 (3) (d) (*see People v Tillery*, 60 AD3d 1203, 1205-1206, *lv denied* 12 NY3d 860).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1017

KA 13-02135

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL MUSCARELLA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered October 15, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree and predatory sexual assault (two counts) and, upon a plea of guilty, of aggravated harassment in the second degree (six counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the first degree (Penal Law § 140.30 [3]) and two counts of predatory sexual assault (§ 130.95 [1] [b]) and, upon a guilty plea, of six counts of aggravated harassment in the second degree (§ 240.30 former [2]). 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 Gray*, 86 NY2d 10, 19). Furthermore, viewing the evidence in light of the elements of the crimes of burglary in the first degree and predatory sexual assault as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is contrary to the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that County Court erred in failing to specify the dangerous instrument when it charged the jury with respect to the predatory sexual assault charge in count two of the indictment (*see People v Corney*, 303 AD2d 1006, 1007, *lv denied* 1 NY3d 570; *People v Molling*, 238 AD2d 915, 915). In any event, we note that the instruction given by the court was consistent with the pattern Criminal Jury Instructions for predatory sexual assault, which does not require the court to specify the dangerous instrument (*see* CJI2d[NY] Penal Law § 130.95 [1] [b]).

Contrary to defendant's contention, Penal Law § 240.30 (former [2]) is constitutional inasmuch as "its proscription is limited to conduct" (*People v Shack*, 86 NY2d 529, 535). The concerns of the Court of Appeals with respect to any proscription of speech in section 240.30 (1) (a) are therefore not relevant to this case (*see generally People v Golb*, 23 NY3d 455, 467).

Defendant further contends that he did not receive a fair trial because the court improperly denied his request for a missing witness charge and improperly struck a portion of a police officer's testimony on hearsay grounds. That contention is without merit. " '[D]efendant's request for . . . a [missing witness] charge, made after the close of proof, was untimely' " and, 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" (*People v Arroyo*, 111 AD3d 1299, 1300, *lv denied* 23 NY3d 960). With respect to the police officer's testimony, even assuming, arguendo, that the court improperly entertained the People's late hearsay objection, we conclude that any error is harmless inasmuch as the court never instructed the jury that the testimony was stricken. The evidence of guilt is overwhelming, and there is "no significant probability that defendant would have been acquitted but for the error" (*People v Brooks*, 26 AD3d 867, 867, *lv denied* 6 NY3d 892).

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1018

KA 13-02153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY P. KNAPP, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), entered June 25, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), defendant contends that County Court erred in failing to consider his ability to pay the restitution award. That contention is not preserved for our review (*see People v Pugliese*, 113 AD3d 1112, 1112, *lv denied* 23 NY3d 1066; *People v Shortell*, 30 AD3d 837, 838), and it is without merit in any event. " 'Consideration of defendant's ability to pay was not required because restitution was ordered as part of a nonprobationary sentence that included a period of incarceration as a significant component' " (*People v Willis*, 105 AD3d 1397, 1397, *lv denied* 22 NY3d 960; *see People v Holmes*, 300 AD2d 1072, 1073). Contrary to defendant's further contention, the People established the amount of restitution by a preponderance of the evidence (*see generally* § 60.27 [2]; CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221; *Pugliese*, 113 AD3d at 1112-1113). The victim's sworn testimony regarding the value of the stolen jewelry and weapons was sufficient to establish his out-of-pocket losses (*see People v Howell*, 46 AD3d 1464, 1465, *lv denied* 10 NY3d 841; *Shortell*, 30 AD3d at 837-838).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1020

KA 12-02052

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAROY WILLIAMS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 29, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256; *People v Weinstock*, 129 AD3d 1663, 1663; *People v Smith*, 122 AD3d 1300, 1301, *lv denied* 25 NY3d 1172). The "plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Arney*, 120 AD3d 949, 949 [internal quotation marks omitted]; *see People v Buske*, 87 AD3d 1354, 1354, *lv denied* 18 NY3d 882). We reject defendant's further contention that the written waiver of appeal is unenforceable because it contained certain nonwaivable rights. "Any nonwaivable [rights] purportedly encompassed by the waiver 'are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable' " (*People v Neal*, 56 AD3d 1211, 1211, *lv denied* 12 NY3d 761; *see People v Henion*, 110 AD3d 1349, 1350, *lv denied* 22 NY3d 1088; *People v Gruber*, 108 AD3d 877, 878, *lv denied* 22 NY3d 956; *People v Umber*, 2 AD3d 1051, 1052, *lv denied* 2 NY3d 747). Defendant's valid waiver of the right to appeal encompasses his challenge to Supreme Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *People v Braxton*, 129 AD3d 1674, 1675; *People v Putnam*,

50 AD3d 1514, 1514, *lv denied* 10 NY3d 963).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1021

CAF 14-00573

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

IN THE MATTER OF ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF MARIA C. TORRES, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VERNON MORRIS, JR., RESPONDENT-APPELLANT. (APPEAL NO. 1.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHARLES J. GALLAGHER, JR., BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered March 7, 2014 in a proceeding pursuant to Family Court Act article 4. The order found that respondent had willfully failed to obey an order of the court and sentenced respondent to six months of incarceration.

It is hereby ORDERED that said appeal from the order insofar as it found that respondent willfully disobeyed a support order is unanimously dismissed and the order is affirmed without costs.

Memorandum: "Because [n]o appeal lies from an order entered by consent upon the stipulation of the appealing party . . . , to the extent that respondent [father] challenges Family Court's order[s] confirming the willful violation[s], [appeal Nos. 1 and 2] must be dismissed" (*Matter of St. Lawrence County Support Collection Unit v Chad T.*, 124 AD3d 1032, 1033 [internal quotation marks omitted]). The father's contention in both appeals that the court erred in failing to cap his support arrears at $500 is raised for the first time on appeal and is thus not preserved for our review (*see Matter of Commissioner of Social Servs. v Turner*, 99 AD3d 1244, 1245). In any event, the father failed to establish that his income was below the federal poverty income guidelines when the arrears accrued, and we therefore decline to exercise our power to review his contention that his arrears should be capped (*see id.*).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1027

CAF 14-00691

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

IN THE MATTER OF ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF ARQUETTE FINLEY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VERNON MORRIS, JR., RESPONDENT-APPELLANT. (APPEAL NO. 2.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHARLES J. GALLAGHER, JR., BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered March 7, 2014 in a proceeding pursuant to Family Court Act article 4. The order found that respondent had willfully failed to obey an order of the court and sentenced respondent to six months of incarceration.

It is hereby ORDERED that said appeal from the order insofar as it found that respondent willfully disobeyed a support order is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Matter of Erie County Dept. of Social Servs. v Morris* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1029

CA 15-00141

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

EILEEN MELGAR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LUIS MELGAR, DEFENDANT-RESPONDENT.

HOGAN WILLIG, PLLC, AMHERST (MICHAEL J. COLLETTA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MATTINGLY CAVAGNARO LLP, BUFFALO (MELISSA A. CAVAGNARO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered June 2, 2014. The order granted that part of the motion of defendant seeking to terminate child support for his daughter on the ground of emancipation and otherwise denied the motion, and denied the cross motion of plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for a hearing in accordance with the following memorandum: Defendant moved in this postjudgment matrimonial proceeding, inter alia, to terminate child support for his daughter on the ground of emancipation. We conclude that Supreme Court erred in granting that part of the motion without conducting a hearing. We therefore modify the order accordingly, and we remit the matter to Supreme Court for a hearing on that part of the motion (*see generally Ortman v Ortman*, 265 AD2d 926, 926-927). Initially, we reject plaintiff's contention that the court was without authority to deem the child emancipated because the child was enrolled in college full time for the spring 2014 semester. The parties' Separation and Property Settlement Agreement, which was incorporated in the judgment of divorce, provided that child support would terminate if the child was financially independent and economically self-sufficient, but not if the child was a full-time college student. At the time of defendant's motion, however, the child was not a full-time college student, and it was therefore proper for the court to consider whether the child was emancipated.

"It is fundamental public policy in New York that parents are responsible for their children's support until age 21" (*Matter of Burr v Fellner*, 73 AD3d 1041, 1041; *see* Family Ct Act § 413 [1] [a]). A child may become emancipated before that age where " 'the child

becomes economically independent through employment and is self-supporting' " (*Matter of Cedeno v Knowlton*, 98 AD3d 1257, 1257; *see Matter of Smith v Smith*, 85 AD3d 1188, 1188). "The fact that a child may work full time is not determinative, as a child cannot be deemed economically independent if he or she still relies upon a parent for significant economic support" (*Matter of Drumm v Drumm*, 88 AD3d 1110, 1113; *see Matter of Thomas B. v Lydia D.*, 69 AD3d 24, 29-30). The burden of proof as to emancipation is on the party asserting it (*see Matter of Barlow v Barlow*, 112 AD3d 817, 818).

Although defendant submitted evidence in support of his motion that the child was working full time, he did not submit proof that the child was economically independent. There was no proof regarding where she lived or who paid her bills (*cf. Cedeno*, 98 AD3d at 1257; *Smith*, 85 AD3d at 1188), and it was therefore error for the court to grant that part of the motion without a hearing. Indeed, "[t]he determination of economic independence necessarily involves a fact-specific inquiry" (*Thomas B.*, 69 AD3d at 29).

Defendant's allegations in support of his motion also raise an issue of fact concerning constructive emancipation. Although the court did not address that issue in its decision, defendant properly raises it on appeal as an alternative ground for affirmance (*see Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546). "[U]nder the doctrine of constructive emancipation, a child of employable age who actively abandons the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support" (*Barlow*, 112 AD3d at 818; *see Burr*, 73 AD3d at 1041). However, "where it is the parent who causes a breakdown in communication with the child, or has made no serious effort to contact the child and exercise his or her visitation rights, the child will not be deemed to have abandoned the parent" (*Barlow*, 112 AD3d at 818; *see Matter of Gansky v Gansky*, 103 AD3d 894, 895; *Thomas B.*, 69 AD3d at 28). Here, defendant asserted in support of his motion, and plaintiff did not dispute, that there is no relationship between defendant and the child, but the cause of the breakdown in communication has not been established. We therefore conclude that a hearing should be held on that issue as well.

