SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 20, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED NOVEMBER 20, 2020

_____	292	CA 19 00831	VERN R. WATSON V JOHN PESCHEL
_____	363	KA 19 01723	PEOPLE V CHASAREA L. ANDERSON
_____	573	KA 18 01620	PEOPLE V KEITH GRIFFIN
_____	586	CA 19 01138	PEOPLE OF THE STATE OF NEW YORK V HARRIS ORIGINALS OF NY, INC.
_____	596	KA 16 02162	PEOPLE V JOHN E. PINNOCK
_____	647	CAF 19 01545	TIMOTHY M. M. V DOREEN R.
_____	648	CAF 19 01969	TIMOTHY M. M. V DOREEN R.
_____	680	CA 19 02303	TAMMY M. WOOD V NATHANIEL CHARLES BROWNLEE
_____	682	KA 18 00519	PEOPLE V GREGORY SEPPE
_____	705	CA 19 00401	JO ALLOWAY V BOWLMOR AMF CORP.
_____	707	CA 19 02136	JERRY WEIKEL, SR. V TOWN OF WEST TURIN
_____	751	KA 16 01619	PEOPLE V JOACHIM SYLVESTER
_____	769	KA 18 01961	PEOPLE V RAYMOND LOVETTE, JR.
_____	770	KA 18 01478	PEOPLE V RAYMOND LOVETTE
_____	790	CA 19 00939	ROBERT C. WILLIAMS V RIDGE VIEW MANOR, LLC
_____	791	CA 20 00068	ROBERT C. WILLIAMS, JR. V RIDGE VIEW MANOR, LLC
_____	822	KA 19 00250	PEOPLE V SHEAHONNIE DAVIS
_____	826	KA 17 00658	PEOPLE V DONALD R. MEYERS
_____	840	CA 19 01671	WATERTOWN PROFESSIONAL FIREFIGHTERS ASSOCIATION LO CITY OF WATERTOWN
_____	867	KA 14 01484	PEOPLE V BRIAN BARRETT
_____	868	KA 15 00052	PEOPLE V BRIAN T. BARRETT
_____	869	KA 16 02083	PEOPLE V EVAN J. CRITTENDEN
_____	929	KA 18 00720	PEOPLE V JULIO RAMOS-PEREZ
_____	930	KA 19 01090	PEOPLE V JEFFREY A. SALONE, JR.

_____	937	CAF 19 00558	Mtr of IRELYNN S.
_____	945	CA 19 01498	CLARK A. BONO V TOWN OF HUMPHREY
_____	950	KA 19 01439	PEOPLE V LAWAYNE TURNER
_____	959	CAF 18 02347	LINDSAY R. BETTS V WAYNE E. MOORE
_____	979	CA 19 01399	SUSAN NOBILE V PATRICIA R. TRAWINSKI
_____	998	CAF 19 00944	Mtr of JAYDA W.
_____	999	CAF 19 00912	Mtr of SANDY L. S.
_____	1000	CAF 19 01017	Mtr of JANAE R.
_____	1001	CAF 20 00695	CHRISTOPHER J. TARTAGLIA V KIMBERLY M. TARTAGLIA
_____	1016	KA 18 02268	PEOPLE V MICHAEL J. HILL
_____	1021	CAF 19 00689	Mtr of MODESTY B.
_____	1022	CAF 19 02132	Mtr of DANYEL J.
_____	1043	CAF 19 00428	Mtr of HAYDEN A.
_____	1044	CAF 19 00653	Mtr of HAYDEN A.
_____	1046	CAF 19 01877	JOSHUA J. GASDIK V HEATHER WINIARZ
_____	1063	KA 18 02218	PEOPLE V SERENA L. SNYDER
_____	1077	KA 18 00303	PEOPLE V GREGORY EDWARDS
_____	1078	KA 19 02224	PEOPLE V MARK GATLING
_____	1081	KA 17 01969	PEOPLE V QUASHAR NEIL
_____	1082	KAH 19 01293	RICHARD B. LYON V MATTHEW THOMS
_____	1083	KA 19 00343	PEOPLE V CLIFTON SEYMORE
_____	1084	CAF 19 00244	Mtr of STEVEN D., JR.
_____	1085	CAF 19 00285	RANDY P. LANE, JR. V ROXANNE RAWLEIGH
_____	1092	CA 20 00595	HILLARY BETH RIFKIN V WILLIAM JOHN ILECKI

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

292

CA 19-00831

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

VERN R. WATSON, PLAINTIFF-APPELLANT-RESPONDENT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

JOHN PESCHEL, DEFENDANT-RESPONDENT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (MELISSA A. MURPHY OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN FELTER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered April 24, 2019. The order granted that part of the motion of plaintiff Vern R. Watson for summary judgment on the issue of negligence and denied that part of the motion for summary judgment on the issue of serious injury.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, damages for injuries that Vern R. Watson (plaintiff) allegedly sustained when the vehicle he was driving collided with a vehicle operated by defendant after defendant ran a red light. Plaintiffs alleged that, as a result of the motor vehicle accident, plaintiff sustained injuries to his cervical spine and right vocal cord that constituted serious injuries within the meaning of Insurance Law § 5102 (d). Plaintiff appeals from an order insofar as it denied that part of his motion seeking summary judgment on the issue of serious injury under the categories of significant limitation of use and permanent consequential limitation of use. Defendant cross-appeals from the same order to the extent that it granted that part of plaintiff's motion seeking summary judgment on the issue of negligence.

We reject plaintiff's contention on appeal that Supreme Court erred in denying that part of his motion on the issue of serious injury under the categories of significant limitation of use and permanent consequential limitation of use. Even assuming, arguendo, that plaintiff met his initial burden of demonstrating his entitlement to judgment as a matter of law to that extent, we conclude that defendant raised a triable issue of fact whether plaintiff's injuries

were causally related to the accident or the result of a preexisting injury to his cervical spine (*see Cicco v Durolek*, 147 AD3d 1487, 1488 [4th Dept 2017]). The parties do not dispute that plaintiff underwent surgery on his cervical spine after the accident and that, as a result of the surgery, plaintiff sustained a vocal cord injury. It logically follows that, if plaintiff's cervical spine condition was unchanged by the accident, the resulting surgery was related to a preexisting condition and any injuries caused thereby, i.e., to the vocal cord, would similarly be unrelated to the accident (*see generally Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]). Based on the record here, we conclude that "it is not possible to determine as a matter of law whether the injuries of plaintiff that were objectively ascertained after the accident were the same injuries that were objectively ascertained before the accident. To the contrary, the conflicting opinions of the parties' respective experts warrant a trial on the issue of serious injury" (*Cicco*, 147 AD3d at 1488).

Contrary to defendant's contention on his cross appeal, we conclude that the court properly granted that part of the motion on the issue of negligence. Plaintiff met his initial burden on the motion of establishing as a matter of law that defendant was negligent in his operation of the vehicle inasmuch as defendant failed to stop at a red light (*see generally Boorman v Bowhers*, 27 AD3d 1058, 1059 [4th Dept 2006]). Contrary to defendant's contention, he failed to raise an issue of fact whether the emergency doctrine applies here (*see Aldridge v Rumsey*, 275 AD2d 897, 897 [4th Dept 2000]; *cf. Chwojdak v Schunk*, 164 AD3d 1630, 1631 [4th Dept 2018]; *Boorman*, 27 AD3d at 1059). The emergency doctrine provides that, "when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the [driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Dalton v Lucas*, 96 AD3d 1648, 1648 [4th Dept 2012] [internal quotation marks omitted]). However, "[t]he emergency doctrine is only applicable when a party is confronted by [a] sudden, unforeseeable occurrence not of their own making" (*Gage v Raffensperger*, 234 AD2d 751, 752 [3d Dept 1996]; *see McGraw v Glowacki*, 303 AD2d 968, 969 [4th Dept 2003]). Stated differently, "it is settled law that the emergency doctrine has no application where . . . the party seeking to invoke it has created or contributed to the emergency" (*Sweeney v McCormick*, 159 AD2d 832, 833 [3d Dept 1990]; *see Mead v Marino*, 205 AD2d 669, 669 [2d Dept 1994]). Further, although hearsay evidence may be considered in opposition to a motion for summary judgment, it is not by itself sufficient to defeat such a motion (*see Thygesen v North Bailey Volunteer Fire Co., Inc.*, 151 AD3d 1708, 1710 [4th Dept 2017]). Here, defendant testified at his deposition that, at the time of the accident, he was not sure why he could not apply his brakes. He learned after the accident from a body shop mechanic that "[t]he floor pad was rolled up underneath the brake pedal." He also testified that the floor mat sliding underneath his brakes was "the only reason [he could] think of" for his inability to brake. In view of that deposition testimony, we conclude that defendant's reliance on the emergency doctrine was based solely on

hearsay and speculation and thus did not raise a triable issue of fact whether that doctrine applies. The record includes no affidavit or deposition testimony from defendant's mechanic.

We disagree with our dissenting colleagues that the rule precluding the use of hearsay alone to defeat a summary judgment motion does not apply here because plaintiff also submitted defendant's deposition transcript containing the inadmissible hearsay. Hearsay alone is "insufficient to raise a triable issue of fact" (*Hyde v Transcontinent Record Sales, Inc.*, 111 AD3d 1339, 1340 [4th Dept 2013]), and we cannot conclude that plaintiff, by submitting defendant's deposition transcript, adopted defendant's statements therein as true, accurate, and most importantly, not hearsay (*cf. Shaw v Rosha Enters., Inc*., 129 AD3d 1574, 1576 [4th Dept 2015]). We similarly disagree with our dissenting colleagues' alternative contention that plaintiff waived any objection to the hearsay contained in defendant's deposition testimony by submitting it on the motion. Hearsay objections cannot be asserted at a deposition and are therefore not waived if not interposed (*see* CPLR 3115; 22 NYCRR 221.1). Notably, inasmuch as an objection to hearsay within a deposition can be raised for the first time at trial (*see* CPLR 3115 [a]), it is illogical to conclude that one could waive any such objection by merely submitting the deposition transcript during motion practice.

Furthermore, even assuming, arguendo, that the evidence regarding the floor mat sliding underneath defendant's brakes and preventing him from braking was based on neither speculation nor hearsay, we conclude that defendant's submissions in opposition to the motion are nonetheless insufficient to raise a triable issue of fact whether the emergency doctrine applies. The record establishes that defendant was the only person in the vehicle, and defendant did not submit any evidence that any other person was responsible for the floor mat rolling up under the brake and purportedly causing the accident. Significantly, the record establishes that defendant successfully applied his brakes twice before the collision. Thus, we conclude that defendant failed to demonstrate that the emergency encountered was not of his own making, i.e., that defendant did not create or contribute to it (*see Sweeney*, 159 AD2d at 833).

All concur except CENTRA and CURRAN, JJ., who dissent and vote to modify in accordance with the following memorandum: We agree with the majority's conclusion on the appeal of Vern R. Watson (plaintiff) that Supreme Court properly denied that part of plaintiff's motion seeking summary judgment on the issue of serious injury within the meaning of Insurance Law § 5102 (d). We disagree, however, with the majority's conclusion on defendant's cross appeal that the court properly granted that part of plaintiff's motion seeking summary judgment on the issue of negligence, and we would therefore modify the order by denying the motion in its entirety. Specifically, we conclude that the court erred in granting the motion to that extent because triable issues of fact exist whether the emergency doctrine applies.

As noted by the majority, "[t]he emergency doctrine is only

applicable when a party is confronted by [a] sudden, unforeseeable occurrence not of their own making" (*Gage v Raffensperger*, 234 AD2d 751, 752 [3d Dept 1996]; *see Stewart v Ellison*, 28 AD3d 252, 254 [1st Dept 2006]; *McGraw v Glowacki*, 303 AD2d 968, 969 [4th Dept 2003]). Significantly, the majority does not address plaintiff's burden on his motion to "show that there is no defense to the cause of action or that the . . . defense has no merit" (CPLR 3212 [b]). Additionally, the majority does not dispute that defendant was confronted with a sudden and unforeseen circumstance inasmuch as he was unable to stop his vehicle before entering the intersection where the accident occurred, despite attempting to apply his brakes. The unforeseeability of defendant's inability to brake at the time of the accident is underscored by the fact that he successfully applied his brakes at two previous intersections minutes before the accident.

The majority concludes, however, that on this record there is no triable issue of fact whether the emergency doctrine applies because defendant's submissions regarding the application of that doctrine were based on speculation and hearsay and failed to establish that any emergency encountered by defendant was not of his own making. We disagree and conclude that plaintiff failed to meet his initial burden on the motion because his own submissions raise questions of fact on those issues.

Just as "what constitutes reasonable care under the circumstances ordinarily is a question for the jury" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 332 [1981], *rearg denied* 54 NY2d 831 [1981]), it is equally well settled that "it generally remains a question for the trier of fact to determine whether an emergency existed" and whether the party asserting the existence thereof was negligent in causing the emergency (*Shanahan v Mackowiak*, 111 AD3d 1328, 1329 [4th Dept 2013] [internal quotation marks omitted]). For an emergency to be of a defendant's own making, there must be a showing that *the defendant's own negligence* caused or contributed to the emergency, i.e., that the defendant "fail[ed] to use that degree of care that a reasonably prudent person would have used under the same circumstances" (PJI 2:10; *see* PJI 2:14; *see generally Herbert v Morgan Drive-A-Way*, 202 AD2d 886, 888-889 [3d Dept 1994, Yesawich, Jr., J., dissenting], *revd on dissenting op* 84 NY2d 835 [1994]; *Unger v Belt Line Ry. Corp.*, 234 NY 86, 90 [1922]).

Here, "[v]iewing the evidence in the light most favorable to the nonmoving part[y], as we must" (*Jayes v Storms*, 12 AD3d 1090, 1091 [4th Dept 2004]), we conclude that plaintiff's own submissions on his motion raise triable issues of fact whether defendant was faced with an emergency and, if so, whether defendant was negligent in causing that emergency (*see generally Thornton v Husted Dairy, Inc.*, 134 AD3d 1402, 1402 [4th Dept 2015]). Specifically, plaintiff submitted defendant's entire deposition testimony, which supplied a nonnegligent explanation for defendant's failure to stop at the intersection where the vehicle he was driving collided with plaintiff's vehicle and raised an issue of fact whether defendant was faced with an unanticipated situation (*see generally Ferrer v Harris*, 55 NY2d 285,

291-292 [1982], *mot to amend remittitur granted* 56 NY2d 737 [1982]; *Warner v Kain*, 162 AD3d 1384, 1386 [3d Dept 2018]; *Sossin v Lewis*, 9 AD3d 849, 850-851 [4th Dept 2004], *amended on rearg on other grounds* 11 AD3d 1045 [4th Dept 2004]). As noted by the majority, defendant testified at his deposition that he was told by his mechanic that his floor mat had shifted under his brake pedal, preventing him from depressing the brake as he approached the intersection. Defendant also testified that he had no previous problems with his brakes or the floor mat.

We also disagree with the majority to the extent that it concludes that defendant's deposition testimony with respect to the floor mat constituted inadmissible hearsay in the context of plaintiff's motion and was therefore insufficient to raise a triable issue of fact. Although hearsay may not be used as the sole means for opposing a motion for summary judgment (*see Biggs v Hess*, 85 AD3d 1675, 1676 [4th Dept 2011]), that rule does not apply here because, to meet his initial burden, plaintiff submitted defendant's entire deposition testimony and thus plaintiff's own submissions raised "triable issues of fact whether [defendant] was faced with an emergency situation" (*White v Mayfield* [appeal No. 2], 161 AD3d 1552, 1554 [4th Dept 2018]; *see Thornton*, 134 AD3d at 1402; *Shaw v Rosha Enters., Inc.*, 129 AD3d 1574, 1575-1576 [4th Dept 2015]). Moreover, even if that rule applied under these circumstances, we conclude that by submitting defendant's entire deposition, plaintiff waived any objection to the hearsay contained therein (*see* Jerome Prince, Richardson on Evidence § 8-108 [Farrell 11th ed 1995]) and, "in effect, 'adopted [those statements] as accurate' " (*Shaw*, 129 AD3d at 1576).

We further submit that—contrary to the majority's conclusion—neither CPLR 3115 nor 22 NYCRR 221.1 is relevant to the situation presented here. We do not dispute that, *at trial*, plaintiff would be entitled to object to the hearsay testimony of defendant regarding what his mechanic told him about the brake pedal. In the context of *plaintiff's motion*, however, that testimony was proffered by plaintiff who, as noted, thereby adopted it (*see Shaw*, 129 AD3d at 1576) and created a triable question of fact with his own submissions (*see generally Thornton*, 134 AD3d at 1402).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

363

KA 19-01723

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

CHASAREA L. ANDERSON, DEFENDANT-RESPONDENT.

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

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

Appeal from an oral order of the Monroe County Court (Sam L. Valleriani, J.), dated February 20, 2019. The oral order dismissed the indictment.

It is hereby ORDERED that the oral order so appealed from is unanimously reversed on the law, those parts of the omnibus motion and the supplemental motion seeking to dismiss the indictment pursuant to CPL 30.30 based on a delay in prosecution during the period from July 14, 2017 to February 12, 2018 are denied, the indictment is reinstated and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an oral order (*see generally People v Elmer*, 19 NY3d 501, 507-508 [2012]) granting defendant's motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30 [1] [a]). Defendant was indicted by a sealed indictment on July 14, 2017. He was ultimately apprehended in Georgia on September 7, 2018, and arraigned on September 27, 2018, at which time the People announced their readiness for trial. In his omnibus motion and supplemental motion, defendant contended that the People had failed to exercise due diligence in attempting to locate him and, as a result, the periods during which he was absent or unavailable could not be excluded from speedy trial calculations (*see* CPL 30.30 [4] [c] [i]). County Court ultimately held a hearing, but limited the evidence to be presented to the time period from the indictment through February 12, 2018, i.e., the date that law enforcement officers learned that defendant might be residing in Georgia.

There is no dispute that defendant met his initial burden "of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]; *see* CPL 30.30 [1] [a]), and that the burden therefore shifted

to the People to demonstrate "sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]). We agree with the People that the court erred in concluding that they failed to establish that the time period at issue at the hearing was excludable from speedy trial calculations.

In computing the time within which the People must be ready for trial, the court must exclude, inter alia, the period of delay resulting from defendant's absence (*see* CPL 30.30 [4] [c] [i]). "A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence" (*id.*).

Inasmuch as there is no contention that defendant was attempting to avoid apprehension or prosecution, the issue is whether law enforcement acted with due diligence in attempting to locate him. Although " '[t]he police are not required to search for a defendant indefinitely, . . . they must exhaust all reasonable investigative leads as to his or her whereabouts' " (*People v Williams*, 137 AD3d 1709, 1710 [4th Dept 2016]). The determination whether law enforcement exercised due diligence in attempting to locate a defendant is a mixed question of law and fact (*see People v Luperon*, 85 NY2d 71, 78 [1995]; *People v Montes*, 178 AD3d 1283, 1286 [3d Dept 2019], *lv denied* 34 NY3d 1161 [2020], *reconsideration denied* 35 NY3d 943 [2020]).

Here, we conclude that the People established that they exercised due diligence in attempting to locate defendant during the time period at issue at the hearing. Law enforcement officers routinely checked computer databases, social media outlets, criminal history reports and information from other government agencies to attempt to identify locations where defendant might be located. In addition, officers investigated all of the addresses associated with defendant to varying degrees, speaking with maintenance workers, neighbors, tenants, and defendant's mother. In attempting to conduct subsequent interviews with defendant's mother, law enforcement officers learned that she no longer resided at the same address. Law enforcement officers also contacted and spoke with all of defendant's known employers. Although law enforcement officers did not conduct a full investigation of one address that appeared on one credit agency report, one of the officers testified at the hearing that credit reports were not reliable because "anyone . . . could go apply for a credit card online today and write [any address] on the application." Without any corroboration of defendant's affiliation with that address, the officer did not investigate beyond driving to the address and verifying that it was a commercial and retail building. Ultimately, on February 12, 2018, the officers' periodic database searches yielded a potential address in Georgia.

"[N]otwithstanding the fact that greater efforts could have been undertaken" (*People v Grey*, 259 AD2d 246, 249 [3d Dept 1999], *lv denied* 94 NY2d 880 [2000]), we conclude that the People established that they exercised the requisite due diligence in attempting to locate defendant during the time period at issue at the hearing and

thus that the period of time from July 14, 2017 through February 12, 2018 should be excluded from speedy trial calculations (*see e.g. People v Lewis*, 177 AD3d 1351, 1352 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020], *reconsideration denied* 35 NY3d 971 [2020]; *People v Butler*, 148 AD3d 1540, 1541 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]; *People v Petrianni*, 24 AD3d 1224, 1224-1225 [4th Dept 2005]; *cf. Williams*, 137 AD3d at 1710-1711; *People v Devore*, 65 AD3d 695, 697 [2d Dept 2009]; *People v Davis*, 205 AD2d 697, 699 [2d Dept 1994]).

Although defendant contends that we should nevertheless affirm the oral order on the ground that other periods of time are not excludable and still exceed the statutorily prescribed time period, we do not address that contention inasmuch as it was "not ruled upon" by the court (*People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 195 [2011]).

We therefore reverse the oral order, deny those parts of the omnibus motion and supplemental motion seeking to dismiss the indictment pursuant to CPL 30.30 based on a delay in prosecution during the period from July 14, 2017 to February 12, 2018, reinstate the indictment and remit the matter to County Court for further proceedings on the indictment, including further proceedings related to the speedy trial motion, if necessary.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

573

KA 18-01620

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH GRIFFIN, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 15, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that County Court erred in refusing to suppress a handgun and his statements to the police. Contrary to defendant's contention, the court properly determined that the police conduct was "justified in its inception and . . . reasonably related in scope to the circumstances [that] rendered its initiation permissible" (*People v De Bour*, 40 NY2d 210, 222 [1976]). The 911 caller who reported the incident identified herself as the mother of the victim and indicated that the victim was being subjected to domestic violence by her boyfriend at a specified address, thereby providing sufficient "self-identifying information" to support the court's determination that "the call was not a truly anonymous one, and [that] the police were justified in acting on such information" (*People v Dixon*, 289 AD2d 937, 937, 938 [4th Dept 2001], *lv denied* 98 NY2d 637 [2002]; *see also People v Van Every*, 1 AD3d 977, 978 [4th Dept 2003], *lv denied* 1 NY3d 602 [2004]). The officers' prior knowledge of the residents of the address given by the 911 caller, specifically that defendant was the boyfriend of the reported victim and that the pair resided together at the address given, allowed the officers to identify defendant as the individual suspected of hitting or "jumping on" the reported victim. Thus, at the time the officers arrived at the location in response to the dispatch for a "violent domestic," they possessed a "reasonable

suspicion that [defendant] was involved in a felony or misdemeanor" (*People v Moore*, 6 NY3d 496, 499 [2006]).

When the officers arrived at the scene shortly after 11:30 p.m., they observed defendant standing behind a minivan that was parked in the driveway. Initially, defendant was visible to the responding officers from about the waist up. Upon seeing the officers, however, defendant crouched behind the minivan out of the officers' sight for a few seconds before standing up again. Based on the totality of the circumstances—including the short period of time between the 911 call, the dispatch for a "violent domestic," and the arrival of the police officers at the reported location; the presence of defendant and his girlfriend in the driveway at that location; the responding officers' knowledge of and familiarity with defendant and his girlfriend and the fact that the officers had responded to the same location earlier that night; and defendant's act of crouching behind the minivan when he saw the officers arriving—the officer's verbal command for defendant to emerge from behind the vehicle and place his hands on the side of a house was a reasonably tailored intrusion on defendant's freedom of movement consistent with a level three encounter (*see People v Camber,* 167 AD3d 1558, 1558-1559 [4th Dept 2018], *lv denied* 33 NY3d 946 [2019]; *see generally De Bour*, 40 NY2d at 223).

Contrary to defendant's further contention, he was not subjected to an unlawful arrest when he was handcuffed, pat frisked, and placed in the back of a patrol vehicle. "It is well established that not every forcible detention constitutes an arrest" (*People v Drake*, 93 AD3d 1158, 1159 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]; *see People v Hicks*, 68 NY2d 234, 239 [1986]) and that "officers may handcuff a detainee out of concern for officer safety" (*People v Wiggins*, 126 AD3d 1369, 1370 [4th Dept 2015]; *see People v Allen*, 73 NY2d 378, 379-380 [1989]). A "corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he [or she] is in danger of physical injury by virtue of the detainee being armed" (*De Bour*, 40 NY2d at 223; *see Wiggins*, 126 AD3d at 1370). In the context of this level three encounter—in which the officers were responding to a "violent domestic," defendant and his girlfriend were observed by the responding officers in proximity to one another in the driveway, it was dark outside, and defendant crouched behind a van upon seeing the police arrive—the officers had "reasonable suspicion to believe that defendant posed a threat to their safety" (*People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]). Defendant was carrying something over his shoulder, and a pat frisk of his person was a reasonable measure taken by the officers to ensure that defendant was not armed with a weapon (*see Camber*, 167 AD3d at 1559; *Mack*, 49 AD3d at 1292).

Although the pat frisk of defendant's person did not reveal any weapons, his brief detention in the patrol vehicle was justified while the officers spoke to defendant and his girlfriend separately and investigated the report of domestic violence. Defendant had a history of fleeing from responding officers, and his brief continued detention was reasonable inasmuch as the officers "diligently pursued a

minimally intrusive means of investigation likely to confirm or dispel suspicion quickly" (*Hicks*, 68 NY2d at 242; *see Allen*, 73 NY2d at 380) and " 'a less intrusive means of fulfilling the police investigation was not readily apparent' " (*People v Howard*, 129 AD3d 1654, 1656 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]). Under these circumstances, we conclude that defendant was not under arrest when he was handcuffed, pat frisked, and placed in the patrol vehicle for an investigatory detention (*see People v Pruitt*, 158 AD3d 1138, 1139-1140 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]; *see also People v McCoy*, 46 AD3d 1348, 1349 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008]). The subsequent discovery by an officer of a handgun on the driveway in the same location where defendant had been observed crouching moments earlier gave the officers probable cause to believe defendant dropped the gun there when he saw the officers arrive at the location (*see People v Smith*, 167 AD3d 1505, 1507-1508 [4th Dept 2018], *lv denied* 33 NY3d 954 [2019]).

Contrary to defendant's further contention, the court properly refused to suppress the initial statements he made while detained in the patrol vehicle. Although defendant was at that time in custody for *Miranda* purposes, " 'both the elements of police "custody" and police "interrogation" must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*' " (*People v Hailey*, 153 AD3d 1639, 1640 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017], quoting *People v Huffman*, 41 NY2d 29, 33 [1976]). Here, the only question asked of defendant prior to the administration of *Miranda* warnings was "What is going on?" We conclude that defendant's statements in reply "were responses to [a] threshold inquir[y] by the [officer] that [was] intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime, and those statements thus were not subject to suppression" (*People v Mitchell*, 132 AD3d 1413, 1414 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016] [internal quotation marks omitted]; *see People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* — US —, 137 S Ct 298 [2016]; *People v Carbonaro*, 134 AD3d 1543, 1547 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016], *reconsideration denied* 27 NY3d 1149 [2016]). Defendant was advised of and waived his *Miranda* rights before he was asked any further questions by either the officers at the scene or the detective at the police station.