Finally, we reject plaintiff's contention that the court abused its discretion in denying that part of her cross motion seeking counsel fees. A court must review the financial circumstances of the parties in determining whether to award counsel fees (*see Wilson v Wilson*, 128 AD3d 1326, 1327) but, here, plaintiff failed to include a statement of her net worth in support of her application therefor (*see* 22 NYCRR 202.16 [k] [2]; *Gass v Gass*, 91 AD3d 557, 558; *Kremler v Kremler*, 199 AD2d 901, 902-903). Plaintiff may renew her application for counsel fees and submit the required information after the hearing on the motion (*see Matter of Fischer-Holland v Walker*, 12 AD3d 671, 672).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1030

CA 14-01461

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

KATHLEEN A. BURGER AND DOUGLAS W. BURGER,
PLAINTIFFS-APPELLANTS,

V ORDER

KENMORE-TOWN OF TONAWANDA UNION FREE SCHOOL
DISTRICT, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

THE COSGROVE LAW FIRM, BUFFALO (J. MICHAEL LENNON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Thomas P. Franczyk, A.J.), entered November 6, 2013. The order denied the motion of plaintiffs to set aside the verdict and for a new trial.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1031

CA 14-01929

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

KATHLEEN A. BURGER AND DOUGLAS W. BURGER,
PLAINTIFFS-APPELLANTS,

V ORDER

KENMORE-TOWN OF TONAWANDA UNION FREE SCHOOL
DISTRICT, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

THE COSGROVE LAW FIRM, BUFFALO (J. MICHAEL LENNON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Thomas P. Franczyk, A.J.), entered May 2, 2014. 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 for reasons stated in the decision at Supreme Court.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1035

KA 12-00368

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON J. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered October 13, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree, criminal possession of marihuana in the fifth degree and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), defendant contends that County Court erred in refusing to suppress physical evidence and his inculpatory statement. We reject that contention.

As police officers approached an apartment to execute a search warrant, the validity of which is not at issue on this appeal, they observed defendant standing in the driveway, only 10 feet away from the “wide open” door of the unoccupied apartment. Officers physically detained defendant while they secured the apartment and, after observing large quantities of cocaine and marihuana in open view on a table in the living room of the apartment, the officers arrested him. Defendant was brought into the apartment while officers conducted a more thorough search of the premises and, shortly thereafter, defendant identified the cell phone on the table next to the drugs as belonging to him. When the officers conducted a search of defendant’s person incident to arrest, they recovered documents linking him to the apartment.

Contrary to defendant's contention, we conclude that defendant was lawfully detained incident to the execution of the search warrant inasmuch as he was in the "immediate vicinity of the premises to be searched" (*Bailey v United States*, ___ US ___, ___, 133 S Ct 1031, 1041). Although the Supreme Court has not defined "immediate vicinity," the Court has limited it "to the area in which [a person] poses a real threat to the safe and efficient execution of a search warrant" (*id.* at ___, 133 S Ct at 1042). Factors to consider include "the lawful limits of the premises, whether the [person] was within the line of sight of his [or her] dwelling, [and] the ease of reentry from the [person's] location" (*id.*). In our view, defendant was in the immediate vicinity of the premises to be searched and, therefore, was lawfully detained (*see People v Sanin*, 60 NY2d 575, 576-577; *People v Jackson*, 88 AD3d 451, 451-452, *lv denied* 18 NY3d 884; *cf. People v Reyes*, 210 AD2d 159, 160, *lv denied* 84 NY2d 1037, *cert denied* 515 US 1152).

Once the large quantity of drugs and money were located in plain view in the apartment, there was probable cause to arrest defendant inasmuch as it was reasonable to conclude that "only trusted members of the [drug] operation would be permitted to enter an apartment containing a large cache of drugs[and] money . . . in plain view" (*People v Bundy*, 90 NY2d 918, 920; *see People v Jackson*, 44 AD3d 364, 364, *lv denied* 9 NY3d 991).

As defendant correctly contends, "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person" (*Ybarra v Illinois*, 444 US 85, 91, *reh denied* 444 US 1049). Here, however, defendant was not merely near others suspected of criminal activity. Rather, defendant was the person suspected of criminal activity because he was the only person in or around an open apartment in which large quantities of drugs were located in plain view. We thus conclude that defendant's reliance on *Ybarra* is misplaced.

"Because the arrest was supported by probable cause, the police were authorized to search defendant incident to that lawful arrest and thus properly seized the inculpatory paper[s] from defendant's pocket during that search" (*People v Ralston*, 303 AD2d 1014, 1014-1015, *lv denied* 100 NY2d 565; *see generally People v Weintraub*, 35 NY2d 351, 354).

Defendant further contends that the court erred in refusing to suppress his statement identifying the cell phone, which was located on the table next to the drugs, as belonging to him. Relying on *Rhode Island v Innis* (446 US 291) and *People v Ferro* (63 NY2d 316, 321-323, *cert denied* 472 US 1007), he specifically contends that the police officers engaged in the functional equivalent of custodial interrogation without the benefit of *Miranda* warnings when they placed him in an area near the cell phone and questioned him concerning pedigree information. We reject that contention. The testimony from the suppression hearing established that the police officers did not in any way draw attention to the phone and "there is no indication that the police acted in a manner that 'should reasonably have been

anticipated to evoke a statement from the defendant' [concerning the phone] or that the statement[] [was] not self-generating" (*People v Hann*, 198 AD2d 904, 904, *lv denied* 83 NY2d 805, quoting *People v Rivers*, 56 NY2d 476, 480, *rearg denied* 57 NY2d 775; *see People v Castro*, 73 AD3d 800, 800-801, *lv denied* 15 NY3d 803; *People v Arriaga*, 309 AD2d 544, 545, *lv denied* 1 NY3d 624; *cf. Ferro*, 63 NY2d at 323). Finally, the questions of the officers relating only to pedigree information "were not 'subtly designed to elicit a statement' from defendant" (*People v Lipscomb*, 214 AD2d 970, 970, *lv denied* 86 NY2d 797, *cert denied* 516 US 1078).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1036

KA 12-02194

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYON M. IELFIELD, DEFENDANT-APPELLANT.

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

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Lewis County (Charles C. Merrell, J.), rendered March 30, 2012. The judgment convicted defendant, upon a jury verdict, of 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 sexual abuse in the first degree (Penal Law § 130.65 [3]), and endangering the welfare of a child (§ 260.10 [1]), arising from an incident involving hand-to-penis contact with his eight-year-old daughter. Defendant first contends that reversal is required based on several instances of prosecutorial misconduct, including shifting the burden of proof, introducing evidence of uncharged crimes, and vouching for the credibility of the witnesses. Defendant objected to the prosecutor's attempt to introduce evidence of uncharged crimes, and to the prosecutor's attempt to discuss that evidence during summation. " 'Any prejudice to defendant that might have arisen from the mention of uncharged criminal activity was alleviated when [Supreme Court] sustained defendant's objection and gave prompt curative instructions to the jury' " regarding both the question concerning such criminal activity and the purported reference to it during summation (*People v Reyes-Paredes*, 13 AD3d 1094, 1095, *lv denied* 4 NY3d 802; *see People v Yontz*, 116 AD3d 1242, 1244, *lv denied* 23 NY3d 1026; *People v Garcia*, 33 AD3d 1050, 1051, *lv denied* 9 NY3d 844). We note in any event that, "[f]ollowing the [court's] curative instructions, defense counsel neither objected further, nor [renewed his request for] a mistrial. Under these circumstances, the curative instructions must be deemed to have corrected the error[s] to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944).

Contrary to defendant's contention, the prosecutor did not make

comments on summation that shifted the burden of proof. In any event, even assuming, arguendo, that the prosecutor did so, we conclude that the comment at issue was "not so . . . egregious as to deny defendant a fair trial" (*People v Rogers*, 103 AD3d 1150, 1153-1154, *lv denied* 21 NY3d 946). We also note that "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; *see People v Page*, 105 AD3d 1380, 1382, *lv denied* 23 NY3d 1023).

Defendant failed to preserve for our review his contention that the prosecutor engaged in misconduct during summation by vouching for the credibility of the witnesses. In any event, we conclude with respect to the majority of defendant's contentions in this respect that " 'the prosecutor [did not] vouch for the credibility of the People's witnesses. Faced with defense counsel's focused attack on their credibility, the prosecutor was clearly entitled to respond by arguing that the witnesses had, in fact, been credible . . . An argument by counsel that his [or her] witnesses have testified truthfully is not vouching for their credibility' " (*People v Roman*, 85 AD3d 1630, 1632, *lv denied* 17 NY3d 821; *see People v McIver*, 107 AD3d 1591, 1592, *lv denied* 22 NY3d 997). With respect to the sole instance in which the prosecutor "expressed his personal belief on matters which may influence the jury" (*People v Paperno*, 54 NY2d 294, 300), we conclude that reversal is not required because those "comments did not 'demonstrate a persistent egregious course of conduct that was deliberate and reprehensible' . . . [and did not] deprive the defendant of a fair trial" (*People v Barnes*, 33 AD3d 811, 812, *lv denied* 8 NY3d 843).

Defendant failed to preserve for our review the remainder of his contentions concerning alleged prosecutorial misconduct during summations inasmuch as he failed to object to the alleged additional instances of misconduct (*see* CPL 470.05 [2]; *People v Stoutenger*, 121 AD3d 1496, 1498, *lv denied* 25 NY3d 1077). In any event, we conclude that the allegedly improper comments were " 'a fair response to defense counsel's summation, and/or a fair comment on the evidence' " (*People v Ross*, 118 AD3d 1413, 1417, *lv denied* 24 NY3d 964; *see People v Santiago*, 101 AD3d 1715, 1716, *lv denied* 21 NY3d 946), and that " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Jackson*, 108 AD3d 1079, 1080, *lv denied* 22 NY3d 997).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The victim's testimony was not "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). Any inconsistencies in the victim's testimony or variances between her testimony and that of the other witnesses merely presented issues of credibility for the jury to resolve (*see People v Witherspoon*, 66 AD3d

1456, 1457, *lv denied* 13 NY3d 942), and we see no basis for disturbing the jury's credibility determinations in this case.