Defendant further contends that the action of the officer in signaling to the other officers at the scene that he found a handgun in the driveway was the functional equivalent of interrogation. That contention is not preserved for our review inasmuch as defendant failed to raise it in his omnibus motion or before the suppression court (*see generally People v White*, 128 AD3d 1457, 1459 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant also contends that the court erred in refusing to suppress the handgun on the ground that the officer's discovery of it

was the result of an unlawful warrantless search of the curtilage of his home. We reject that contention. "Although a private driveway leading to a home is not outside the area entitled to protection against unreasonable search and seizure . . . , the key inquiry . . . is whether defendant had a reasonable expectation of privacy in this area" (*People v Smith*, 109 AD2d 1096, 1098 [4th Dept 1985]). Here, the record establishes that an officer standing "a couple feet" away from the minivan parked in defendant's driveway observed the handgun on the surface of the driveway below the front bumper of the minivan, which was "the same location" where defendant had crouched when he first saw the officers arriving. The driveway was adjacent to defendant's property on the right and the neighboring house on the left, and it was connected to the public sidewalk in the front. The rear of the parked minivan was approximately at the sidewalk, and the front bumper was approximately "halfway up the driveway" between the two houses. The handgun, therefore, was approximately a minivan's length away from the sidewalk, between defendant's house and the house next door. The area was used for vehicle parking, it was not fenced or gated, and there were no signs or notices evidencing any intent to exclude the public from the area. The area was illuminated by the light from the streetlights. Thus, we conclude that the record supports the court's determination that defendant lacked a reasonable expectation of privacy in the area where the handgun was observed by the officer (*see People v Reed*, 115 AD3d 1334, 1337 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]; *People v Versaggi*, 296 AD2d 429, 429 [2d Dept 2002], *lv denied* 98 NY2d 714 [2002]; *People v Warmuth*, 187 AD2d 473, 474 [2d Dept 1992], *lv denied* 81 NY2d 894 [1993]; *cf. Collins v Virginia*, — US — , 138 S Ct 1663, 1670-1671 [2018]; *United States v Alexander*, 888 F3d 628, 633-634 [2d Cir 2018]).

Even assuming, arguendo, that defendant had established standing to challenge the search of his driveway, the record supports the suppression court's determination that the handgun was not unlawfully seized because "[t]he officer who found the firearm did nothing other than to look at the ground to discover it." The officer was lawfully in a position to view the handgun, had lawful access to it, and its incriminating nature was immediately apparent (*see generally People v Brown*, 96 NY2d 80, 88-89 [2001]; *People v Bishop*, 161 AD3d 1547, 1547 [4th Dept 2018], *lv denied* 32 NY3d 1002 [2018]).

Inasmuch as there was no unlawful police conduct with respect to defendant's investigative detention, his initial statements to the officer, or the seizure of the handgun, his further contention that his subsequent statements to police should have been suppressed as tainted by unlawful police conduct is necessarily without merit (*see People v Bethany*, 144 AD3d 1666, 1668 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

586

CA 19-01138

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

THE PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF STATE OF NEW YORK, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

HARRIS ORIGINALS OF NY, INC., ET AL., DEFENDANTS-RESPONDENTS-APPELLANTS.

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

VENABLE LLP, NEW YORK CITY (ALLYSON B. BAKER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered April 29, 2019. The order granted in part and denied in part the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying that part of the motion seeking to dismiss the seventh cause of action and reinstating that cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging various claims for usury, common-law and statutory fraud, and deceptive business practices. Supreme Court granted in part and denied in part defendants' motion to dismiss the complaint. Plaintiff appeals, and defendants cross-appeal.

We agree with plaintiff on its appeal that the court erred in granting the part of defendants' motion that sought to dismiss the seventh cause of action, which alleges that defendants operated a "credit services business" in a manner that violated General Business Law § 458-h. A "credit services business" is defined as "any person who sells, provides, or performs, or represents that he can or will sell, provide or perform, a service for the express or implied purpose of improving a consumer's credit record, history, or rating or providing advice or assistance to a consumer with regard to the consumer's credit record history or rating in return for the payment of a fee" (§ 458-b [1]). According to the complaint, defendants "represent[]" that they "provide" a "service" to consumers—specifically, financing the purchase of jewelry—and

defendants market such financing as a means "of improving [the] consumer's credit record." Put simply, defendants allegedly offer consumers the option of paying for jewelry over many months, and defendants allegedly advertise that financing option as a mechanism to improve the consumer's credit. In exchange for that financing—i.e., the "service" contemplated by section 458-b (1)—defendants allegedly charge interest. Such interest, we conclude, constitutes a "fee" within the meaning of section 458-b (1). Thus, contrary to the court's determination and the view of our dissenting colleague, the complaint sufficiently alleges that defendants' business satisfies the statutory definition of a "credit services business" (*see People v Debt Resolve, Inc.*, 387 F Supp 3d 358, 366-367 [SD NY 2019]; *see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). We therefore modify the order accordingly.

We reject plaintiff's remaining contentions on its appeal for the reasons stated in the decision at Supreme Court. We likewise reject defendants' contentions on their cross appeal for the reasons stated in the decision at Supreme Court.

All concur except CURRAN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and vote to affirm the order in its entirety. Although I otherwise agree with the majority's conclusions, I reject its determination that Supreme Court erred in granting that part of defendants' motion seeking to dismiss the seventh cause of action, alleging a violation of General Business Law § 458-h, which prohibits certain deceptive acts by a credit services business. In my view, plaintiff did not adequately allege in the complaint the "payment of a fee" required to determine that defendants met the statutory definition of a credit services business (§ 458-b [1]).

General Business Law § 458-b (1) defines a credit services business as "any person who sells, provides, or performs, or represents that he [or she] can or will sell, provide or perform, a service for the express or implied purpose of improving a consumer's credit record, history, or rating or providing advice or assistance to a consumer with regard to the consumer's credit record history or rating in return *for the payment of a fee*" (emphasis added). Here, the seventh cause of action relies on the conclusory allegation that "[b]ased upon the business practices, procedures, and marketing materials described above, [d]efendants are a 'credit services business' within the meaning of the General Business Law" without specifically alleging that defendants charged a fee for that particular service.

In my view, it was incumbent on plaintiff to allege that some form of consideration, i.e., the "payment of a fee," was supplied for the "service" that was purportedly obtained, specifically defendants' assistance in improving "a consumer's credit record, history, or rating or providing advice or assistance to a consumer with regard to the consumer's credit record history or rating" (General Business Law § 458-b [1]). Moreover, the word "fee" should be understood in its ordinary sense as a "fixed charge" or "a sum paid or charged for a

service" (Merriam-Webster Online Dictionary, fee [http://www.merriam-webster.com/dictionary/fee]). The majority's expansive definition of the word "fee" to include the interest charged on the purchase price of the jewelry is likely to broaden the meaning of a credit services business, in a manner not intended by the legislature, to encompass many retail sellers that provide finance services.

In my view, plaintiff's allegation that the entire amount of the interest charged by defendants for the jewelry constituted the statutorily-required "fee" was insufficient to successfully state a cause of action under General Business Law § 458-h. In support of its position that the interest constituted a "fee," plaintiff merely relies on inapposite cases where consumers were charged fees separate from, and in addition to, interest (*see e.g. People v Debt Resolve, Inc.*, 387 F Supp 3d 358, 362 [SD NY 2019]; *CashCall, Inc. v Maryland Commr. of Fin. Regulation*, 448 Md 412, 418-420, 139 A3d 990 [2016]). Plaintiff also contends that, as with the usury claims that the majority agrees should be dismissed, discovery may assist plaintiff in establishing the allegations in the seventh cause of action. The usury claims have not survived despite plaintiff's request for discovery, and I see no reason to treat the seventh cause of action any differently.

Ultimately, absent a specific allegation that defendants imposed some fixed charge as consideration for the credit repair service, the seventh cause of action fails to state a cause of action under General Business Law § 458-h, and the court properly granted the motion with respect to that cause of action (*see generally* CPLR 3211 [a] [7]; *Sager v City of Buffalo*, 151 AD3d 1908, 1910 [4th Dept 2017]; *Miller v Allstate Indem. Co.*, 132 AD3d 1306, 1307 [4th Dept 2015]; *Dominski v Frank Williams & Son, LLC*, 46 AD3d 1443, 1444 [4th Dept 2007]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

596

KA 16-02162

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN E. PINNOCK, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered July 5, 2016. The judgment convicted defendant upon a jury verdict of criminally negligent homicide and assault in the third degree (two counts).

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 Ontario County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant was convicted following a jury trial of one count of criminally negligent homicide (Penal Law § 125.10) and two counts of assault in the third degree (§ 120.00 [3]). The incident giving rise to those charges was an accident involving multiple vehicles that occurred on Route 96 in Farmington after the driver's side wheel on the pickup truck defendant was driving came off and rolled into an oncoming lane of traffic. When the wheel came off, defendant, age 50 with no criminal record, was driving slowly on the side of the road with his four-way flashers activated. A delivery truck hit the detached wheel, tipped over and collided with a third vehicle, killing its operator, before colliding with a fourth vehicle and injuring its two occupants. On appeal, defendant challenges the legal sufficiency and weight of the evidence, contending that his operation of the pickup truck in a state of disrepair cannot be a basis of criminal liability.

We agree with defendant that the verdict is against the weight of the evidence. The testimony at trial established that defendant came into possession of the pickup truck several weeks before the accident, but that its last valid inspection was three years before the accident. Although the People established that the pickup truck had a

forged inspection sticker, there was no evidence that defendant knew it was forged. Several witnesses testified that, in the three days preceding the accident, the pickup truck was making loud grinding noises and that, either the day before the accident or the day of the accident, defendant asked a person with mechanical experience what that person thought might be the issue. That person opined that the noise was likely being caused by a wheel or the brakes.

An inspection of the driver's side wheel and truck after the accident established some significant problems with the wheel, and witnesses testified that the existence of problems would have been noticeable and would have created issues with steering. The testimony also established, however, that the severity of the problems could not have been known to the operator unless the wheel was removed from the truck.

A review of the weight of the evidence requires us to first determine whether an acquittal would have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]). If we determine that an acquittal would not have been unreasonable, then we "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*id.*). We thus " 'serve, in effect, as a second jury' with the power to 'independently assess all of the proof' " (*People v Gonzalez*, 174 AD3d 1542, 1544 [4th Dept 2019], quoting *People v Delamota*, 18 NY3d 107, 116-117 [2011]).

Here, inasmuch as an acquittal would not have been unreasonable, we must independently weigh the evidence and determine whether the People proved defendant's guilt beyond a reasonable doubt. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

The evidence presented at trial failed to establish beyond a reasonable doubt that defendant was criminally negligent in his operation of the truck. Pursuant to Penal Law § 15.05 (4), "[a] person acts with criminal negligence with respect to a result . . . when he [or she] fails to perceive a substantial and unjustifiable risk that such result will occur . . . The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." With respect to the crimes at issue, "[a] person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of another person" (§ 125.10) and, as relevant here, a person is guilty of assault in the third degree when "[w]ith criminal negligence, he [or she] causes physical injury to another person by means of . . . a dangerous instrument," i.e., a vehicle (§ 120.00 [3]; *see generally People v Cabrera*, 10 NY3d 370, 375 [2008]).

It is well settled that " 'the carelessness required for criminal negligence is appreciably more serious than that for ordinary civil

negligence, and that the carelessness must be such that its *seriousness would be apparent to anyone who shares the community's general sense of right and wrong*. Moreover, criminal negligence requires a defendant to have *engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk* of a proscribed result; *nonperception of a risk*, even if [the proscribed result occurs], *is not enough*' " (*Cabrera*, 10 NY3d at 376, quoting *People v Conway*, 6 NY3d 869, 872 [2006]; *see People v Haney*, 30 NY2d 328, 333, 335 [1972]).

Based on the foregoing principles, we conclude that the People failed to prove beyond a reasonable doubt that defendant engaged in some blameworthy conduct that either *created or contributed* to a substantial and unjustifiable risk (*cf. People v Asaro*, 21 NY3d 677, 682-685 [2013]; *People v Paul V.S.*, 75 NY2d 944, 944-945 [1990]; *People v Ricardo B.*, 73 NY2d 228, 235-236 [1989]; *People v Garner*, 144 AD3d 940, 940 [2d Dept 2016], *lv denied* 29 NY3d 1031 [2017]; *People v Olsen*, 124 AD3d 1084, 1085-1087 [3d Dept 2015], *lv denied* 26 NY3d 933 [2015]). At most, the evidence established that defendant failed to perceive a risk, which does not establish criminal negligence beyond a reasonable doubt (*see e.g. Cabrera*, 10 NY3d at 377-378*; People v Boutin*, 75 NY2d 692, 695-698 [1990]; *cf. People v Congregational Khal Chaisidei Skwere*, 232 AD2d 919, 920-921 [3d Dept 1996], *lv denied* 89 NY2d 984 [1997]). Moreover, even if defendant could or should have perceived the risk that a tire on the truck would come off while he was operating the vehicle, the risk that the proscribed result (i.e., the tire coming to rest in the road and then causing a delivery truck to overturn and fall on a car, killing its driver) would occur was not substantial. In sum, this was a tragic and freak accident that does not give rise to criminal liability.

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

Mark W. Bennett

Entered: November 20, 2020

Clerk of the Court

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

647

CAF 19-01545

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

IN THE MATTER OF TIMOTHY M.M.,
PETITIONER-APPELLANT,

V ORDER

DOREEN R., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

MARK A. WOLBER, UTICA, FOR PETITIONER-APPELLANT.