We reject defendant's further contention that he was deprived of effective assistance of counsel by his attorney's failure to move to suppress a photograph depicting a sex act, which was found on a cell phone that was seized pursuant to a search warrant. "*People v Turner* (5 NY3d 476 [2005]) . . . stands for the proposition that a single failing in an otherwise competent performance may, in a rare case, be so egregious and prejudicial as to deprive a defendant of his constitutional right to effective legal representation . . . To rise to that level, the omission must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy" (*People v Keschner*, 25 NY3d 704, 723 [internal quotation marks omitted]). Here, defendant has failed to demonstrate that he had a clear-cut right to suppression of the evidence. Furthermore, we note that defense counsel extensively and effectively used the photograph in attempting to impeach the credibility of a witness, and thus defendant also failed to "demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient performance (*People v Rivera*, 71 NY2d 705, 709). The evidence, the law, and the circumstances of this case, viewed in totality and as of the time of representation, establish that defense counsel provided meaningful representation (*see generally People v Stultz*, 2 NY3d 277, 283-284, *rearg denied* 3 NY3d 702; *People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1040

KA 13-01079

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EZEIEKILE NAFI, 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 A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 29, 2013. 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: On appeal from a judgment convicting him following a jury trial of manslaughter in the first degree (Penal Law §§ 20.00, 125.20 [1]) as a lesser included offense of murder in the second degree (§§ 20.00, 125.25 [1]), defendant contends that the verdict is against the weight of the evidence and that the evidence is legally insufficient to support the conviction because the evidence at trial was insufficient to establish either that he intended to cause the victim serious physical injury or that he aided and abetted the perpetrators who inflicted the fatal stab wounds. "Given defendant's failure to argue with particularity that the evidence was legally insufficient to prove that he acted with the requisite mens rea," we conclude that defendant's current challenge to the sufficiency of the evidence concerning his mens rea has not been preserved for our review (*People v Carncross*, 14 NY3d 319, 325; *see People v Vanderhorst*, 117 AD3d 1197, 1198, *lv denied* 24 NY3d 1089; *see generally People v Gray*, 86 NY2d 10, 19).

In any event, we conclude that defendant's challenges to the weight and sufficiency of the evidence are without merit. "A person is guilty of manslaughter in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he [or she] causes the death of such person or of a third person" (Penal Law § 125.20 [1]). Thus, in order for defendant to be found guilty of manslaughter in the first degree as an accomplice, the People had to establish that, "when [defendant] aided [those] whose acts resulted in the death

of a person, [he] did so with the intent to cause serious physical injury to the victim" (*People v Vasquez*, 179 Misc 2d 854, 866, *affd* 298 AD2d 230, *lv denied* 100 NY2d 543; *see People v Browne*, 307 AD2d 645, 645-646, *lv denied* 1 NY3d 539).

Addressing first the sufficiency of the evidence, we conclude that, "[v]iewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference, as we must" (*People v Bay*, 67 NY2d 787, 788), the evidence is legally sufficient to establish that defendant intended to cause serious physical injury to the victim (*see generally People v Bleakley*, 69 NY2d 490, 495). Although the evidence established that the stab wounds inflicted by defendant were not the fatal stab wounds, "[t]he evidence that defendant stabbed the victim multiple times is legally sufficient to establish that defendant intended to cause serious physical injury to the victim" (*People v Simpson*, 35 AD3d 1182, 1182, *lv denied* 8 NY3d 990; *see People v Rivera*, 23 NY3d 112, 124; *People v Collins*, 43 AD3d 1338, 1338, *lv denied* 9 NY3d 1005; *cf. People v Stevens*, 153 AD2d 768, 769, *affd* 76 NY2d 833).

Defendant further contends that, by acquitting him of intentional murder, the jury necessarily decided that he was not an accessory of the other participants and was thus liable for only his conduct and could not be guilty of manslaughter based on the actions of the other perpetrators. We reject that contention. "Accessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Chapman*, 30 AD3d 1000, 1001, *lv denied* 7 NY3d 811 [internal quotation marks omitted]). Here, the evidence established that defendant "intended to cause serious physical injury to the victim and that death resulted" (*People v Lewis*, 300 AD2d 827, 828, *lv denied* 99 NY2d 630*; see People v Rutledge*, 70 AD3d 1368, 1369, *lv denied* 15 NY3d 777; *see also People v Monaco*, 14 NY2d 43, 47). The fact that the jury acquitted defendant of intentional murder establishes only that, when defendant aided those whose acts resulted in the victim's death, defendant did not do so with the intent to cause death.

For the same reasons, we conclude that the verdict is not against the weight of the evidence (*see Rutledge*, 70 AD3d at 1369; *Chapman*, 30 AD3d at 1001; *see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, his rights to due process and a fair trial, and his right of confrontation were not violated when Supreme Court allowed a prosecution witness to testify that defendant nodded in agreement to a statement made by a nontestifying codefendant. Defendant's nonverbal response was admissible as an adoptive admission (*see People v Campney*, 94 NY2d 307, 311-312; *see generally People v Lourido*, 70 NY2d 428, 433), and the court properly instructed the jury in accordance with *Lourido* that the codefendant's statements were being admitted solely to establish defendant's "reaction . . . to that statement . . . [and] not for the truth of the statement" made by the codefendant (*see Campney*, 94 NY2d

at 316-317).

We agree with the People that the court properly allowed the same prosecution witness to testify at trial that, when he observed police officers near the scene of the homicide, he went to the crime scene "looking for . . . [t]he body . . . To see if it was true . . . That they had killed somebody." Those statements were not offered for their truth but, rather, "[were] properly admitted to explain [the witness's] presence at the scene, and to avoid speculation by the jury" (*People v Baez*, 7 AD3d 633, 633; *see generally People v Tosca*, 98 NY2d 660, 661). Although defendant now contends that the court erred in failing to issue limiting instructions to the jury, that contention is not preserved for our review because "defendant failed to request that the court instruct the jury as to the proper use of that testimony" (*People v Wisdom*, 120 AD3d 724, 726, *lv denied* 24 NY3d 1048; *see People v Martinez*, 100 AD3d 537, 538, *affd* 22 NY3d 551; *People v Tucker*, 291 AD2d 663, 665, *lv denied* 98 NY2d 703). Moreover, "[a]ny error in the court's failure to sua sponte issue a limiting instruction was harmless. The evidence of the defendant's guilt was overwhelming and there was no significant probability that the defendant would have been acquitted had the court given a limiting instruction with respect to this evidence" (*Wisdom*, 120 AD3d at 726; *see generally People v Crimmins*, 36 NY2d 230, 242). Based on the foregoing, we further conclude that the admission of the testimony and "the absence of a limiting instruction did not deprive the defendant of a fair trial" (*Wisdom*, 120 AD3d at 726), and thus the court properly denied defendant's request for a mistrial based on the admission of that testimony (*see* CPL 280.10 [1]).

Contrary to defendant's further contention, the court properly denied defendant's request for a jury instruction on the affirmative defense of duress (*see* Penal Law § 40.00 [1]). The testimony and exhibits admitted at trial, "when . . . viewed in the light most favorable to defendant, did not create a reasonable view of the evidence supporting such a charge" (*People v Thompson*, 34 AD3d 325, 325, *lv denied* 8 NY3d 885). While there was evidence that one of the other perpetrators threatened to kill defendant if he told anyone about the homicide, "[p]ost-crime threats and force are irrelevant as a matter of law" (*People v Staffieri*, 251 AD2d 998, 998-999). To the extent that defendant contends that he had no choice but to participate because he was told to do so by a higher ranking member of the gang with which he was affiliated, we note that there was no testimony from any witness concerning what higher ranking gang members would do to lesser ranking members if their instructions were disobeyed. In any event, even assuming, arguendo, that such testimony had been presented, we conclude that the defense of duress would not be available because, by voluntarily joining a gang, defendant "intentionally or recklessly place[d] himself in a situation in which it [was] probable that he [would] be subjected to duress" by the higher ranking gang members (§ 40.00 [2]; *see People v Morson*, 42 AD3d 505, 506, *lv denied* 9 NY3d 924).

Finally, we reject defendant's contentions that the court abused its discretion in denying his request for youthful offender status and

that the sentence is unduly harsh and severe. "The decision 'whether to grant or deny youthful offender status rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Williams*, 204 AD2d 1002, 1002, *lv denied* 83 NY2d 973). Given the particularly heinous nature of the crime perpetrated on the 16-year-old victim, there is "no basis to conclude that the court abused its discretion in refusing to grant defendant youthful offender status," and we decline to modify the sentence (*id.*).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1041

KA 10-02080

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL L. JACKSON, JR., DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered July 28, 2010. 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 upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [2] [b]), arising from an incident in which he refused to pay a prostitute the agreed-upon price for a sex act and then stole money from her by threatening her with what appeared to be a handgun, but was established to be a pellet gun. We reject defendant's contention that the verdict is against the weight of the evidence based on, inter alia, the complainant's lack of credibility. We agree with defendant that, "based on all the credible evidence a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), however, we conclude that the jury did not fail to give the evidence the weight it should be accorded. " '[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 West*, 118 AD3d 1450, 1451-1452, *lv denied* 24 NY3d 1048), and we see no reason to disturb the jury's determination of those issues in this case.

We reject defendant's further contention that he was denied effective assistance of counsel. Insofar as defendant's contention is based on his trial attorney's failure to file a speedy trial motion, that contention is without merit. The record establishes that the People declared their readiness for trial within five months of the commencement of the proceeding, and there is no indication of any additional time that is chargeable to the People. Thus, any CPL 30.30

motion would have been without merit (*see* CPL 30.30 [1] [a]), and defendant was not "denied effective assistance of trial counsel merely because counsel [did] not make a motion or argument that [had] little or no chance of success" (*People v Joslyn*, 103 AD3d 1254, 1256, *lv denied* 21 NY3d 944 [internal quotation marks omitted]; *see People v Barksdale*, 129 AD3d 1497, 1498). With respect to defendant's contention that his attorney was ineffective in failing to seek immunity for a prosecution witness, we note that, " '[p]ursuant to CPL 50.30, the trial court may confer immunity to witnesses in a criminal proceeding only when expressly requested to do so by the District Attorney' " (*People v Bolling*, 24 AD3d 1195, 1196, *affd* 7 NY3d 874). Here, the prosecutor made no such request, and defendant's contention lacks merit insofar as defendant contends that defense counsel should have "demanded" that the prosecutor make such a request. In order "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712), and defendant failed to meet that burden here (*see People v Holland*, 126 AD3d 1514, 1515, *lv denied* 25 NY3d 1165; *People v Torres*, 125 AD3d 1481, 1482-1483, *lv denied* 25 NY3d 1172). Based upon our examination of the entire record, we conclude that "the evidence, the law, and the circumstances of [the] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

The sentence is not unduly harsh or severe.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1045

CA 14-01841

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

ERICK J. MILLER AND AMY RYAN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ALLSTATE INDEMNITY COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ANTHONY G. MARECKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF FRANK G. MONTEMALO, PLLC, ROCHESTER (FRANK G. MONTEMALO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 29, 2014. The order, insofar as appealed from, denied those parts of defendant's motion seeking to dismiss plaintiffs' fourth and sixth causes of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in part and the fourth and sixth causes of action are dismissed.

Memorandum: Plaintiffs commenced this action against defendant, Allstate Indemnity Company (Allstate), after their claim for property damage to their home under a policy issued by Allstate was disclaimed and denied. After answering the complaint, Allstate moved, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the fourth, fifth and sixth causes of action as well as plaintiffs' demands for punitive damages and attorneys' fees. Plaintiffs withdrew their fifth cause of action, which alleged unfair claim practices in violation of Insurance Law § 2601, and opposed the remainder of Allstate's motion.

In the order in appeal No. 1, Supreme Court, inter alia, denied Allstate's motion with respect to the fourth and sixth causes of action and reserved decision on that part of Allstate's motion with respect to plaintiffs' demands for punitive damages and attorneys' fees. In the order in appeal No. 2, the court granted that part of Allstate's motion to dismiss plaintiffs' demand for attorneys' fees and, because plaintiffs had withdrawn their fifth cause of action, the court "denied as moot" that part of Allstate's motion to dismiss plaintiffs' demand for punitive damages. In appeal No. 1, Allstate contends that the court erred in denying those parts of its motion

seeking to dismiss the fourth and sixth causes of action and, in appeal No. 2, Allstate contends that the court erred in denying as moot that part of its motion seeking dismissal of plaintiffs' demand for punitive damages.

We agree with Allstate in appeal No. 1 that the court erred in denying those parts of its motion to dismiss the fourth and sixth causes of action for failure to state a cause of action (*see* CPLR 3211 [a] [7]). We recognize that this appeal comes to us on a motion to dismiss pursuant to CPLR 3211 (a) (7), and "[t]hus, we accept as true each and every allegation made by plaintiff[s] and limit our inquiry to the legal sufficiency of plaintiff[s'] claim[s]" (*Silsdorf v Levine*, 59 NY2d 8, 12, *cert denied* 464 US 831). Our role is thus to "determine only whether the facts as alleged fit within any cognizable legal theory . . . and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one' " (*Leon v Martinez*, 84 NY2d 83, 87-88). Nevertheless, " '[w]hile it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support' " (*Dominski v Frank Williams & Son, LLC*, 46 AD3d 1443, 1444). Indeed, " 'a cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations' " (*Ben Soep Co. v Highgate Hall of Orange County*, 71 AD2d 825, 825).

To the extent that the fourth and sixth causes of action allege bad faith, we note that, "in order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests" (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453, *rearg denied* 83 NY2d 779). We conclude in appeal No. 1 that the fourth and sixth causes of action "should have been dismissed because they do not allege [any] conduct by [Allstate] constituting the requisite 'gross disregard of the insured's interests' necessary to support such causes of action" (*Cooper v New York Cent. Mut. Fire Ins. Co.*, 72 AD3d 1556, 1557). Moreover, the "[a]llegations that [Allstate] had no good faith basis for denying coverage are redundant to [plaintiffs'] cause[s] of action for breach of contract based on the denial of coverage, and do not give rise to an independent tort cause of action, regardless of the insertion of tort language into the pleading" (*Royal Indem. Co. v Salomon Smith Barney*, 308 AD2d 349, 350; *see Dinstber v Allstate Ins. Co.*, 110 AD3d 1410, 1411-1412).

Inasmuch as plaintiffs also demanded punitive damages in the fourth cause of action, we likewise agree with Allstate in appeal No. 2 that the court erred in denying as moot that part of its motion to dismiss the demand for punitive damages after plaintiffs withdrew the fifth cause of action. "A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616). Here, the complaint fails to set forth "the pleading elements required to state a claim for punitive damages" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316); plaintiffs' "conclusory allegation[s] as to [Allstate's] motive for [its] refusal

[to pay the claim are] an insufficient premise for a demand for punitive damages" (*Aldrich v Aetna Life & Cas. Ins. Co.*, 140 AD2d 574, 574).

We further agree with Allstate in appeal No. 1 that plaintiffs failed to state a cause of action for untimely disclaimer in the sixth cause of action. "Where, as here, the underlying claim does not arise out of an accident involving bodily injury or death, the notice of disclaimer provisions set forth in Insurance Law § 3420 (d) are inapplicable and, '[u]nder the common-law rule, delay in giving notice of disclaimer of coverage, even if unreasonable, will not estop the insurer to disclaim unless the insured has suffered prejudice from the delay' " (*Vecchiarelli v Continental Ins. Co.*, 277 AD2d 992, 993; *see Legum v Allstate Ins. Co.*, 33 AD3d 670, 670; *Rodriguez v Metropolitan Life Ins. Co.*, 251 AD2d 208, 208; *see generally KeySpan Gas E. Corp. v Munich Reins. Am., Inc*., 23 NY3d 583, 590). Contrary to plaintiffs' contention, their conclusory allegation that they were "damaged and prejudiced" by the untimely disclaimer is insufficient to withstand this CPLR 3211 (a) (7) motion to dismiss (*see Tierney v Capricorn Invs.*, 189 AD2d 629, 632, *lv denied* 81 NY2d 710).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1046

CA 14-01842

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

ERICK J. MILLER AND AMY RYAN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ALLSTATE INDEMNITY COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ANTHONY G. MARECKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF FRANK G. MONTEMALO, PLLC, ROCHESTER (FRANK G. MONTEMALO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 22, 2014. The order, insofar as appealed from, denied that part of defendant's motion seeking dismissal of plaintiffs' claim for punitive damages.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of defendant's motion seeking dismissal of plaintiffs' claims for punitive damages is granted.

Same memorandum as in *Miller v Allstate Indem. Co.* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1048

CA 15-00117

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

JACOB STILLMAN, PLAINTIFF-APPELLANT,

V ORDER

MOBILE MOUNTAIN, INC., PHILLIP A. CERNY, JOSHUA WOOLEY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

THE BALLOW LAW FIRM, P.C., WILLIAMSVILLE (KEVIN F. WALSH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered May 8, 2014. The order granted the motion of defendants Mobile Mountain, Inc., Phillip A. Cerny and Joshua Wooley to bifurcate trial of the issues of liability and damages.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1051

CA 14-02062

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

ERIE MATERIALS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CENTRAL CITY ROOFING CO., INC.,
DEFENDANT-APPELLANT,
AND JAMES T. PIPINES, DEFENDANT.

THE WARD FIRM, PLLC, LIVERPOOL (LINDA M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered August 12, 2014. The order, among other things, awarded plaintiff partial summary judgment on the first cause of action in its complaint and dismissed the counterclaims.

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

Memorandum: Central City Roofing Co., Inc. (defendant) appeals from those parts of an order granting plaintiff's motion for partial summary judgment insofar as plaintiff sought a money judgment on its first cause of action for goods sold and delivered, and dismissal of defendant's counterclaims. Contrary to defendant's contention, plaintiff's complaint, with its attached invoices, satisfied the pleading requirements of CPLR 3016 (f) (*see Offset Paperback Mfrs. v Banner Press*, 47 AD2d 733, 733, *affd* 39 NY2d 770; *Duban v Platt*, 23 AD2d 660, 660, *affd* 17 NY2d 526, *rearg denied* 17 NY2d 612; *Netguistics, Inc. v Coldwell Banker Prime Props., Inc.*, 23 AD3d 719, 719-720). The invoices provided the requisite degree of specificity inasmuch as they permitted defendant " 'to respond in a meaningful way on an item-by-item basis' " (*Green v Harris Beach & Wilcox*, 202 AD2d 993, 993). Each invoice set forth the date of the order, the specific items ordered and delivered, the quantity ordered and delivered, as well as the price per unit and the total price for the quantity ordered (*see Offset Paperback Mfrs.*, 47 AD2d at 733; *Netguistics, Inc.*, 23 AD3d at 719-720; *O'Callaghan v Republic W. Ins. Co.*, 269 AD2d 114, 114, *lv denied* 95 NY2d 758; *cf. Waterfront Operations Assoc., LLC v Candino*, 115 AD3d 1313, 1314; *Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34, 35). Defendant was thus required to indicate specifically in its verified answer

"those items [it] dispute[d] and whether in respect of delivery or performance, reasonable value or agreed price" (CPLR 3016 [f]). Defendant failed to do so and, therefore, Supreme Court properly granted that part of plaintiff's motion on the cause of action for goods sold and delivered (*see Netguistics, Inc.*, 23 AD3d at 720; *see also Duban*, 23 AD2d at 660; *Cibro Petroleum Prods. v Onondaga Oil Co.*, 144 AD2d 152, 153).

Defendant's contention that the court should have ordered defendant to amend the answer under the authority of CPLR 2001 is not properly before us inasmuch as it "is . . . raised for the first time on appeal" (*Paporters v Campos*, 122 AD3d 521, 522; *see Brandenburg v St. Michael's Cemetery*, 92 AD3d 631, 633; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Defendant further contends that the court erred in granting that part of plaintiff's motion seeking to dismiss the counterclaims as barred by the four-year statute of limitations set forth in UCC 2-725 (1). Even assuming, arguendo, that defendant is correct that the statute of limitations does not bar its counterclaims, we would nevertheless affirm the order inasmuch as the court also dismissed the counterclaims as barred by the statute of frauds set forth in UCC 2-201 (1). By failing to address that basis for the dismissal of the counterclaims in its brief on appeal, defendant has abandoned any challenge with respect thereto (*see Sto Corp. v Henrietta Bldg. Supplies*, 202 AD2d 969, 970; *Ciesinski*, 202 AD2d at 984). Inasmuch as any resolution of the statute of limitations issue would have no effect on the outcome of this appeal, we decline to address that issue as academic (*see generally Matter of Hoston v New York State Dept. of Health*, 203 AD2d 826, 827, *lv denied* 84 NY2d 803).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1052

CA 15-00118

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

DONNOVAN CRUTCHFIELD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN JONES, POWER & CONSTRUCTION GROUP, INC.,
AND LIVINGSTON ASSOCIATES, INC.,
DEFENDANTS-RESPONDENTS.