MICHAEL G. PUTTER, ROME, FOR RESPONDENT-RESPONDENT.

JOHN G. KOSLOSKY, UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered July 12, 2019 in a proceeding pursuant to Family Court Act article 4. The order dismissed the petition.

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

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

648

CAF 19-01969

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

IN THE MATTER OF TIMOTHY M.M.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DOREEN R., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

MARK A. WOLBER, UTICA, FOR PETITIONER-APPELLANT.

MICHAEL G. PUTTER, ROME, FOR RESPONDENT-RESPONDENT.

JOHN G. KOSLOSKY, UTICA, ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Oneida County (James R. Griffith, J.), entered September 13, 2019 in a proceeding pursuant to Family Court Act article 4. The amended order, among other things, denied petitioner's motion for summary judgment and granted that part of respondent's motion seeking summary judgment dismissing the petition.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by denying respondent's motion in its entirety and reinstating the petition and as modified the amended order is affirmed without costs and the matter is remitted to Family Court, Oneida County, for further proceedings on the petition.

Memorandum: Petitioner father and respondent mother were married in 1991 and have four children together, two of whom are the subject children. The mother also has three other children from a prior relationship. Before the two subject children were born, the father had an inappropriate sexual relationship with one of his stepdaughters. The parties nonetheless remained married until 2009, when they were divorced. Following the divorce, the mother and the stepdaughter reported the sexual abuse committed by the father to child protective services, which led to the filing of an abuse petition in Family Court. In 2010, the father was granted an adjournment in contemplation of dismissal with respect to the abuse petition upon the condition that he, inter alia, participate in supervised visitation with the subject children. During the next year, although the subject children continued to visit the father, they started to withdraw from him. Ultimately, they ceased visiting him altogether. In 2016, the father filed a petition seeking an order requiring the mother to facilitate his visitation with the subject children. The court, inter alia,

granted the father visitation with the subject children "as he and [the mother] agree" but, despite the order, no such visitation occurred during the next three years.

In February 2019, the father commenced this proceeding pursuant to Family Court Act article 4 seeking to terminate his child support obligation with respect to the subject children on the ground that they had constructively emancipated themselves. Thereafter, the father moved for summary judgment on the petition, and the mother moved for, inter alia, summary judgment—dismissing the petition. The father now appeals from an amended order that, inter alia, denied his motion and granted that part of the mother's motion seeking summary judgment dismissing the petition.

"[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" (*Matter of Oneida County Dept. of Social Servs. v Christman*, 125 AD3d 1409, 1410 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Saunders v Aiello*, 59 AD3d 1090, 1091 [4th Dept 2009]; *see generally Matter of Roe v Doe*, 29 NY2d 188, 193 [1971]).

Even assuming, arguendo, that the subject children were both of employable age (*see Matter of Jones v Jones*, 160 AD3d 1428, 1429 [4th Dept 2018]; *Matter of Jurgielewicz v Johnston*, 114 AD3d 945, 946 [2d Dept 2014]; *see generally* Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 413 at 87 [2008 ed]), we conclude that the father did not meet his initial burden on his motion of establishing that their refusal to visit with him was unjustified (*see Matter of Wiegert v Wiegert*, 267 AD2d 620, 621 [3d Dept 1999]; *see also Christman*, 125 AD3d at 1410). Inasmuch as the father's own submissions suggest that the subject children did not want to visit him due to their purported knowledge of the sex abuse allegations, his submissions failed to eliminate all material issues of fact (*see generally Wiegert*, 267 AD2d at 621). Indeed, the father failed to establish that his behavior "was not a primary cause of the deterioration in his relationship with [the subject] children" (*Matter of Shisgal v Abels*, 179 AD3d 1070, 1072 [2d Dept 2020]). Thus, we conclude that the court properly denied his motion.

We also conclude that the court should not have granted that part of the mother's motion seeking summary judgment dismissing the petition. The court erred in relying on the unsworn letters from the subject children's psychologist because they were not in admissible form (*see Matter of Kenneth J. v Lesley B.*, 165 AD3d 439, 440 [1st Dept 2018]; *LaBeef v Baitsell*, 104 AD3d 1191, 1192 [4th Dept 2013]). Without the letters from the children's psychologist, we conclude that the mother failed to meet her initial burden on her motion of establishing that the children were justified in abandoning the father by refusing to attend visitation. Like the father, the mother did not submit any admissible evidence establishing the reasons for the children's decision not to visit the father. We therefore modify the amended order accordingly.

Finally, because the mother did not cross-appeal from that part of the amended order implicitly denying her request for counsel fees, costs, and disbursements (*see generally Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864 [4th Dept 1993]), her contention that she is entitled to such relief is not properly before us on appeal (*see Mal-Bon, LLC v Smith*, 163 AD3d 1415, 1415 [4th Dept 2018]; *Matter of Treyvone C. [Shameel P.]*, 115 AD3d 1246, 1247 [4th Dept 2014], *lv denied* 23 NY3d 907 [2014]; *see generally Hecht v City of New York*, 60 NY2d 57, 60 [1983]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

680

CA 19-02303

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

TAMMY M. WOOD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL CHARLES BROWNLEE, DEFENDANT-RESPONDENT, AND STELLAR DISTRIBUTION SERVICES, INC., DOING BUSINESS AS NATIONAL DISTRIBUTION SERVICES, INC., DEFENDANT-APPELLANT.

MICHAEL J. VAN AERNAM, PLAINTIFF-RESPONDENT,

V

NATHANIEL CHARLES BROWNLEE, DEFENDANT-RESPONDENT, AND STELLAR DISTRIBUTION SERVICES, INC., DOING BUSINESS AS NATIONAL DISTRIBUTION SERVICES, INC., DEFENDANT-APPELLANT.

GOLDBERG SEGALLA, LLP, BUFFALO (SAMANTHA V. CATONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

NASH CONNORS, P.C., BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (J. David Sampson, A.J.), entered June 17, 2019. The order, insofar as appealed from, denied the motion of defendant Stellar Distribution Services, Inc., doing business as National Distribution Services, Inc. for summary judgment dismissing the amended complaints against it.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion is granted, and the amended complaints against defendant Stellar Distribution Services, Inc., doing business as National Distribution Services, Inc., are dismissed.

Memorandum: Plaintiffs separately commenced these actions seeking damages for injuries they sustained when the vehicle they were traveling in was struck by a vehicle operated by defendant Nathaniel Charles Brownlee. Plaintiffs' amended complaints alleged that, at the time of the collision, Brownlee was acting within the scope of his

employment for defendant Stellar Distribution Services, Inc., doing business as National Distribution Services, Inc. (Stellar). Stellar appeals from an order that, inter alia, denied its motion for summary judgment dismissing the amended complaints against it on the ground that Brownlee was not acting within the scope of his employment when the collision occurred. We reverse the order insofar as appealed from.

" 'Under the doctrine of *respondeat superior*, an employer will be liable for the negligence of an employee committed while the employee is acting in the scope of his [or her] employment . . . As a general rule, an employee driving to and from work is not acting in the scope of his [or her] employment' " (*Swierczynski v O'Neill* [appeal No. 2], 41 AD3d 1145, 1146 [4th Dept 2007], *lv denied* 9 NY3d 812 [2007], quoting *Lundberg v State of New York*, 25 NY2d 467, 470-471 [1969], *rearg denied* 26 NY2d 883 [1970]; *see Cicatello v Sobierajski*, 295 AD2d 974, 975 [4th Dept 2002]). Although the employee's drive home is work motivated, "the element of control is lacking" (*Lundberg*, 25 NY2d at 471), and such a drive is generally undertaken "not . . . to satisfy an obligation . . . owed to [the] employer but solely to satisfy [a] personal desire to . . . [return] home" (*id.* at 472). An exception to that rule applies "where the employee is under the control of his or her employer from the time that the employee enters his or her vehicle at the start of the workday until the employee leaves the vehicle at the end of the workday as is the case, for example, of a traveling salesperson or repairperson" (*Swierczynski*, 41 AD3d at 1147).

We conclude that Stellar established as a matter of law that Brownlee was not acting within the scope of his employment at the time of the accident and that plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, it is undisputed that the collision occurred while Brownlee was driving home from a corporate meeting held by Stellar at its headquarters in Canada. Evidence submitted by Stellar on its motion established that the corporate meeting had ended and that Brownlee had been released for the day at the time of the collision. Although Brownlee testified at his deposition that he believed that he had intended to stop at Stellar's facility in Pennsylvania before returning home, once he received permission to leave the corporate meeting, he was no longer acting in furtherance of any duty that he owed to Stellar and was no longer under Stellar's control (*see Swierczynski*, 41 AD3d at 1147). Indeed, Brownlee did not testify that Stellar had directed him to stop at the Pennsylvania facility or that Stellar had ordered him to perform any other act once the meeting had ended. The fact that the corporate meeting was held at a location other than Brownlee's typical place of work does not alter our analysis, nor does the fact that Brownlee was reimbursed for travel expenses (*see Lundberg*, 25 NY2d at 469, 472).

All concur except BANNISTER, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and vote to affirm the order of Supreme Court. The precise scope of one's employment is heavily dependent on factual considerations, and thus the issue is ordinarily one for the trier of fact (*see Virtuoso v*

Pepsi-Cola Co., 286 AD2d 868, 869 [4th Dept 2001]; *Tenczar v Richmond*, 172 AD2d 952, 953 [3d Dept 1991], *lv denied* 78 NY2d 859 [1991]). In my view, the court properly denied the motion of defendant Stellar Distribution Services, Inc., doing business as National Distribution Services, Inc. (Stellar), for summary judgment dismissing the amended complaints against it because Stellar's own submissions raise questions of fact whether defendant Nathaniel Charles Brownlee was acting within the scope of his employment at the time of the accident.

While Stellar insists that Brownlee's employment duties had ended and that he was on his own time while traveling home, this case does not involve the typical travel between an employee's home and workplace (*see Douglas v Hugerich*, 70 AD2d 755, 756 [3d Dept 1979]). Rather, Brownlee, a facility manager for Stellar, testified at his deposition that he traveled to corporate headquarters in Canada for business reasons inasmuch as he was required to attend Stellar's annual meeting there. He would not have traveled in the area of the accident had it not been for the mandatory corporate meeting. Moreover, the accident occurred at approximately 11:45 a.m. on a Tuesday, i.e., during Brownlee's regular working hours. Brownlee further testified that his intention that day was to drive to his place of employment at Stellar's Pennsylvania facility. In my view, the evidence presents questions of fact whether Brownlee was acting within the scope of his employment when the accident occurred (*see Makoske v Lombardy*, 47 AD2d 284, 288 [3d Dept 1975], *affd* 39 NY2d 773 [1976]), and thus Stellar failed to establish as a matter of law that it had no respondeat superior liability for Brownlee's negligence.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

682

KA 18-00519

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY SEPPE, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (CHERYL L. NIELSEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered November 6, 2017. The judgment convicted defendant upon his plea of guilty of attempted burglary in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20), defendant challenges the validity of his purported waiver of the right to appeal and the severity of his sentence. Inasmuch as " 'defendant has completed serving the sentence imposed, his contention that the sentence is unduly harsh and severe has been rendered moot' . . . , and we therefore need not reach defendant's contention with respect to the alleged invalidity of the waiver of the right to appeal" (*People v Bald*, 34 AD3d 1362, 1362 [4th Dept 2006]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

705

CA 19-00401

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

JO ALLOWAY, ET AL., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BOWLMOR AMF CORP., AMF BOWLING CENTERS, INC., KINGPIN INTERMEDIATE HOLDINGS, LLC, CERBERUS CAPITAL MANAGEMENT, LP, TOM SHANNON, BRETT PARKER, ETHAN KLEMPERER, ERIK WRIGHT, ROBERT DAVENPORT, JERRY COMSTOCK, JOHN YOUNG, GERRY MADIGAN, MICHAEL ELKINS, CERBERUS CAPITAL LP, CERBERUS INSTITUTIONAL PARTNERS LP, CERBERUS INSTITUTIONAL ASSOCIATES, LLC, CERBERUS OPERATIONS AND ADVISORY COMPANY, LLC, CERBERUS CALIFORNIA LLC, CERBERUS SERIES FOUR HOLDINGS, LLC, AAI PENTWATER FUND P.L.C., CHASE LINCOLN FIRST COMMERCIAL CORP., COBALT RECREATION LLC, SELOUS CAPITAL II LLC, OCEANA MASTER FUND LTD, PENTWATER EQUITY OPPORTUNITIES MASTER FUND LTD., PENTWATER EVENT DRIVEN CAYMAN FUND LTD., PWCM MASTER FUND, LTD, MAP 98 SEGREGATED PORTFOLIO OF LMA SPC, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

DOWE PARTNERS, LLC, BRONXVILLE, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, NEW YORK CITY (ROBERTO FINZI OF COUNSEL), AND HANCOCK ESTABROOK, LLP, SYRACUSE, FOR DEFENDANTS-RESPONDENTS BOWLMOR AMF CORP., AMF BOWLING CENTERS, INC., KINGPIN INTERMEDIATE HOLDINGS, LLC, TOM SHANNON, BRETT PARKER, ETHAN KLEMPERER, ERIC WRIGHT, ROBERT DAVENPORT, JERRY COMSTOCK, JOHN YOUNG, GERRY MADIGAN, MICHAEL ELKINS, COBALT RECREATION LLC, AND SELOUS CAPITAL II LLC.

LOWENSTEIN SANDLER LLP, NEW YORK CITY (SHEILA A. SADIGHI, OF THE NEW JERSEY BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CERBERUS CAPITAL MANAGEMENT, LP, CERBERUS CAPITAL LP, CERBERUS INSTITUTIONAL PARTNERS LP, CERBERUS INSTITUTIONAL ASSOCIATES, LLC, CERBERUS OPERATIONS AND ADVISORY COMPANY, LLC, CERBERUS CALIFORNIA LLC, AND CERBERUS SERIES FOUR HOLDINGS, LLC.