PARISI & BELLAVIA, LLP, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, ROCHESTER (ALYSON CULLITON OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 3, 2014. The order, insofar as appealed from, denied that part of the cross motion of plaintiff seeking partial summary judgment on the issue of serious injury.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as the result of a motor vehicle accident, and he contends on appeal that Supreme Court erred in denying his cross motion for summary judgment determining that he sustained a serious injury within the meaning of Insurance Law § 5102 (d). We affirm.

Contrary to plaintiff's contention, the court properly denied his cross motion with respect to the three categories of serious injury alleged by plaintiff in support of the cross motion. We agree with plaintiff that he met his initial burden with respect to the fracture category by submitting the affirmation of his physician, who examined an X ray of plaintiff's neck and opined that plaintiff sustained an anterior compression fracture of his C6 vertebra (*see Madafferi v Herring*, 104 AD3d 1293, 1293-1294). Nevertheless, defendants raised a triable issue of fact concerning that category by submitting, inter alia, the affirmed report of their medical expert concluding that there was no evidence of such a fracture. It is well settled that " 'conflicting expert opinions may not be resolved on a motion for summary judgment' " (*Edwards v Devine*, 111 AD3d 1370, 1372; *see Lawrence v McClary*, 125 AD3d 1502, 1503). Even assuming, arguendo, that plaintiff met his initial burden with respect to the remaining

categories alleged by him in support of the cross motion, we conclude that defendants raised a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1055.1

KA 13-00583

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL ROLLINS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 15, 2013. The appeal was held by this Court by order entered February 13, 2015, the decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (125 AD3d 1540).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on June 11, 2015, and by the attorneys for the parties on June 11 and July 6, 2015,

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1056

TP 14-01400

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

IN THE MATTER OF ROBERT HAIGLER, PETITIONER,

V ORDER

SUPERINTENDENT SHEAHAN, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

ROBERT HAIGLER, PETITIONER PRO SE.

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, Seneca County [Dennis F. Bender, A.J.], entered August 6, 2014) 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1060

KA 13-00067

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW RAJCZAK, JR., DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (DOREEN M. HOFFMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered November 5, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, attempted petit larceny and criminal trespass 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]), attempted petit larceny (§§ 110.00, 155.25), and criminal trespass in the second degree (§ 140.15). 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We note in particular that, although it would not have been unreasonable for the jury to find that defendant did not have the requisite intent to commit the crimes of burglary in the second degree and attempted petit larceny, defendant's intent to commit those crimes may be inferred from "his 'unexplained presence on the premises, and [his] actions and statements when confronted by [the] police [and] the property owner' " (*People v James*, 114 AD3d 1202, 1205, *lv denied* 22 NY3d 1199). Here, we conclude that "it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Martinez*, 118 AD3d 1446, 1447).

We reject defendant's further contention that County Court erred in permitting the People to ask a defense witness about defendant's prior arrest for attempted burglary. " 'A defense witness who has not testified as a character witness on direct examination may not be cross-examined about the defendant's criminal record . . . However,

once the defendant has introduced character evidence, the People may question the defense witness about whether he or she has heard of the defendant's previous criminal acts, since such questions are relevant to the ability of the character witness to accurately reflect the defendant's reputation in the community' " (*People v Marzug*, 280 AD2d 974, 975, *lv denied* 96 NY2d 904; *see People v Kuss*, 32 NY2d 436, 443, *rearg denied* 33 NY2d 644, *cert denied* 415 US 913). Finally, the sentence is not unduly harsh or severe.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1061

KA 13-01519

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAJSHEEM J. RICHARDSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 24, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (*id.*) involving a separate incident. County Court sentenced defendant to concurrent determinate terms of incarceration.

Contrary to defendant's contention in appeal No. 1, the court properly refused to suppress evidence, i.e., cocaine, seized from an apartment that he leased as a tenant. It is undisputed that the police entered the apartment without a warrant but that no search was conducted until a warrant was obtained. We conclude that the court properly determined that the police had probable cause to believe that a crime was being committed in the apartment and that exigent circumstances existed for the warrantless entry into the apartment (*see generally People v McBride*, 14 NY3d 440, 445, *cert denied* 562 US 931).

The police received a complaint that there was a strong odor of marijuana coming from a certain apartment, and that the odor was causing the complainant's children to feel ill. In response, a police officer knocked on the door of the apartment to investigate whether it

was the source of the odor. The door was opened by a man (codefendant) who was known to the officer. When the officer told codefendant that he needed to talk to him about the odor of marijuana, which was much stronger after the door was opened, codefendant tried to slam the door, and the officer prevented him from doing so by placing his foot in the threshold. He and other officers thereafter entered the apartment, and he observed two other occupants and what appeared to be a large amount of cocaine on the kitchen counters. Defendant was not at the apartment. The officer left the apartment to obtain a warrant and, after doing so, the evidence was seized and the occupants were arrested.

Less than two hours before he entered defendant's apartment, the same officer was conducting surveillance of the apartment building for suspected drug trafficking, and he observed defendant enter the building by a door that led to the apartment. Shortly thereafter, the officer observed a man known to him to have a revoked driver's license exit the building from the door by which defendant entered. After the man drove away, the officer arrested him for unauthorized operation of a motor vehicle, and the man told the officer that he had purchased cocaine from codefendant, whom he referred to by a nickname, at an apartment that matched the location of the apartment leased by defendant. The man was thereafter picked up at the scene of his arrest by the mother of defendant's child, a person also known to the officer.

The officer testified that he did not seek a search warrant before knocking on the door because he was not "100% certain" that the odor was emanating from the apartment, and because the man he arrested refused to cooperate with respect to a warrant application, and he did not consider the man to be a sufficiently reliable source for purposes of seeking a warrant.

The court properly determined that the police had the right to knock on the door to investigate the complaint of the odor of marijuana (*see People v Kozlowski*, 69 NY2d 761, 762-763, *rearg denied* 69 NY2d 985; *cf. Florida v Jardines*, ___ US ___, 133 S Ct 1409, 1414-1415). After codefendant opened the door, the officer then had probable cause to believe both that there was marijuana in the apartment, based upon the strong odor that emanated therefrom, and that codefendant had sold cocaine to the man the officer had arrested. The court properly determined that exigent circumstances arose when codefendant attempted to slam the door inasmuch as it "is well known that persons who engage in drug trafficking will often attempt to dispose of the narcotics or escape" (*People v Brown*, 274 AD2d 941, 942, *affd* 95 NY2d 942; *see People v Ellison*, 46 AD3d 1341, 1343, *lv denied* 10 NY3d 862). "Courts have long recognized that the Fourth Amendment is not violated every time police enter a private premises without a warrant. Indeed, though warrantless entries into a home are 'presumptively unreasonable' . . . , '[t]he touchstone of the Fourth Amendment is reasonableness'—not the warrant requirement" (*People v Molnar*, 98 NY2d 328, 331). We conclude that, here, both probable cause and exigent circumstances existed "to justify a warrantless entry" (*McBride*, 14 NY3d at 445; *cf. People v Hunter*, 92 AD3d 1277,

1280).

We reject defendant's further contention in appeal No. 1 that his *Alford* plea was legally and factually insufficient because he denied that he saw cocaine in the apartment on the day in question and because he denied that he knew that the occupants were selling drugs. Defendant admitted that he sublet the apartment to a person he knew to be a drug dealer, that he was at the apartment on the day in question and that, within the two weeks prior to the day in question, he had seen implements in the apartment used to make crack cocaine. Defendant also stated that he was accepting the plea offer of a sentence of 5½ years of imprisonment with three years of postrelease supervision, to run concurrently with the 5½ year term of imprisonment imposed in appeal No. 2, in order to avoid the possibility of being convicted of the more serious count charged in the indictment or receiving a longer sentence. The People made an offer of proof that, less than two hours after defendant was at the apartment, the police seized in excess of three pounds of cocaine in plain view, as well as implements to make crack cocaine; that defendant had been observed entering and leaving the building on several occasions by police officers conducting surveillance; that there were no beds or other furnishings to indicate that people lived in the apartment and that, instead, it appeared to be used to store and sell controlled substances; and that there were several recorded jail telephone conversations between codefendant and defendant that implicated defendant. It is axiomatic that, " '[i]n New York, [an *Alford*] plea is allowed only when, as in *Alford* itself, it is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt' " (*People v Richardson*, 72 AD3d 1578, 1579; *see People v Hill*, 16 NY3d 811, 814). We conclude that both conditions are present on this record (*see People v Cruz*, 89 AD3d 1464, 1465, *lv denied* 18 NY3d 993; *cf. Hill*, 16 NY3d at 814; *Richardson*, 72 AD3d at 1579).

In light of our determination in appeal No. 1, there is no basis to reverse the judgment in appeal No. 2 and vacate defendant's plea of guilty (*see People v Roosevelt*, 125 AD3d 1452, 1455, *lv denied* 25 NY3d 1076; *cf. People v Fuggazzatto*, 62 NY2d 862, 863).

Frances E. Cafarell

Entered: October 2, 2015

Clerk of the Court

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

1062

KA 13-01520

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAJSHEEM J. RICHARDSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 24, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Richardson* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1063

KA 12-01261

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. DIXON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 2, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) 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 two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), and one count of reckless endangerment in the first degree (§ 120.25). Defendant contends that the People failed to establish that the police had reasonable suspicion to detain him for a showup identification because they failed to establish the reliability of the dog tracking evidence that the police used to assist them in locating him. Defendant's contention is not preserved for our review (*see People v Lewis*, 97 AD3d 1097, 1097-1098, *lv denied* 19 NY3d 1103; *People v Cruz*, 89 AD3d 1464, 1465-1466, *lv denied* 18 NY3d 993; *People v Clark*, 161 AD2d 1181, 1181, *lv denied* 76 NY2d 786). In any event, the evidence at the suppression hearing, even without the dog tracking evidence, supports Supreme Court's determination that the police had the requisite reasonable suspicion. A description of the suspect was broadcast over the police radio, and officers arrived at the house where defendant was found crouching on the front porch, which was in geographic and temporal proximity to the scene of the crime, even before the dog tracking team arrived at that same location (*see People v Carr*, 99 AD3d 1173, 1175, *lv denied* 20 NY3d 1010; *People v Johnson*, 174 AD2d 694, 694-695).