DUANE MORRIS LLP, NEW YORK CITY (ANDREW L. FISH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CHASE LINCOLN FIRST COMMERCIAL CORP., AAI PENTWATER FUND P.L.C., OCEANA MASTER FUND LTD., PENTWATER EQUITY OPPORTUNITIES MASTER FUND LTD., PENTWATER EVENT DRIVEN CAYMAN FUND LTD., PWCM MASTER FUND, LTD., AND MAP 98 SEGREGATED PORTFOLIO OF LMA

SPC.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 31, 2019. The order, inter alia, granted the motions of defendants-respondents to dismiss the third amended complaint against them.

It is hereby ORDERED that said appeal insofar as it concerns the imposition of sanctions against plaintiffs' counsel is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiffs are 70 former employees of defendant AMF Bowling Centers, Inc. who filed a complaint with the Equal Employment Opportunity Commission alleging age discrimination. In the present action, plaintiffs allege that defendants engaged in various unlawful transactions that rendered insolvent defendant Bowlmor AMF Corp. (Bowlmor), the parent company of AMF Bowling Centers, Inc. Defendants-respondents (defendants) moved to dismiss the third amended complaint against them, and Bowlmor, among others, separately moved for costs and sanctions against plaintiffs and their counsel (Bowlmor motion). Plaintiffs appeal from an order granting defendants' respective motions to dismiss and granting the Bowlmor motion insofar as it sought sanctions against plaintiffs' counsel.

We note at the outset that plaintiffs' appeal insofar as it concerns the imposition of sanctions against plaintiffs' counsel must be dismissed (*see generally Scopelliti v Town of New Castle*, 92 NY2d 944, 945 [1998]). Only an aggrieved party may appeal from an order (*see generally* CPLR 5511) and, here, it is plaintiffs' counsel rather than plaintiffs themselves who is aggrieved by the court's imposition of sanctions (*see Scopelliti*, 92 NY2d at 945; *Moore v Federated Dept. Stores, Inc.*, 94 AD3d 638, 639 [1st Dept 2012], *lv dismissed* 19 NY3d 1065 [2012]).

Contrary to plaintiffs' contention, we conclude that Supreme Court properly granted defendants' motions to dismiss the third amended complaint against them inasmuch as plaintiffs lack standing to commence this action (*see Argyle Farm & Props., LLC v Watershed Agric. Counsel of the N.Y. City Watersheds, Inc.*, 135 AD3d 1262, 1266 [3d Dept 2016]). "The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]; *see Matter of ADM, LLC v Village of Macedon*, 101 AD3d 1717, 1718 [4th Dept 2012]). "The most critical requirement of standing . . . is the presence of 'injury in fact—an actual legal stake in the matter being adjudicated' " (*Security Pac. Natl. Bank*, 31 AD3d at 279, quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]).

Here, the primary relief sought in plaintiffs' third amended

complaint is the "rescission of previous sales and transfers of Bowlmor assets." Plaintiffs allege that those transactions financially ruined Bowlmor and will result in its inability to pay future judgments owed to plaintiffs. Significantly, the latter allegation is based on the assumption that plaintiffs are successful in their age discrimination lawsuits that have not yet been filed. Further, plaintiffs did not allege that they are shareholders, directors, or that they hold any ownership interest in Bowlmor, and defendants established that there is no pending bankruptcy proceeding with respect to Bowlmor. Thus, we conclude that plaintiffs' "alleged injuries and claimed damages are entirely speculative, as they are predicated upon hypothetical, future events that may or may not come to pass" (*Argyle Farm & Props., LLC*, 135 AD3d at 1266).

Finally, we have reviewed plaintiffs' remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

707

CA 19-02136

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

IN THE MATTER OF JERRY WEIKEL, SR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF WEST TURIN, AND DOUGLAS SALMON,
IN HIS CAPACITY AS SUPERINTENDENT OF
HIGHWAYS FOR THE TOWN OF WEST TURIN,
RESPONDENTS-APPELLANTS.

BARCLAY DAMON LLP, WATERTOWN (MARK G. GEBO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CAMPANY, MCARDLE & RANDALL, PLLC, LOWVILLE (KEVIN M. MCARDLE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Lewis County (James P. McClusky, J.), entered June 24, 2019 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, granted the petition and directed respondents to provide snow plowing services.

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

Memorandum: Respondent-defendant Town of West Turin (Town) enacted Local Law No. 1 of 1997 (Local Law), which allowed the Town to classify certain roads as low volume roads, including "minimum maintenance roads," and granted the superintendent of highways the authority to determine the amount of maintenance provided to such roads, including snow plowing. In August 2004, petitioner-plaintiff (petitioner) purchased property along a town highway named Bower Road, also known as Bauer Road, which had previously been classified as a minimum maintenance road. Several months later, the Town and Lewis County (County) approved petitioner's respective applications for the construction of a building on the property to be used as a seasonal camp. In June 2008, the County issued a "certificate of occupancy/compliance" to petitioner indicating that a single family dwelling constructed on the property conformed to the approved plans and applicable provisions of law. Petitioner decided in 2014 to relocate permanently to the property and requested that the Town assume responsibility to plow Bower Road. The Town declined to remove the classification and to plow the road.

Petitioner thereafter commenced a hybrid declaratory judgment action and CPLR article 78 proceeding seeking various forms of relief, including a declaration that the Local Law was invalid. On a prior appeal, respondents-defendants (respondents) appealed from a judgment insofar as it granted that part of petitioner's motion for summary judgment seeking that declaratory relief, and we reversed the judgment insofar as appealed from on the ground that petitioner's challenge to the validity of the Local Law was untimely (*Matter of Weikel v Town of W. Turin*, 162 AD3d 1706, 1707-1709 [4th Dept 2018]). We also noted that petitioner had not cross-appealed from that part of the judgment denying his motion to the extent that it sought relief pursuant to CPLR article 78, and thus his contentions regarding such relief were not properly before us (*id.* at 1709).

In November 2018, petitioner again requested pursuant to the provisions of the Local Law that the Town discontinue the classification of Bower Road as a minimum maintenance road. The Town Board, after conducting a properly noticed public hearing as required by the Local Law, passed a resolution denying petitioner's request and declining to plow the road. Petitioner then commenced this hybrid CPLR article 78 proceeding and declaratory judgment action alleging, in relevant part, that the Town Board's decision denying his request was arbitrary and capricious and an abuse of discretion because it was contrary to the Local Law and that the decision not to plow Bower Road constituted a failure to perform a duty imposed by law under Highway Law § 140. Supreme Court granted the petition-complaint (petition) and ordered, among other things, that the road no longer be classified as a minimum maintenance road and that the superintendent of highways plow snow from the road. Respondents appeal, and we now affirm.

As a preliminary matter, we note that this is properly only a CPLR article 78 proceeding inasmuch as the relief sought by petitioner is available under CPLR article 78 without the necessity of a declaration (*see generally* CPLR 7801; *Matter of Level 3 Communications, LLC v Chautauqua County*, 148 AD3d 1702, 1703 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]).

With respect to this proceeding, contrary to the parties' contentions, "the substantial evidence standard of review does not apply to the administrative decision at issue, since it was made after [an] informational public hearing[], as opposed to a quasi-judicial evidentiary hearing" (*Matter of Yilmaz v Foley*, 63 AD3d 955, 956 [2d Dept 2009]; *see generally Matter of Lake St. Granite Quarry, Inc. v Town/Village of Harrison*, 106 AD3d 918, 919 [2d Dept 2013]). "Evidentiary hearings that are constitutionally required and have some of the characteristics of adversary trials, including cross-examination, result in 'quasi-judicial' determinations that are subject to article 78 review in the nature of certiorari, where the 'substantial evidence' inquiry is applicable" (*New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 203 n 2 [1994], *rearg denied* 84 NY2d 865 [1994]; *see* CPLR 7803 [4]). "In a mandamus to review proceeding, however, no quasi-judicial hearing is required; the petitioner need only be given an opportunity 'to be heard' and to submit whatever evidence he or she chooses and the agency [or body]

may consider whatever evidence is at hand, whether obtained through a hearing or otherwise. The standard of review in such a proceeding is whether the agency [or body] determination was arbitrary and capricious or affected by an error of law" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758 [1991]; *see* CPLR 7803 [3]; *New York City Health & Hosps. Corp.*, 84 NY2d at 203 n 2). Here, the public hearing requirement in the Local Law merely provided for notice to the public and affected segments thereof, i.e., written notice to owners of property abutting the road; petitioner was provided with the opportunity to be heard; and the Town Board considered whatever evidence was at hand. "A public hearing, like the one held here, is for informational purposes only and is not the type of hearing contemplated by [subdivision four of] CPLR 7803" (*Matter of Dan Gernatt Gravel Prods. v Town of Collins*, 105 AD2d 1057, 1058 [4th Dept 1984]; *see New York City Health & Hosps. Corp.*, 84 NY2d at 203 n 2). Thus, as the court implicitly recognized, the first and second causes of action challenging the Town Board's decision to deny the request for discontinuance of Bower Road as a minimum maintenance road are in the nature of mandamus to review (*see* CPLR 7803 [3]).

In that regard, we agree with petitioner that the court properly granted the petition to that extent, concluding that the Town Board's decision to continue the classification of Bower Road as a minimum maintenance road violated the terms of the Local Law and was, therefore, arbitrary and capricious (*see Matter of Wrobel v Town Bd. of Town of Holland*, 210 AD2d 986, 987 [4th Dept 1994]). The Local Law provides several classifications for low volume roads, i.e., those serving less than 400 vehicles per day, which determine the amount of rehabilitation and maintenance such roads receive. The "[l]and use adjacent to the road shall be the basis for classification because it is a convenient and accurate way of identifying the kind of use that a low volume road serves." Among the available classifications is the minimum maintenance road, which is defined, in relevant part, as "a low-volume road or road segment which may be of a seasonal nature, having an average traffic volume of less than [50] vehicles per day which principally or exclusively provides agricultural or recreational land access." Critically, the definition further states that the term minimum maintenance road "shall not apply to those roads, or road segments, which provide . . . access to an individual year-round residence." Other provisions of the Local Law are in conformance with that definition inasmuch as the superintendent of highways may not recommend to the Town Board that a road be classified as a minimum maintenance road if it provides "year-round residences with principal motor vehicle access to goods and services necessary for the effective support of such . . . year-round residences," and the Town Board is precluded from adopting a local law classifying a minimum maintenance road unless it finds "that such road, or portion thereof, does not constitute access to a year-round residence."

Here, given the applicable definitions set forth in the Local Law and the change in use of the property abutting Bower Road to a year-round residence, petitioner sought to discontinue the classification of Bower Road as a minimum maintenance road pursuant to the procedure

established by the Local Law. Contrary to respondents' contention, petitioner was not estopped from doing so. Although petitioner was notified when he initially sought approval to construct a building on the property to be used as a seasonal camp that Bower Road was a minimum maintenance road that would never be plowed unless the Town agreed to change the classification, petitioner did not promise to abstain from seeking such a change and he properly availed himself of the right provided in the Local Law to seek discontinuance of the classification (*see Matter of Social Spirits v Town of Colonie*, 74 AD2d 933, 934 [3d Dept 1980]). Moreover, the fact that the "certificate of occupancy/compliance" for petitioner's single family dwelling was issued by the County rather than the Town is irrelevant inasmuch as the Local Law provides that "[a]ny person . . . owning or occupying real property abutting a road or portion thereof which has been designated a minimum maintenance road may petition the town board to discontinue the designation." It is indisputable that petitioner owns and occupies property abutting Bower Road and that he now maintains his year-round residence at that location. As the court properly concluded, the Town was bound to follow the Local Law upon consideration of petitioner's request to discontinue the classification of Bower Road as a minimum maintenance road and, inasmuch as the decision to continue the classification violated the terms of the Local Law, the decision was arbitrary and capricious (*see Wrobel*, 210 AD2d at 987).

We also agree with petitioner that the court properly granted that part of the petition seeking to compel the superintendent of highways to plow snow from Bower Road (*see generally Matter of Village of Chestnut Ridge v Howard*, 92 NY2d 718, 724 [1999]; *Matter of Van Aken v Town of Roxbury*, 211 AD2d 863, 865 [3d Dept 1995], *lv denied* 85 NY2d 812 [1995]). "It is well settled that the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion . . . A party seeking mandamus must show a 'clear legal right' to relief . . . The availability of the remedy depends 'not on the [petitioner's] substantive entitlement to prevail, but on the nature of the duty sought to be commanded—i.e., mandatory, nondiscretionary action' " (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]; *see* CPLR 7803 [1]; *Scherbyn*, 77 NY2d at 757; *Matter of Barhite v Town of Dewitt*, 144 AD3d 1645, 1648 [4th Dept 2016], *lv denied* 29 NY3d 902 [2017]). Petitioner's third cause of action "is in the nature of mandamus to compel the performance of a duty imposed by law" inasmuch as he alleged that respondents failed to perform their duty of removing snow from Bower Road as required by Highway Law § 140 (*Matter of Aldous v Town of Lake Luzerne*, 281 AD2d 807, 808 [3d Dept 2001], citing § 140; *see* CPLR 7803 [1]; *Van Aken*, 211 AD2d at 863-865).

In relevant part, the subject statute provides that "[t]he town superintendent shall, subject to the rules and regulations of the department of transportation, . . . [c]ause [town] highways and bridges . . . to be kept in repair, and free from obstructions caused by snow and give the necessary directions therefor" (Highway Law § 140

[2]). Section 140 further provides that the town superintendent shall, "[w]ithin the limits of appropriations[,] employ such persons as may be necessary for the maintenance and repair of town highways and bridges, and the removal of obstructions caused by snow, subject to the approval of the town board, and provide for the supervision of such persons" (§ 140 [4]).

As courts have recognized, Highway Law § 140 imposes a duty upon towns to keep town highways free of obstructions caused by snow (*see Herman v Town of Huntington*, 173 AD2d 681, 681 [2d Dept 1991]; *see generally Fulgum v Town of Cortlandt*, 2 AD3d 775, 777 [2d Dept 2003]). Additionally, the New York Attorney General's Office has opined that section 140 "imposes a duty upon the town superintendent of highways to employ such persons, within budgetary limits, as are needed to remove snow which obstructs *all* town highways, and that duty is unqualified, with no exceptions for certain town highways" (1975 Atty Gen [Inf Ops] 139 at *1). Although the legislature subsequently enacted Highway Law § 205-a, which allows for the temporary discontinuance of snow and ice removal from certain highways, respondents correctly did not invoke that statute here inasmuch as it does not apply to town highways with "occupied residences . . . dependent upon such highways for access" (*id*.). The Attorney General has further opined that section 140 requires a town superintendent of highways "to keep town highways in repair and free from obstructions caused by snow" (1986 Ops Atty Gen No. 86-46 at *1). Based on the forgoing, the court properly granted relief to the extent that it compelled the superintendent of highways to plow snow from Bower Road (*see generally Village of Chestnut Ridge*, 92 NY2d at 724; *Van Aken*, 211 AD2d at 865).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

751

KA 16-01619

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOACHIM SYLVESTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered December 8, 2015. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment that convicted him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We reject defendant's contention that the verdict is against the weight of the evidence. Although a different verdict would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that County Court erred by permitting the prosecutor to present evidence of a prior uncharged shooting under the theory that defense counsel opened the door to such evidence (*see People v Massie*, 2 NY3d 179, 183 [2004]; *People v Melendez*, 55 NY2d 445, 452 [1982]). The charges against defendant arose from an incident involving a shooter who had previously been seen driving a silver SUV and who, among other things, fired at least once at the victim as the victim was entering the passenger side of a Chevy Trailblazer in which the victim's girlfriend was the driver. Nonetheless, at trial the prosecution was permitted to submit evidence to the jury that, two days before that charged incident, a neighbor of

the victim's girlfriend heard gunshots on the street and observed an individual getting into a silver SUV, which had been parked behind the Trailblazer, before both vehicles drove away.

Contrary to the People's contention, the cross-examination of a law enforcement witness by defense counsel did not create a misleading impression that projectile holes found in the driver's side of the Trailblazer occurred during the charged shooting (*cf. People v Singh*, 147 AD3d 787, 787 [2d Dept 2017], *lv denied* 29 NY3d 1037 [2017]). In response to defense counsel's questions, the witness confirmed that the projectile holes in the driver's side were "older" and were made possibly days or weeks before the charged shooting. Inasmuch as the witness explained on cross-examination that the projectile holes in the driver's side of the Trailblazer existed prior to the charged shooting and no evidence from that or any other witness suggested otherwise, the court erred in ruling that defense counsel opened the door to further explanation regarding the projectile holes (*see People v Dowdell*, 133 AD3d 1345, 1346-1347 [4th Dept 2015]).

Even assuming, arguendo, that defense counsel opened the door to further explanation, we note that "[t]he 'opening the door' theory does not provide an independent basis for introducing new evidence on redirect; nor does it afford a party the opportunity to place evidence before the jury that should have been brought out on direct examination" (*Melendez*, 55 NY2d at 452; *see Massie*, 2 NY3d at 183-184). Instead that "principle merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination, and the trial court should normally exclude all evidence which has not been made necessary by the opponent's case in reply" (*Melendez*, 55 NY2d at 452 [internal quotation marks and emphasis omitted]; *see Massie*, 2 NY3d at 183-184). Thus, even if a misleading impression had been created on cross-examination of the law enforcement witness, the court erred in permitting the People to supplement their direct case with the additional testimony of four witnesses regarding the prior shooting, including a firearms examiner who testified to his comparison of the shell casings collected from both the charged and the prior shooting, inasmuch as such evidence far exceeded that necessary to confirm for the jury that the projectile holes on the driver's side of the Trailblazer predated the charged shooting (*see Melendez*, 55 NY2d at 452-453). Further, as defendant contends, the court's improper admission of evidence of the prior shooting under the erroneous theory that defense counsel opened the door to such evidence is compounded by the absence of any pretrial notice of the People's intent to offer evidence of an uncharged crime or a *Ventimiglia* ruling on the admissibility of such evidence (*see generally People v Ventimiglia*, 52 NY2d 350, 359-360 [1981]). The error cannot be deemed harmless inasmuch as the proof of defendant's guilt is not overwhelming and it cannot be said that there is no significant probability that defendant would have been acquitted but for the error (*cf. People v Paul*, 78 AD3d 1684, 1684 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]; *People v Lazcano*, 66 AD3d 1474, 1476 [4th Dept 2009], *lv denied* 13 NY3d 940 [2010]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

We agree with defendant's further contention that the prosecutor deprived him of a fair trial by improperly impeaching two of the People's own witnesses in violation of CPL 60.35. Although as defendant correctly concedes this contention is unpreserved for our review, we exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). "If the trial testimony of a witness contradicts a prior sworn statement, but does not affirmatively damage the case of the party calling him [or her], the recollection of the witness may be refreshed with the prior inconsistent statement, but only in such a manner that does not disclose the contents of the statement to the jury" (*People v Lawrence*, 227 AD2d 893, 894 [4th Dept 1996]; *see* CPL 60.35 [3]; *People v Reed*, 40 NY2d 204, 207 [1976]). However, "[w]here a party has had no forewarning that his [or her] witness would testify in an inconsistent manner upon a material issue of the case which tends to disprove the position of such party, [CPL 60.35 (1)] permits impeachment of such witness with a prior inconsistent written or sworn statement" (*People v Davis*, 112 AD2d 722, 723 [4th Dept 1985], *lv denied* 66 NY2d 918 [1985]; *see People v Fitzpatrick*, 40 NY2d 44, 52-53 [1976]).

Here, the prosecutor was amply warned that each of the relevant witnesses would testify as she ultimately did, i.e., that the first witness would identify someone other than defendant as the shooter appearing on video surveillance of the charged shooting and that the second would give no more than a qualified answer that the shooter on the video could be defendant. The prosecutor therefore assumed the risk of the adverse testimony by "calling the witness[es] . . . in the face of the forewarning" (*Fitzpatrick*, 40 NY2d at 52). Further, at the time of the relevant questioning, the court had not granted the prosecutor permission to treat either witness as hostile (*cf. People v Mills*, 302 AD2d 141, 145 [4th Dept 2002], *affd* 1 NY3d 269 [2003]). Thus, the prosecutor improperly "use[d the] prior statement[s] for the purpose of refreshing the recollection of the witness[es] in a manner that disclose[d their] contents to the trier of the facts" (CPL 60.35 [3]).

Based on the foregoing, we reverse the judgment and grant a new trial. In light of our conclusions, defendant's remaining contentions are academic.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

769

KA 18-01961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND LOVETTE, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered August 17, 2016. The judgment convicted defendant upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (three counts), and criminal possession of a weapon in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentences imposed on the two counts of criminal possession of a weapon in the third degree and as modified judgment is affirmed, and the matter is remitted to Monroe County Court for resentencing on counts 2 and 10 of the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [3]). In appeal No. 2, defendant appeals by permission of this Court from an order that denied his motion pursuant to CPL 440.10 seeking to vacate the judgment of conviction.

Taking appeal No. 2 first, contrary to defendant's contention, County Court properly denied his CPL 440.10 motion on the ground that the judgment was "pending on appeal, and sufficient facts appear on the record with respect to the . . . issue[s] raised upon the motion to permit adequate review thereof upon such an appeal" (CPL 440.10 [2] [b]; *see People v Satterfield*, 66 NY2d 796, 799 [1985]). To the extent defendant raises contentions in appeal No. 2 that involve facts outside the record, we note that they were not raised in the CPL 440.10 motion and are therefore not properly before us (*see People v*

Swift, 66 AD3d 1439, 1440 [4th Dept 2009], *lv denied* 13 NY3d 911 [2009], *reconsideration denied* 14 NY3d 845 [2010]; *see also People v Hamilton*, 115 AD3d 12, 20 [2d Dept 2014]).

In appeal No. 1, defendant contends that defense counsel was ineffective because, at the suppression hearing, he failed to use the purported inconsistencies between the testimony of a police officer and the statements in a report prepared by that officer concerning the sequence of events leading up to the vehicle stop to undermine the People's showing at the hearing that the vehicle stop was based on probable cause, i.e., that the police stopped the vehicle after observing the driver of the vehicle commit a traffic violation (*see generally People v Robinson*, 97 NY2d 341, 349 [2001]). In our view, to the extent that defendant's contention survives his guilty plea (*see generally People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]), it is without merit. Defendant did not meet his burden of establishing that there was no "strategic or other legitimate explanation[]" (*People v Rivera*, 71 NY2d 705, 709 [1988]) for defense counsel's alleged failure to cross-examine the police officer with respect to the purportedly inconsistent statements, or for failing to call another officer to testify about the sequence of events leading up to the traffic stop. We note that the testifying police officer's report is silent on the sequence of events leading up to the stop and, therefore, would have done nothing to impeach that officer's testimony at the suppression hearing.

To the extent that defendant contends that defense counsel was ineffective for not impeaching the testifying officer with an inconsistent account of the traffic stop contained in a report prepared by a fellow officer, we reject that contention inasmuch as such action had little or no chance of success (*see generally People v Caban*, 5 NY3d 143, 152 [2005]) because a party may not impeach a witness with the prior inconsistent statement of another individual (*see* Jerome Prince, Richardson on Evidence § 6-411 [Farrell 11th ed 1995]; *see generally People v Ortiz*, 85 AD3d 588, 589 [1st Dept 2011]). Further, defense counsel was not ineffective for failing to call the other officer to testify about the sequence of events leading up to the traffic stop, because defendant has not shown the absence of any strategic reasons for that decision. Indeed, based on the other officer's account of the stop contained in his police report, testimony from that witness may actually have strengthened the People's case by establishing another reason justifying the stop of the vehicle (*see generally People v Garcia*, 148 AD3d 1559, 1561 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]; *People v Biro*, 85 AD3d 1570, 1571 [4th Dept 2011]).

We have reviewed the remaining instances of alleged ineffective assistance of counsel raised by defendant and conclude that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]), particularly in light of the fact that counsel negotiated a very favorable plea (*see People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]; *People v Arney*, 120 AD3d 949, 950 [4th Dept 2014]; *People v Mack*, 31 AD3d 1197, 1198

[4th Dept 2006], *lv denied* 7 NY3d 814 [2006]).

Finally, we agree with defendant that the determinate terms of incarceration of seven years imposed on counts 2 and 10 of the indictment, for criminal possession of a weapon in the third degree, class D felonies, are illegal. Those crimes are not violent felonies (*see generally* Penal Law § 70.02 [1] [c]), and therefore, the court should have sentenced defendant as a second felony offender on those counts and imposed indeterminate terms of incarceration (*see* § 70.06 [3] [d]; [4] [b]). Furthermore, inasmuch as defendant must be sentenced to indeterminate terms of incarceration, he is not subject to a period of postrelease supervision on those counts (*see* § 70.45 [1]; *People v Harvey*, 170 AD3d 1675, 1678 [4th Dept 2019], *lv denied* 33 NY3d 1031 [2019]). We therefore modify the judgment in appeal No. 1 by vacating the sentences imposed on the two counts of criminal possession of a weapon in the third degree, and we remit the matter to County Court for resentencing on counts 2 and 10 of the indictment.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

770

KA 18-01478

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND LOVETTE, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered April 11, 2018. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Same memorandum as in *People v Lovette* ([appeal No. 1] — AD3d — [Nov. 20, 2020] [4th Dept 2020]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

790

CA 19-00939

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

ROBERT C. WILLIAMS, JR., AS ADMINISTRATOR
OF THE ESTATE OF CHYRIE L. WILLIAMS, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RIDGE VIEW MANOR, LLC, AND LEGACY HEALTH
CARE, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

CAITLIN ROBIN AND ASSOCIATES, PLLC, BUFFALO (ANGELA THOMPSON-TINSLEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (MICHAEL C. SCINTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 6, 2019. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and a new trial is granted.

Memorandum: Plaintiff commenced this action as the administrator of the estate of his mother, Chyrie L. Williams (decedent), seeking to recover damages for injuries that decedent allegedly sustained due to, among other things, defendants' negligence and violations of the Public Health Law. In appeal No. 1, defendants appeal from a judgment awarding plaintiff damages following a jury trial. In appeal No. 2, defendants appeal from an order denying their motion to set aside the verdict.