We reject defendant's further contention that he was denied

effective assistance of counsel. The People established the relevance of a gray hooded sweatshirt found at the house where defendant was apprehended inasmuch as two witnesses observed the suspect wearing a gray hooded sweatshirt at the time of the shooting (*see People v Schultz*, 156 AD2d 944, 944, *lv denied* 82 NY2d 808). Therefore, defense counsel's failure to object to the admission of the sweatshirt in evidence does not constitute ineffective assistance of counsel inasmuch as such an objection would have had little to no chance of success (*see People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Although defense counsel failed to object to the lack of a foundation for the dog tracking evidence (*see People v Towsley*, 85 AD3d 1549, 1551, *lv denied* 17 NY3d 905; *People v Vandenbosch*, 216 AD2d 884, 885, *lv denied* 86 NY2d 804; *People v Abdullah*, 134 AD2d 503, 504, *lv denied* 71 NY2d 965), and failed to request a limiting instruction with respect to that evidence (*see People v Gangler*, 227 AD2d 946, 946, *lv denied* 88 NY2d 985, *reconsideration denied* 89 NY2d 922; *Abdullah*, 134 AD2d at 504), we conclude that those errors were not so egregious and prejudicial to defendant as to deny him a fair trial (*see People v Releford*, 126 AD3d 1407, 1408, *lv denied* 25 NY3d 1170; *see generally People v Turner*, 5 NY3d 476, 480). The dog tracking evidence concerned only the issue of defendant's identity as the shooter, and the evidence established that the police located defendant after the shooting even without the dog tracking evidence. In addition, two witnesses identified defendant at trial as the shooter. We therefore conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant was afforded meaningful representation (*see People v Baldi*, 54 NY2d 137, 147).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1067

CA 14-02111

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

JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DYLAN J. BRADLEY, TREVOR A. BRADLEY AND CHASE Q. BRADLEY, INFANTS, ZACHARY HERR AND MELANIE HERR, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF COLETON HERR AND HEATHER HERR, INFANTS, AND NATHAN E. KORSON AND ELENA KORSON, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LOGAN J. KORSON, AN INFANT, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, GLENN SPRINGS HOLDINGS, INC., GROSS PHC LLC, MILLER SPRINGS REMEDIATION MANAGEMENT, INC., OXY, INC., FORMERLY KNOWN AS OCCIDENTAL CHEMICAL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO HOOKER CHEMICALS AND PLASTICS CORPORATION, OP-TECH ENVIRONMENTAL SERVICES, DEFENDANTS-RESPONDENTS-APPELLANTS, ROY'S PLUMBING, INC., DEFENDANT-RESPONDENT, SCOTT LAWN YARD, INC., DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

PHILLIPS & PAOLICELLI LLP, NEW YORK CITY (STEPHEN J. PHILLIPS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (DOUGLAS A. JANESE, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT CITY OF NIAGARA FALLS.

PHILLIPS LYTLE LLP, BUFFALO (KEVIN M. HOGAN OF COUNSEL), QUINN EMANUEL URQUHART & SULLIVAN LLP, NEW YORK CITY, AND KLEINFELD, KAPLAN AND BECKER, LLP, WASHINGTON, D.C., FOR DEFENDANTS-RESPONDENTS-APPELLANTS GLENN SPRINGS HOLDINGS, INC., MILLER SPRINGS REMEDIATION MANAGEMENT, INC., AND OXY, INC., FORMERLY KNOWN AS OCCIDENTAL CHEMICAL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO HOOKER CHEMICALS AND PLASTICS CORPORATION.

SCHNITTER CICCARELLI & MILLS PLLC, EAST AMHERST (PATRICIA S. CICCARELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT GROSS PHC LLC.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (JEFFREY D. SCHULMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT OP-TECH ENVIRONMENTAL SERVICES.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT SCOTT LAWN YARD, INC.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeals from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered August 20, 2014. The order granted in part and denied in part the motions of defendants City of Niagara Falls, Gross PHC LLC, Glenn Springs Holdings, Inc., Miller Springs Remediation Management, Inc., Oxy, Inc., formerly known as Occidental Chemical Corporation, individually and as successor in interest to Hooker Chemicals and Plastics Corporation, Op-Tech Environmental Services, Roy's Plumbing, Inc., and Scott Lawn Yard, Inc., to dismiss the second amended complaint against them.

It is hereby ORDERED that said cross appeal of Gross PHC LLC is unanimously dismissed as moot, and the order is modified on the law by granting those parts of the motions of defendants City of Niagara Falls, Glenn Springs Holdings, Inc., Miller Springs Remediation Management, Inc., Oxy, Inc., formerly known as Occidental Chemical Corporation, individually and as successor in interest to Hooker Chemicals and Plastics Corporation, Op-Tech Environmental Services, and Scott Lawn Yard, Inc., seeking to dismiss the third and fourth causes of action against them insofar as asserted by each plaintiff as parent and natural guardian of an infant child or children and dismissing those causes of action to that extent, and denying those parts of the motions of those defendants and defendant Roy's Plumbing, Inc. seeking to dismiss the first through fourth causes of action insofar as they seek damages related to the landfill remediation and sewer project and reinstating those causes of action against those defendants to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking to recover damages for personal injuries and property damage allegedly caused by defendants' failure to properly perform their respective roles in the plan to remediate the toxic contamination at the Love Canal site (hereafter, landfill remediation) and in the sewers in the Love Canal corridor (hereafter, sewer project), as well as for claims related to a release of Love Canal-era toxins in January 2011 during a sewer renovation that was outside of the remediation area. Several defendants moved to dismiss the second amended complaint for, inter alia, failure to state a cause of action and inadequate pleading. Supreme Court, in four separate orders, granted those parts of the motions seeking to dismiss the first four causes of action insofar as they seek damages allegedly resulting from the landfill remediation and sewer project, but denied those parts of the motions seeking to

dismiss those causes of action insofar as they seek damages allegedly resulting from the release of toxins in January 2011. Plaintiffs appeal from each of those orders. In appeal No. 1, defendants City of Niagara Falls (City), Glenn Springs Holdings, Inc., Miller Springs Remediation Management, Inc. (MSRM), Oxy, Inc., formerly known as Occidental Chemical Corporation, individually and as successor in interest to Hooker Chemicals and Plastics Corporation, Op-Tech Environmental Services, and Scott Lawn Yard, Inc., cross-appeal from that part of the order denying their respective motions to dismiss the second amended complaint in its entirety on the ground that it was not adequately pleaded with respect to the claims of fraud and misrepresentation (*see* CPLR 3016 [b]), or with respect to personal injuries, property damage, and standing.

We agree with defendants on their cross appeals in appeal No. 1 that the court erred in denying those parts of their respective motions seeking to dismiss the third and fourth causes of action, asserting private nuisance and trespass, as alleged by plaintiffs as parents and natural guardians of their infant children, inasmuch as plaintiffs' children lack an ownership or possessory interest in the respective properties (*see Ivory v International Bus. Machines Corp.*, 116 AD3d 121, 128, *lv denied* 23 NY3d 903). We therefore modify the order accordingly. We note that defendant Roy's Plumbing, Inc. did not cross-appeal from the order and therefore is not entitled to affirmative relief with respect to the third and fourth causes of action (*see Bennett v McGorry*, 34 AD3d 1290, 1291).

We agree with plaintiffs in appeal Nos. 1 through 4 that the court erred in dismissing the first through fourth causes of action, asserting negligence, abnormally dangerous activity, private nuisance, and trespass, insofar as they seek damages related to the landfill remediation and sewer project, on the ground that those claims are barred by judicial estoppel. We therefore further modify the orders accordingly. MSRM removed this matter to federal district court, alleging that plaintiffs were challenging a remedy established under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (*see* 42 USC 9601 *et seq.*), and thus that federal district court had original jurisdiction to adjudicate the matter *(see Abbo-Bradley v City of Niagara Falls*, 2013 WL 4505454 at *4 [WDNY 2013]). Plaintiffs moved to remand the matter to state court on the ground that they did not challenge the CERCLA remedy, but instead challenged defendants' allegedly faulty performance of their respective obligations in executing the CERCLA remedy.

The record establishes that, in opposition to plaintiffs' motion to remand the matter, the defendants asserted that "[p]laintiffs' claims necessarily present substantial and disputed questions of federal law, including whether the *selection, construction and monitoring* of the remedy . . . substantively complied with CERCLA" (emphasis added). In reply, plaintiffs stated that defendants "relentlessly mischaracterize [their] complaint" as " 'attacking a CERCLA remedy' . . . But plaintiffs do not challenge *'the selection, construction and monitoring'* of any previous remediation plan. Plaintiffs make no attack on any decision by EPA, or upon how such a

decision was reached" (emphasis added).

As the federal District Court explained, "it is uniformly recognized that, in enacting CERCLA, Congress expressly disclaimed an intent to preempt state tort liability for damages caused by the release of hazardous substances" (*Abbo-Bradley*, 2013 WL 4505454 at *6; *see* 42 USC § 9652 [d]). District Court therefore granted plaintiffs' motion seeking to remand the matter to Supreme Court, determining that "plaintiffs seek relief only under common law theories of negligence, . . . private nuisance, and trespass" (*Abbo-Bradley*, 2013 WL 4505454 at *7), "[and t]he claims . . . do not expressly challenge the effectiveness of the [CERCLA] remedy . . . Rather, plaintiffs seek only to be made whole for any harm proximately caused by defendants' conduct, whether in performance of operation, maintenance, and monitoring obligations with respect to the remedy, or during the [sewer project]" (*id.* at *10).

The moving defendants alleged in their respective motions to dismiss the second amended complaint that plaintiffs had advised District Court that they were not challenging the "selection, construction and monitoring of any previous remediation plan" and that plaintiffs were therefore judicially estopped from challenging the selection, construction or monitoring of the remediation plan, i.e., the CERCLA remedy, in the second amended complaint. Supreme Court agreed with the moving defendants that plaintiffs were challenging the CERCLA remedy in the second amended complaint and dismissed on the ground of judicial estoppel the claims applying to the landfill remediation and sewer project in the first through fourth causes of action. That was error. The doctrine of judicial estoppel prohibits a party who has assumed a position in one legal proceeding, and prevailed on that position, from assuming a contrary position in another proceeding because the party's interests have changed (*see Popadyn v Clark Constr. & Prop. Maintenance Servs. Inc.*, 49 AD3d 1335, 1336). Here, however, we conclude that plaintiffs' position was consistent in both the federal and state court matters inasmuch as they maintained that they did not challenge the CERCLA remedy, as the moving defendants alleged, but instead challenged defendants' performance of their respective obligations in executing the CERCLA remedy.