Although we reject defendants' contention in appeal No. 1 that the verdict is against the weight of the evidence (*see Hoover v New Holland N. Am., Inc.*, 100 AD3d 1495, 1497 [4th Dept 2012], *affd* 23 NY3d 41 [2014]), we agree with defendants that Supreme Court erred in allowing plaintiff to cross-examine a defense expert using the deposition of decedent's husband, a nonparty. CPLR 3117 limits the use of a nonparty's deposition at trial to either the impeachment of that nonparty as a witness (*see* CPLR 3117 [a] [1]), or for "any purpose against any other party" in case of the nonparty's unavailability at trial (CPLR 3117 [a] [3]; *see United Bank v Cambridge Sporting Goods Corp.*, 41 NY2d 254, 264 [1976], *rearg denied*

41 NY2d 901 [1977]). Here, plaintiff was not using the husband's deposition testimony to impeach the husband's own trial testimony, and the husband was available and testified at trial. Contrary to plaintiff's assertion, CPLR 4515 does not permit a party to cross-examine an expert with all the materials that the expert reviewed in formulating his or her opinion, regardless of the independent admissibility of those materials (*see generally Jemmott v Lazofsky*, 5 AD3d 558, 560 [2d Dept 2004]). "That statute provides only that an expert witness may on cross-examination 'be required to specify the data and other criteria supporting the opinion' " (*Cromp v Ahluwalia*, 43 AD3d 1389, 1390 [4th Dept 2007], *lv denied* 9 NY3d 818 [2008], quoting CPLR 4515). Because the testimony pertained directly to the central issue to be resolved by the jury, i.e., the quality of care that decedent received, the error was not harmless, and we therefore reverse the judgment and order a new trial (*see Billok v Union Carbide Corp.*, 170 AD3d 1388, 1389-1390 [3d Dept 2019]; *see generally M.S. v County of Orange*, 64 AD3d 560, 562 [2d Dept 2009]).

Defendants' remaining contentions in appeal No. 1 are academic.

With respect to appeal No. 2, because the issues raised on appeal from the order are brought up for review and have been considered on the appeal from the final judgment in appeal No. 1, the appeal from the order in appeal No. 2 must be dismissed (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a]; *cf. Knapp v Finger Lakes NY, Inc.*, 184 AD3d 335, 337 [4th Dept 2020]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

791

CA 20-00068

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

ROBERT C. WILLIAMS, JR., AS ADMINISTRATOR
OF THE ESTATE OF CHYRIE L. WILLAMS, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RIDGE VIEW MANOR, LLC, AND LEGACY HEALTH
CARE, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

CAITLIN ROBIN AND ASSOCIATES, PLLC, BUFFALO (ANGELA THOMPSON-TINSLEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (MICHAEL C. SCINTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 9, 2019. The order denied the motion of defendants to set aside a verdict.

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

Same memorandum as in *Williams v Ridge View Manor, LLC* ([appeal No. 1] — AD3d — [Nov. 20, 2020] [4th Dept 2020]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

822

KA 19-00250

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHEAHONNIE DAVIS, DEFENDANT-APPELLANT.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 24, 2018. The judgment convicted defendant upon a plea of guilty of attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]). We affirm.

We agree with defendant that she did not validly waive her right to appeal. Although no "particular litany" is required for a waiver of the right to appeal to be valid (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Johnson* [appeal No. 1], 169 AD3d 1366, 1366 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]), defendant's waiver of the right to appeal was invalid because County Court's oral colloquy mischaracterized it as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US — , 140 S Ct 2634 [2020]; *cf. People v Cromie*, — AD3d — , 2020 NY Slip Op 05647 [4th Dept 2020]). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*Thomas*, 34 NY3d at 567, citing NY Model Colloquies, Waiver of Right to Appeal).

Furthermore, the written waiver executed by defendant did not contain any clarifying language to correct deficiencies in the oral colloquy. Rather, it perpetuated the oral colloquy's mischaracterization of the waiver of the right to appeal as an absolute bar to the taking of a first-tier direct appeal and even stated that the rights defendant was waiving included the "right to

have an attorney appointed" if she could not afford one and the "right to submit a brief and argue before an appellate court issues relating to [her] sentence and conviction" (*see id.* at 554, 564-566). Where, as here, the "trial court has utterly 'mischaracterized the nature of the right a defendant was being asked to cede,' [this] '[C]ourt cannot be certain that the defendant comprehended the nature of the waiver of appellate rights' " (*id.* at 565-566).

Because the purported waiver of the right to appeal is unenforceable, it does not preclude our review of defendant's challenge to the court's refusal to grant her youthful offender status (*see People v Johnson*, 182 AD3d 1036, 1036 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]). Nevertheless, we conclude that the court did not abuse its discretion in declining to adjudicate defendant a youthful offender (*see People v Simpson*, 182 AD3d 1046, 1046 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]; *see generally People v Minemier*, 29 NY3d 414, 421 [2017]). In addition, having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant her such status (*see Simpson*, 182 AD3d at 1046; *Lewis*, 128 AD3d at 1400-1401; *cf. Keith B.J.*, 158 AD3d at 1161).

Finally, we note that we have not considered belated arguments not raised in defendant's appellate brief, i.e., her contention that the sentence is unduly harsh and severe (*see People v Weaver*, 222 AD2d 1046, 1046 [4th Dept 1995], *appeal denied* 87 NY2d 1026 [1996], *cert denied* 519 US 855 [1996]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

826

KA 17-00658

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD R. MEYERS, DEFENDANT-APPELLANT.

JAMES S. HINMAN, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered February 3, 2017. The judgment convicted defendant upon a jury verdict of course of sexual conduct against a child in the first degree, criminal sexual act in the second degree and sexual abuse in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), criminal sexual act in the second degree (§ 130.45 [1]), and sexual abuse in the second degree (§ 130.60 [2]). In the indictment and bill of particulars, the People alleged that the course of sexual conduct against the child occurred "[o]n or about and between July 30, 2010 and June 25, 2014." Despite a demand from the prosecution, defendant never served any notice of alibi pursuant to CPL 250.20 (1). During the first trial, which ended in a mistrial, and again at the second trial, the People established that the night of July 30, 2010 was the night that defendant's friend passed away and the night that one of the acts of sexual conduct occurred. That friend's father testified at the first trial that defendant was at the friend's house for some period of time that night. At the second trial, defendant again called the friend's father to testify, and he testified that defendant was at the friend's house until 1:00 a.m. on the night of the friend's death. Defendant thereafter sought to have his sister testify that she picked up defendant from the friend's house and that defendant spent the remainder of that night at her house. County Court precluded that testimony on the ground that defendant failed to file any notice of alibi. We reject defendant's contention that the court abused its discretion in precluding that alibi testimony.

Contrary to defendant's contention, the testimony constituted alibi evidence inasmuch as the victim testified at the second trial that defendant arrived at the location where the victim was staying between 10:00 p.m. and 11:00 p.m. on that night and that, sometime during that night, he committed acts of oral and anal sexual conduct against her. Given that the crime occurred sometime after 10 or 11 p.m. and the testimony of defendant's sister would have placed him at a different location during the time frame of one of the "particular incident[s]" of the continuing crime (*Matter of Block v Ambach*, 73 NY2d 323, 334 [1989]), we conclude that the notice requirements of CPL 250.20 (1) applied (*cf. People v Hicks*, 94 AD3d 1483, 1484 [4th Dept 2012]; *People v Bennett*, 128 AD2d 540, 540 [2d Dept 1987], *lv denied* 69 NY2d 1001 [1987]).

We further conclude that the court did not abuse its discretion in precluding that alibi evidence (*see* CPL 250.20 [3]). There was no "good cause" for defendant's failure to file a notice of alibi (CPL 250.20 [1]). Even if defense counsel did not learn of the sister's potential alibi testimony until the second trial, defendant would have known from the time of the first trial, i.e., when a date in the indictment was linked to a specific event, whether he was with anyone on that night (*see People v Batchilly*, 33 AD3d 360, 361 [1st Dept 2006], *lv denied* 7 NY3d 900 [2006], *reconsideration denied* 8 NY3d 878 [2007]; *People v Whitehead*, 305 AD2d 286, 287 [1st Dept 2003], *lv denied* 100 NY2d 600 [2003]). In our view, "[t]he emergence of the alibi witness at the eleventh hour indicated that her proposed testimony was a product of recent fabrication . . . and warrants a finding of willful conduct on the part of defendant, personally" (*People v Walker*, 294 AD2d 218, 219 [1st Dept 2002], *lv denied* 98 NY2d 772 [2002]; *see Batchilly*, 33 AD3d at 361).

We further conclude that the court did not err in permitting expert testimony on child sexual abuse accommodation syndrome (CSAAS) at the second trial even though it had precluded such testimony at the first trial. Such testimony helped to explain the victim's behavior during the years of sexual abuse (*see generally People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]) and, contrary to defendant's contention, it did not serve to bolster the victim's testimony (*cf. People v Ruiz*, 159 AD3d 1375, 1376 [4th Dept 2018]).

Defendant finally contends that he was denied effective assistance of counsel based on defense counsel's failure to file an alibi notice and failure "to identify, or utilize an expert in relation" to the CSAAS testimony. We reject that contention. With respect to the failure to secure opposition CSAAS testimony, " '[d]efendant has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence' " (*People v Kilbury*, 83 AD3d 1579, 1580 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011]; *see People v Englert*, 130 AD3d 1532, 1533 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015], *lv denied* 26 NY3d 1144 [2016]). Defendant's contention with respect to defense counsel's failure to file an alibi notice involves matters outside the record on direct appeal and, as a result, must be raised

in a CPL 440.10 motion (*see e.g. People v Williams* [appeal No. 2], 175 AD3d 980, 981 [4th Dept 2019], *lv denied* 34 NY3d 1020 [2019]; *People v Almonte*, 171 AD3d 470, 471 [1st Dept 2019], *lv denied* 33 NY3d 1102 [2019]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

840

CA 19-01671

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF WATERTOWN PROFESSIONAL FIREFIGHTERS' ASSOCIATION, LOCAL 191, PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF WATERTOWN, RESPONDENT-RESPONDENT-APPELLANT.

BLITMAN & KING LLP, SYRACUSE (NATHANIEL G. LAMBRIGHT OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

SLYE LAW OFFICES, P.C., WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered August 1, 2019 in a proceeding pursuant to CPLR article 78. The judgment declared that respondent is prohibited from appointing firefighters to acting captain positions except in legitimate emergency situations.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting judgment in favor of respondent as follows:

> It is ADJUDGED AND DECLARED that respondent is not prohibited from assigning fire captains to municipal training officer duties,

and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, which was later converted into a declaratory judgment action, seeking to restrain respondent (City) from assigning a fire captain to municipal training officer (MTO) duties and firefighters to ride in the right front seat of the fire department's rescue vehicle and to perform certain alleged captain duties associated therewith. Petitioner argued that such assignments were out-of-title work and therefore violations of Civil Service Law § 61 (2). We conclude that Supreme Court, for reasons stated in its decision, properly determined that the fire captain was not assigned out-of-title work, but that the firefighters were assigned out-of-title work. Thus, the court properly declared that the City was prohibited from appointing

firefighters to acting captain positions except in legitimate emergency situations. We add only that the court failed to declare the rights of the parties with respect to the MTO duties performed by the fire captain, and we therefore modify the judgment by making the requisite declaration (*see Skalyo v Laurel Park Condominium Bd. of Mgrs.*, 147 AD3d 1358, 1358 [4th Dept 2017]; *see generally Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 953 [1989]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

867

KA 14-01484

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN T. BARRETT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered July 3, 2014. The judgment convicted defendant after a nonjury trial of criminal contempt in the first degree (two counts), criminal mischief in the third degree and assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of criminal contempt in the first degree (Penal Law § 215.51 [c]) under counts one and two of the indictment to criminal contempt in the second degree (§ 215.50 [3]) and by vacating the sentence imposed on counts one and two of the indictment and imposing a definite sentence of 364 days' incarceration for both counts, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a nonjury trial of two counts of criminal contempt in the first degree (Penal Law § 215.51 [c]), criminal mischief in the third degree (§ 145.05 [2]), and assault in the third degree (§ 120.00 [1]). In appeal No. 2, defendant appeals, by permission of this Court, from an order denying his pro se motion seeking to vacate the judgment in appeal No. 1 pursuant to CPL 440.10. Inasmuch as defendant raises no contentions with respect to the order in appeal No. 2, we dismiss that appeal (*see People v Grant*, 160 AD3d 1406, 1407 [4th Dept 2018], *lv denied* 31 NY3d 1148 [2018]).

Defendant's conviction stems from an incident that occurred when he encountered his estranged wife and her friends in the early morning hours in a parking lot after an evening of drinking. Defendant smashed the windshield of a vehicle and fought with his wife's

friends, causing injury to one of the friends. The police found defendant later that morning in a bedroom with his wife at the home of his wife's father. At the time of the incident, there was an order of protection in effect requiring defendant to stay away from and have no contact with his wife. At trial, defendant, his then ex-wife, and his mother testified for the defense in an attempt to establish that defendant did not know that his wife was present during the fight or later at her father's house, that he was not the initial aggressor in the fight with the wife's friends and was defending himself, and that he was too intoxicated to form the requisite criminal intent for the charges.

Defendant first contends that the conviction of criminal contempt in the first degree under counts one and two of the indictment is not supported by legally sufficient evidence inasmuch as the People failed to establish certain required facts underlying the prior conviction. We agree. Although defendant did not preserve his contention for our review, we exercise our power to reach it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Dewall*, 15 AD3d 498, 499 [2d Dept 2005], *lv denied* 5 NY3d 787 [2005]), instead of addressing the same contention, as defendant requests us to do in the alternative, in the context of an analysis of the weight of the evidence (*see generally People v Heatley*, 116 AD3d 23, 28-32 [4th Dept 2014], *appeal dismissed* 25 NY3d 933 [2015]).

The People were required to establish as an element of the offense of criminal contempt in the first degree that defendant had been previously convicted, within the preceding five years, of the crime of aggravated criminal contempt or criminal contempt in the first or second degree "for violating an order of protection" that "require[d] the . . . defendant to stay away from the person or persons on whose behalf the order was issued" (Penal Law § 215.51 [c]). Thus, this is a situation where the enhancing element of an offense is not merely the existence of a prior conviction, but also the existence of additional facts related to that prior conviction (*see People v Cooper*, 78 NY2d 476, 479, 483 [1991]; *People v Gaddy*, 191 AD2d 735, 736 [2d Dept 1993], *lv denied* 82 NY2d 718 [1993]). The special information filed by the People to assert the existence of the predicate conviction (*see* CPL 200.60 [1], [2]) alleges only that defendant previously had been convicted of the crime of criminal contempt in the second degree, without specifying whether that previous conviction involved the violation of an order of protection or of any stay-away provision therein (*see* Penal Law § 215.51 [c]; *see generally* § 215.50; *Dewall*, 15 AD3d at 500).