We have reviewed the remaining contentions raised by plaintiffs in their appeals and the remaining contentions of defendants on their respective cross appeals and conclude that they are without merit.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1068

CA 14-02112

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

JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DYLAN J. BRADLEY, TREVOR A. BRADLEY AND CHASE Q. BRADLEY, INFANTS, ZACHARY HERR AND MELANIE HERR, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF COLETON HERR AND HEATHER HERR, INFANTS, AND NATHAN E. KORSON AND ELENA KORSON, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LOGAN J. KORSON, AN INFANT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS, AND SEVENSON ENVIRONMENTAL SERVICES, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

PHILLIPS & PAOLICELLI LLP, NEW YORK CITY (STEPHEN J. PHILLIPS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered August 15, 2014. The order granted the motion of defendant Sevenson Environmental Services, Inc. to dismiss the second amended complaint against it and dismissed the action against that defendant.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendant Sevenson Environmental Services, Inc., seeking to dismiss the second amended complaint against it and reinstating the second amended complaint against that defendant except insofar as the third and fourth causes of action assert claims by each plaintiff as parent and natural guardian of an infant child or children, and as modified the order is affirmed without costs.

Same memorandum as in *Abbo-Bradley v City of Niagara Falls* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1069

CA 14-02113

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

JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DYLAN J. BRADLEY, TREVOR A. BRADLEY AND CHASE Q. BRADLEY, INFANTS, ZACHARY HERR AND MELANIE HERR, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF COLETON HERR AND HEATHER HERR, INFANTS, AND NATHAN E. KORSON AND ELENA KORSON, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LOGAN J. KORSON, AN INFANT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS, AND CONESTOGA-ROVERS & ASSOCIATES, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

PHILLIPS & PAOLICELLI LLP, NEW YORK CITY (STEPHEN J. PHILLIPS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JEFFREY C. STRAVINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered August 15, 2014. The order granted the motion of defendant Conestoga-Rovers & Associates, to dismiss the second amended complaint against it and dismissed the second amended complaint against that defendant.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendant Conestoga-Rovers & Associates seeking to dismiss the second amended complaint against it and reinstating the second amended complaint against that defendant except insofar as the third and fourth causes of action assert claims by each plaintiff as parent and natural guardian of an infant child or children, and as modified the order is affirmed without costs.

Same memorandum as in *Abbo-Bradley v City of Niagara Falls* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1070

CA 14-02114

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

JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DYLAN J. BRADLEY, TREVOR A. BRADLEY AND CHASE Q. BRADLEY, INFANTS, ZACHARY HERR AND MELANIE HERR, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF COLETON HERR AND HEATHER HERR, INFANTS, AND NATHAN E. KORSON AND ELENA KORSON, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LOGAN J. KORSON, AN INFANT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS, AND CECOS INTERNATIONAL, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 4.)

PHILLIPS & PAOLICELLI LLP, NEW YORK CITY (STEPHEN J. PHILLIPS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LATHROP & GAGE, LLP, CHICAGO, ILLINOIS (RUSSELL EGGERT, OF THE ILLINOIS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND WEBSTER SZANYI LLP, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered August 22, 2014. The order granted the motion of defendant CECOS International, Inc. to dismiss the second amended complaint against it and dismissed the action against that defendant.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendant CECOS International, Inc., seeking to dismiss the second amended complaint against it and reinstating the second amended complaint against that defendant except insofar as the third and fourth causes of action assert claims by each plaintiff as parent and natural guardian of an infant child or children, and as modified the order is affirmed without costs.

Same memorandum as in *Abbo-Bradley v City of Niagara Falls* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2015]).

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1071

CA 15-00270

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

STEVEN MULLIN, PLAINTIFF-APPELLANT,

V ORDER

OSWEGO COUNTY CORRECTIONAL FACILITY, OSWEGO COUNTY, AND OSWEGO COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS-RESPONDENTS.

LEVINE & BLIT, PLLC, SYRACUSE (GRAEME SPICER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LYNCH LAW OFFICE, PLLC, SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment and order (one paper) of the Supreme Court, Oswego County (James W. McCarthy, J.), entered May 2, 2014. The judgment and order granted the motion of defendants to dismiss the complaint, denied the cross motion of plaintiff for leave to file a late notice of claim and dismissed the complaint.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1075

CA 15-00355

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

THOMAS P. CLARK, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KIMBERLY M. BOORMAN, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, BUFFALO (MEGAN FURRER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAW & SHAW, P.C., HAMBURG (CHRISTOPHER M. PANNOZZO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered May 16, 2014. The order granted the motion of plaintiff for partial summary judgment on the issue of serious injury under the category of significant limitation of use of a body function or system.

It is hereby ORDERED that said appeal is unanimously dismissed in part, and the order is otherwise affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident. Defendant conceded that she was negligent, and plaintiff sought partial summary judgment on the issue of serious injury (*see* Insurance Law § 5102 [d]). Supreme Court granted plaintiff's motion only insofar as he alleged that he sustained a significant limitation of use of a body function or system. We therefore dismiss defendant's appeal to the extent that she raises contentions with respect to the permanent consequential limitation of use and 90/180-day categories of serious injury inasmuch as she is not aggrieved by the court's order with respect to those categories (*see Seneca One Realty, LLC v City of Buffalo*, 93 AD3d 1226, 1227; *see generally* CPLR 5511).

Plaintiff alleged that he sustained qualifying injuries to, inter alia, his cervical and lumbar spine. Contrary to defendant's contention, we conclude that plaintiff met his initial burden of establishing that he had a significant limitation of use of his cervical and lumbar spine, and defendant failed to raise an issue of fact sufficient to defeat the motion (*see Ellithorpe v Marion* [appeal No. 2], 34 AD3d 1195, 1196-1197). Plaintiff submitted the affidavit and report of a physician who interpreted the MRI studies of his cervical and lumbar spine and opined that plaintiff has anterior disc herniations at C4-5, C5-6 and L5-S1. Plaintiff also submitted the

records of a physician who both reviewed the MRI studies and examined plaintiff. That physician agreed with the above interpretation and opined that there was a "relative indication" for spinal surgery but that surgery was not an option because of the nature of plaintiff's diabetic condition, and that the injuries were caused by the motor vehicle accident (*see id.* at 1196-1197).

It is well established that proof of a herniated disc, without additional objective evidence, is not sufficient to establish a serious injury (*see Pommells v Perez*, 4 NY3d 566, 574). Plaintiff also submitted, however, the certified records of his treating chiropractor, as well as the report of the physician who conducted an independent medical examination (IME) for defendant two years later, and those documents quantify significant limitations in the range of motion in plaintiff's cervical and lumbar spine. Plaintiff therefore established the " 'extent or degree of the limitation . . . [and] its duration' " (*Lively v Fernandez*, 85 AD3d 981, 982; *see Gates v Longden*, 120 AD3d 980, 981-982; *see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). Defendant failed to raise an issue of fact sufficient to defeat the motion with the conclusory opinion of the IME physician that the MRI studies were "unremarkable." Indeed, the IME physician recorded that plaintiff's range of motion "remains impaired" and furthermore, as noted above, the measurements set forth in his own report specifically quantify significant limitations in plaintiff's range of motion.

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1092

CAF 14-00601

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF WILLIAM MELLEN,
PETITIONER-APPELLANT,

V ORDER

AMY MELLEN, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN M. WESLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

GERMAIN & GERMAIN, LLP, SYRACUSE (GALEN F. HAAB OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered February 26, 2014 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

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

1097

CA 14-01871

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF THE ESTATE OF DOROTHY H. LONGLEY, DECEASED.

---------- ORDER

MARY ANN LATHAN, PETITIONER-RESPONDENT;

RUTH ANN SALVADOR, OBJECTANT-APPELLANT.

MICHAEL E. JONASCU, HONEOYE FALLS, FOR OBJECTANT-APPELLANT.

POLOWITZ & SCHWACH, LLP, BUFFALO (LAWRENCE R. SCHWACH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Erie County (Barbara Howe, S.), entered May 27, 2014. The decree, among other things, admitted decedent's December 11, 2010 Last Will and Testament to probate.

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

Entered: October 2, 2015

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1180/88) KA 15-01007. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SANTO GONZALEZ, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND VALENTINO, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (1393/88) KA 15-00886. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FREDERICK EARL WALKER, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (1742/95) KA 15-00990. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRIAN SCOTT LORENZO, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NOS. (153-154/96) KA 05-01122. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 05-01123. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (330/04) KA 01-02565. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN K. WILLIAMS, DEFENDANT-APPELLANT. –- Motion for writ of

error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (164/05) KA 01-01500. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENJAMIN SWITZER, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (1585/09) KA 07-02429. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AHMIR COLE, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (162/10) KA 08-02022. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CARLOS PETERSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (1012/11) KA 09-01372. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PAUL A. OSBORNE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (226/12) KA 10-00616. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V STUART J. DIZAK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (618/13) KA 11-01397. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PERRY GRIGGS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (1098/13) KA 09-01279. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V VERNON L. CARTER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (1294/13) KA 09-00385. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEON S. ANDERSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (459/14) CA 13-01332. -- MARY KALK BIELBY, PLAINTIFF-APPELLANT, V DANIEL MIDDAUGH, INDIVIDUALLY AND AS SHERIFF OF ONEIDA COUNTY, PETER PARAVATI, INDIVIDUALLY AND AS UNDERSHERIFF OF ONEIDA COUNTY SHERIFF'S DEPARTMENT, THE ESTATE OF JAMES ENGLISH, DECEASED, JOSEPH LISI, INDIVIDUALLY AND AS AN EMPLOYEE OF ONEIDA COUNTY SHERIFF'S DEPARTMENT,

COUNTY OF ONEIDA, AND PATRICIA COPPERWHEAT, INDIVIDUALLY AND AS AN EMPLOYEE OF ONEIDA COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (540/14) KA 12-01248. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL A. ROSS, DEFENDANT-APPELLANT. -- Motion for reconsideration denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (703/14) KA 11-01064. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRIAN BROWN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (1185/14) KA 13-00948. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALEXANDER J. KESSLER, ALSO KNOWN AS ALEXANDER JACOB KESSLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (14/15) CA 13-00976. -- ADAM VILLAR, PLAINTIFF-APPELLANT, V COUNTY OF ERIE, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motions for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND DEJOSEPH,

JJ. (Filed Oct. 2, 2015.)

MOTION NO. (244/15) CA 14-01125. -- JEFFERY BURNS, PLAINTIFF-RESPONDENT, V LECESSE CONSTRUCTION SERVICES LLC, DUKES PROPERTY DEVELOPMENT, LLC, THE MILLS HIGH FALLS HOUSING DEVELOPMENT FUND COMPANY, INC., U.S. CEILING CORP., URBAN LEAGUE OF ROCHESTER, NY, INC., DEFENDANTS-APPELLANTS, AND PRO CARPET, INC., DEFENDANT. PRO CARPET, INC., THIRD-PARTY PLAINTIFF-APPELLANT, V JEFFERY W. BURNS, DOING BUSINESS AS BURNS FLOORING, THIRD-PARTY DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (285/15) CA 14-01485. -- SCOTT BOWMAN, PLAINTIFF-APPELLANT, V JEANETTE E. ZUMPANO, ET AL., DEFENDANTS, KATHI WHEATLEY AND RANDY K. WHEATLEY, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (307/15) CA 14-01640. -- SHANE VANDERWALL, PLAINTIFF-APPELLANT, V 1255 PORTLAND AVENUE LLC AND SPOLETA CONSTRUCTION LLC, DEFENDANTS-RESPONDENTS. SPOLETA CONSTRUCTION LLC, THIRD-PARTY PLAINTIFF, V HUB-LANGIE PAVING, INC., THIRD-PARTY DEFENDANT. -- Motions for leave to

appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (351/15) CA 14-01385. -- IN THE MATTER OF RITE AID CORPORATION, PETITIONER-RESPONDENT, V STEPHEN HAYWOOD, ASSESSOR, AND BOARD OF ASSESSMENT REVIEW OF TOWN OF WILLIAMSON, WAYNE COUNTY, RESPONDENTS-APPELLANTS. (PROCEEDING NOS. 1 & 2.) IN THE MATTER OF RITE AID CORPORATION, PETITIONER-RESPONDENT, V TOWN OF WILLIAMSON BOARD OF ASSESSMENT REVIEW, ASSESSOR OF TOWN OF WILLIAMSON AND TOWN OF WILLIAMSON, WAYNE COUNTY, RESPONDENTS-APPELLANTS. (PROCEEDING NO. 3.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (356/15) CA 14-00961. -- IN THE MATTER OF RITE AID CORPORATION, PETITIONER-RESPONDENT, V TERIE HUSEBY, ASSESSOR, AND BOARD OF ASSESSMENT REVIEW OF TOWN OF IRONDEQUOIT, RESPONDENTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (357/15) CA 14-00962. -- IN THE MATTER OF RITE AID CORPORATION, PETITIONER-RESPONDENT, V TERIE HUSEBY, ASSESSOR, AND BOARD OF ASSESSMENT REVIEW OF TOWN OF IRONDEQUOIT, RESPONDENTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT:

SCUDDER, P.J., SMITH, CARNI, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (478/15) CA 14-02011. -- SCOTT M. HARVEY, PLAINTIFF-APPELLANT, V HANDELMAN, WITKOWICZ AND LEVITSKY, LLP, STEVEN M. WITKOWICZ AND STEVEN B. LEVITSKY, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (525/15) CA 14-01855. -- KATHLEEN BENEDETTI, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ERIC SMITH, DECEASED, PLAINTIFF-RESPONDENT, V ERIE COUNTY MEDICAL CENTER CORPORATION, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (535/15) KA 12-00840. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARIO CLARK, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (550/15) CA 14-02000. -- REBECCA LALKA, PLAINTIFF-APPELLANT, V ACA INSURANCE COMPANY, DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (576/15) CA 14-01993. -- LYUBOV KLEPANCHUK, NADIA FEFILOV, HOA NGO, KASEY GHARET, WILLIAM HILL, JR., AND THE ESTATE OF LE NGO, DECEASED, PLAINTIFFS-RESPONDENTS, V COUNTY OF MONROE AND MONROE COUNTY AIRPORT AUTHORITY, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (606/15) CA 14-01927. -- P&B CAPITAL GROUP, LLC, AND P&B ACQUISITIONS, LLC, PLAINTIFFS-APPELLANTS, V RAB PERFORMANCE RECOVERIES, LLC, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND VALENTINO, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (625/15) CA 14-01788. -- JESSICA MANFORD, PLAINTIFF-RESPONDENT, V FRED M. WILBER, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (651/15) CA 14-02303. -- IN THE MATTER OF EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION. BETH ANN PIENTA, AS SUCCESSOR EXECUTRIX OF THE ESTATE OF LEE HOLDSWORTH, DECEASED, AND AS EXECUTRIX OF THE ESTATE OF CAROL A. HOLDSWORTH, DECEASED, PLAINTIFF-RESPONDENT, V A.W. CHESTERTON COMPANY, ET AL., DEFENDANTS, AND CRANE CO., DEFENDANT-APPELLANT. -- Motion

for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (706/15) CA 14-01040. -- CATHERINE FLINT, ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF MARIE SMITH, DECEASED, PLAINTIFF-APPELLANT, V ROBERT ZIELINSKI, M.D., DEFENDANT-RESPONDENT, ET AL., DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CARNI, VALENTINO, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (707/15) CA 14-01856. -- DAVID G. HARRIS, PLAINTIFF-APPELLANT, V SYRACUSE UNIVERSITY, NANCY CANTOR, ERIC SPINA, MELVIN STITH, RANDAL ELDER AND SUSAN ALBRING, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CARNI, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (708/15) CA 14-01857. -- DAVID G. HARRIS, PLAINTIFF-APPELLANT, V SYRACUSE UNIVERSITY, NANCY CANTOR, ERIC SPINA, MELVIN STITH, RANDAL ELDER AND SUSAN ALBRING, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CARNI, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (711/15) CA 14-01919. -- IN THE MATTER OF JAMES R. DIEGELMAN AND ANDREA M. DIEGELMAN, CLAIMANTS-RESPONDENTS, V CITY OF BUFFALO AND CITY OF BUFFALO BOARD OF EDUCATION, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CARNI, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (727/15) CA 14-00117. -- ACQUEST WEHRLE, LLC, PLAINTIFF-RESPONDENT, V TOWN OF AMHERST, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (728/15) CA 14-01436. -- ACQUEST WEHRLE, LLC, PLAINTIFF-RESPONDENT, V TOWN OF AMHERST, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (750/15) CA 14-01337. -- TOWN OF AMHERST, PLAINTIFF-RESPONDENT, V GRANITE STATE INSURANCE COMPANY, INC., DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (761/15) CA 15-00051. -- IN THE MATTER OF LEONARD FISCHER, PETITIONER-RESPONDENT, V MICHAEL GRAZIANO, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, AND TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (804/15) CA 14-01566. -- DONNA M. LATTUCA, PLAINTIFF-RESPONDENT, V JOHN M. LATTUCA, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (812/15) CA 14-02149. -- AFFINITY ELMWOOD GATEWAY PROPERTIES, LLC, PLAINTIFF-RESPONDENT, V AJC PROPERTIES LLC, ET AL., DEFENDANTS, EVELYN BENCINICH, SUSAN M. DAVIS, STEVEN GATHERS, ANGELINE C. GENOVESE, SANDRA GIRAGE, ANDREW B. LANE AND LORENZ M. WUSTNER, DEFENDANTS-APPELLANTS. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (835/15) CA 13-01599. -- MICHAEL J. CARLSON, SR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CLAUDIA D'AGOSTINO CARLSON, DECEASED, AND AS ASSIGNEE OF WILLIAM PORTER, PLAINTIFF-RESPONDENT, V AMERICAN INTERNATIONAL GROUP, INC., ET AL., DEFENDANTS, AND AMERICAN ALTERNATIVE

INSURANCE CO., DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (836/15) CA 15-00089. -- IN THE MATTER OF DESIREE DAWLEY, JAMES DAWLEY, LYNN BARBUTO, ROBERT BARBUTO, JAMES NEARPASS, ASTRID NEARPASS, TODD WORDEN, LAURA WORDEN, JONATHAN MORELLI AND JANE MORELLI, PETITIONERS-APPELLANTS, V WHITETAIL 414, LLC, WILMORITE, INC., TOWN OF TYRE TOWN BOARD, JAMES LEONARD AND JEANNE LEONARD, RESPONDENTS-RESPONDENTS. -- Motions for reargument denied. Motions for leave to appeal to the Court of Appeals granted. PRESENT: CENTRA, J.P., CARNI, VALENTINO, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (840/15) CA 14-02027. -- MICHAEL J. CARLSON, SR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CLAUDIA D'AGOSTINO CARLSON, AND AS ASSIGNEE OF WILLIAM PORTER, PLAINTIFF-RESPONDENT-APPELLANT, V AMERICAN INTERNATIONAL GROUP, INC., AIG DOMESTIC CLAIMS, INC., AMERICAN ALTERNATIVE INSURANCE CO., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, DEFENDANTS-APPELLANTS-RESPONDENTS, AND DHL EXPRESS (USA), INC., FORMERLY KNOWN AS DHL WORLDWIDE EXPRESS, INC., DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

MOTION NO. (877.1/15) CA 15-00856. -- IN THE MATTER OF CONCRETE APPLIED TECHNOLOGIES CORPORATION, DOING BUSINESS AS CATCO, PETITIONER-RESPONDENT, V COUNTY OF ERIE, MARIA R. WHYTE, COMMISSIONER, ERIE COUNTY DEPARTMENT OF ENVIRONMENTAL PLANNING, AND KANDEY COMPANY, INC., RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed Oct. 2, 2015.)

CAF 14-01739. -- IN THE MATTER OF CINIA E. BILES, PETITIONER-RESPONDENT, V MICHAEL S. BILES, RESPONDENT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: By order entered August 26, 2014, upon respondent's default, Family Court granted sole custody of the subject children to petitioner. Respondent's assigned appellate counsel has moved to be relieved of the assignment on the ground that there are no nonfrivolous issues for appeal. We conclude that there is a nonfrivolous issue as to whether Family Court abused its discretion in denying the request by respondent's trial counsel for an adjournment (*see Tun v Aw*, 10 AD3d 651, 652). We therefore relieve appellate counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from an Order of Family Court, Oneida County, Randal B. Caldwell, J. - Custody). PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)

KA 14-00301. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ELIZABETH L. WHITE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from a Judgment of Ontario County Court, Craig J. Doran, J. - Attempted Burglary, 3rd Degree). PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Oct. 2, 2015.)