The fact that defendant stipulated to the accuracy of the imprecise special information did not relieve the People of their burden of establishing the predicate conviction and related facts as part of their case-in-chief (*cf. generally People v Lawrence*, 141 AD3d 1079, 1082-1083 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Inasmuch as the People failed to establish that the predicate conviction of criminal contempt in the second degree was based on the violation of a stay-away provision in an order of protection, they failed to establish a required element of criminal contempt in the

first degree, and thus the evidence is legally insufficient to support the conviction of those crimes. We conclude, however, that the evidence is legally sufficient to support the lesser included offenses of criminal contempt in the second degree (Penal Law § 215.50 [3]), and we therefore modify the judgment accordingly (*see* CPL 470.15 [2] [a]). There is no need to remit for resentencing because defendant has served the maximum sentence for the class A misdemeanor of criminal contempt in the second degree (*see* Penal Law § 70.15 [1]; *People v Clark*, 138 AD3d 1449, 1451 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]). In the interest of judicial economy, we further modify the judgment by vacating the sentences imposed on counts one and two of the indictment and by imposing the maximum sentence allowed for criminal contempt in the second degree, i.e., definite sentences of 364 days' incarceration (*see* § 70.15 [1], [1-a] [b]).

Defendant next contends that the verdict is against the weight of the evidence because he did not violate the order of protection and thus is not guilty of criminal contempt, his actions in striking the victim of the assault crime were justified, and he was not capable of forming the intent necessary for any of the crimes due to his intoxication. Viewing the evidence in light of the elements of the lesser included offense of criminal contempt in the second degree (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that a verdict convicting defendant of that crime would not be against the weight of the evidence (*see People v Jones*, 100 AD3d 1362, 1365 [4th Dept 2012], *lv denied* 21 NY3d 1005 [2013], *cert denied* 571 US 1077 [2013]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Likewise, viewing the evidence in light of the elements of criminal mischief in the third degree and assault in the third degree in this nonjury trial (*see Danielson*, 9 NY3d at 349), we conclude that the verdict with respect to these counts is also not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We see no reason to disturb County Court's credibility determinations with respect to whether defendant intended to violate the order of protection (*see People v Barrios-Rodriguez*, 107 AD3d 1533, 1534 [4th Dept 2013], *lv denied* 22 NY3d 1137 [2014]; *see also People v Steinberg*, 79 NY2d 673, 682 [1992]; *People v Aikey*, 153 AD3d 1603, 1604 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]), whether defendant was the initial aggressor in starting a brawl (*see People v Perkins*, 160 AD3d 1455, 1456-1457 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018]; *People v Contreras*, 154 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]), or whether defendant was still capable of forming the requisite criminal intent for the crimes despite the fact that there was evidence he was intoxicated at the time they were committed (*see People v Principio*, 107 AD3d 1572, 1573 [4th Dept 2013], *lv denied* 22 NY3d 1090 [2014]; *see also People v Reibel*, 181 AD3d 1268, 1270 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020], *reconsideration denied* 35 NY3d 1096 [2020]).

Finally, defendant contends that the evidence is not legally sufficient to support the conviction of assault in the third degree (Penal Law § 120.00 [1]) inasmuch as the People failed to establish that the victim of that crime sustained a physical injury (§ 10.00

[9]). That contention is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Castillo*, 151 AD3d 1802, 1802-1803 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]; *see also People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]) and, in any event, it is without merit (*see People v Azadian*, 195 AD2d 564, 564 [2d Dept 1993], *lv denied* 82 NY2d 804 [1993]; *People v Brooks*, 155 AD2d 680, 681-682 [2d Dept 1989], *lv denied* 76 NY2d 731 [1990]; *see also People v Perser*, 67 AD3d 1048, 1049-1050 [3d Dept 2009], *lv denied* 13 NY3d 941 [2010]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

868

KA 15-00052

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN T. BARRETT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA 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 Livingston County Court (Robert B. Wiggins, J.), dated November 26, 2014. The order denied defendant's motion pursuant to CPL 440.10 to vacate a judgment of conviction.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Barrett* ([appeal No. 1] — AD3d — [Nov. 20, 2020] [4th Dept 2020]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

869

KA 16-02083

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVAN J. CRITTENDEN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 23, 2016. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of criminal contempt in the first degree (Penal Law § 215.51 [c]) under count one of the indictment to criminal contempt in the second degree (§ 215.50 [3]) and vacating the sentence imposed on that count and imposing a definite sentence of 364 days' incarceration, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant argues that the conviction is based on legally insufficient evidence. Although defendant's argument is unpreserved for appellate review, we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Dewall*, 15 AD3d 498, 499 [2d Dept 2005], *lv denied* 5 NY3d 787 [2005]).

A person is guilty of criminal contempt in the first degree as charged in count one of the indictment when he or she, among other requirements, intentionally violates "that part of [an] order of protection . . . which requires [him or her] to stay away from the [protected] person" (Penal Law § 215.51 [c]; *see* § 215.50 [3]). Viewing the evidence in the light most favorable to the People (*see People v Bleakley*, 69 NY2d 490, 495 [1987]), we conclude that no rational juror could have found that the People proved, beyond a reasonable doubt, that defendant had any contact with the protected

person during the charged incident (*see Dewall*, 15 AD3d at 501). Put differently, the People did not prove that defendant failed to "stay away" from the protected person during the subject incident, as required for a conviction under section 215.51 (c). Notably, the People's brief identifies no evidence of contact between defendant and the protected person during the subject incident, and the lone piece of evidence cited by the People at oral argument, i.e., a de-contextualized excerpt from a 911 call made by a person who did not testify at trial, is vague and inadequate to infer reasonably that defendant had contact with the protected person. Moreover, even if defendant had some incidental contact with the protected person during the charged incident, no rational juror could have concluded that such contact was intentional given the undisputed fact that the protected person was supposed to be on a week-long trip away from his house when defendant arrived there (*cf. People v Burch*, 97 AD3d 987, 989-990 [3d Dept 2012], *lv denied* 19 NY3d 1101 [2012]).

We reject the People's argument that the jury could have rationally inferred both the contact and the intent required by Penal Law § 215.51 (c) from the undisputed fact that defendant went to the protected person's house and was apprehended inside a closet therein. As explained in *Dewall*, "the words [of section 215.51 (c)] are plainly limiting. To interpret the words 'violating that part of a [protective] order . . . which requires the . . . defendant to stay away from the [protected] person[']. . . to encompass a violation of any provision of an order of protection would be to render the plain and ordinary application or the words 'stay away from the person' meaningless and superfluous in contravention of well-settled principles of statutory construction . . . The unambiguous language of Penal Law § 215.51 (c) is a clear indication of the Legislature's intent to limit the reach and scope of the statute . . . Had the Legislature intended a more expansive application of felony criminal liability for violations of orders of protection it could have so provided by omitting the limiting language" (15 AD3d at 500 [emphasis omitted]). Thus, we "decline the People's invitation to create criminal liability when none is written" (*id.*).

In sum, the People adduced legally insufficient evidence that defendant intentionally violated "that part" of the protective order that required him to "stay away from the [protected] person," as required for a conviction for criminal contempt in the first degree under Penal Law § 215.51 (c) (*see Dewall*, 15 AD3d at 501). Rather, the evidence proves only that defendant committed the lesser included offense of criminal contempt in the second degree under section 215.50 (3) by going to the protected person's house, and we therefore modify the judgment accordingly (*see Dewall*, 15 AD3d at 501; *see generally* CPL 470.15 [2] [a]). Remittal for resentencing is unnecessary since defendant has already served the maximum sentence for criminal contempt in the second degree, and we therefore further modify the judgment by sentencing him to the maximum legal term of 364 days' incarceration for that crime (*see* Penal Law § 70.15 [1], [1-a] [b]; *see generally People v McKinney*, 91 AD3d 1300, 1300 [4th Dept 2012]). Defendant's remaining contentions do not warrant reversal or further

modification of the judgment.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

929

KA 18-00720

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIO Z. RAMOS-PEREZ, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, 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 (Michael L. Dwyer, J.), rendered August 14, 2017. 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 [3]). Although defendant's contention that his plea was coerced by statements made by County Court or was otherwise involuntarily entered survives his waiver of the right to appeal (*see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]; *People v Watkins*, 77 AD3d 1403, 1403 [4th Dept 2010], *lv denied* 15 NY3d 956 [2010]), "defendant failed to preserve that contention for our review because . . . he failed to move to withdraw the plea or to vacate the judgment of conviction" (*People v Connolly*, 70 AD3d 1510, 1511 [4th Dept 2010], *lv denied* 14 NY3d 886 [2010]; *see Watkins*, 77 AD3d at 1403). In any event, that contention lacks merit. Defendant's contention "is belied by [his] responses to the court's questions during the plea colloquy, indicating that he was pleading guilty voluntarily and that no threats or promises had induced the plea" (*People v Jenkins*, 117 AD3d 1528, 1528-1529 [4th Dept 2014], *lv denied* 23 NY3d 1063 [2014] [internal quotation marks omitted]; *see People v Toliver*, 82 AD3d 1581, 1582 [4th Dept 2011], *lv denied* 17 NY3d 802 [2011], *reconsideration denied* 17 NY3d 862 [2011]). During the plea colloquy, defendant also acknowledged, inter alia, that he had sufficient time to review the plea offer with his attorney. Moreover, the record establishes that defendant had several weeks to consider the plea offer, that defendant and his attorney were in agreement that defendant should avail himself of the plea offer, and that defendant understood the nature and

consequences of his actions (*see generally Watkins*, 77 AD3d at 1403-1404).

Finally, we agree with defendant that, as the People correctly concede, his waiver of the right to appeal does not encompass his challenge to the severity of the sentence inasmuch as "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence" (*People v Tomeno*, 141 AD3d 1120, 1120 [4th Dept 2016], *lv denied* 28 NY3d 974 [2016] [internal quotation marks omitted]; *see People v Maracle*, 19 NY3d 925, 928 [2012]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

930

KA 19-01090

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY A. SALONE, JR., DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered May 21, 2019. 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 reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted on count two of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention that County Court erred in allowing an investigating police officer to testify regarding his opinion that a homicide was committed in this case is preserved for our review only in part (*see* CPL 470.05 [2]). To the extent that defendant's contention is unpreserved, we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that the court erred in admitting that testimony because it " 'usurp[ed] the jury's fact-finding function' " (*People v Hartzog*, 15 AD3d 866, 867 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]).

We further agree with defendant that the court erred in permitting the victim's mother to testify regarding the victim's personal background, including various aspects of the victim's life and his family relationships. It is well settled that "testimony about [a] victim['s] personal background[] that is immaterial to any

issue at trial should be excluded" (*People v Harris*, 98 NY2d 452, 490-491 [2002]; *see People v Miller*, 6 NY2d 152, 157-158 [1959]; *People v Caruso*, 246 NY 437, 443-444 [1927]) and, here, the testimony of the victim's mother regarding the victim's personal background was not relevant to a material issue at trial.

We conclude that reversal is required based upon the cumulative effect of the above evidentiary errors, which substantially prejudiced defendant's rights, and that a new trial must be granted on count two of the indictment (*see generally People v Calabria*, 94 NY2d 519, 523 [2000]). In light of our determination, we do not reach defendant's remaining contentions.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

937

CAF 19-00558

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

IN THE MATTER OF IRELYNN S.

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

MEMORANDUM AND ORDER

MAURICE S., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered February 11, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent father appeals from an order terminating his parental rights and freeing his child for adoption. The father failed to appear at the dispositional hearing and his attorney, although present, elected not to participate in the father's absence. Under those circumstances, we conclude that the father's refusal to appear constituted a default, and we therefore dismiss the appeal (*see Matter of Makia S. [Catherine S.]*, 134 AD3d 1445, 1445-1446 [4th Dept 2015]; *Matter of Shawn A. [Milisa C.B.]*, 85 AD3d 1598, 1598-1599 [4th Dept 2011], *lv denied* 17 NY3d 713 [2011]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

945

CA 19-01498

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

CLARK A. BONO AND LOIS E. BONO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF HUMPHREY, DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK J. MACKEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JEFFREY F. BAASE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered July 9, 2019. The order denied the motion of plaintiffs for partial summary judgment, granted the cross motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion and reinstating the complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action for trespass, private nuisance, and de facto taking after defendant replaced a culvert under the road abutting plaintiffs' property, allegedly resulting in increased surface water drainage onto plaintiffs' property. Plaintiffs moved for partial summary judgment on liability, and defendant cross-moved for summary judgment dismissing the complaint. Although Supreme Court properly denied the motion, it erred in granting defendant's cross motion, and we therefore modify the order accordingly.

It is settled law that a property owner, including a municipality, has no right "to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the lands of another" (*Noonan v City of Albany*, 79 NY 470, 476 [1880]; *see Higgins v Village of Orchard Park*, 277 AD2d 989, 990 [4th Dept 2000]; *M. C. D. Carbone, Inc. v Town of Bedford*, 98 AD2d 714, 714 [2d Dept 1983], *lv denied* 61 NY2d 605 [1984]; *Musumeci v State of New York*, 43 AD2d 288, 291-292 [4th Dept 1974], *lv denied* 34 NY2d 517 [1974]). Thus, while a municipality may make improvements to its property, it may be held liable if surface water is drained onto the property of

another by means of drains, pipes, or ditches (*see Buffalo Sewer Auth. v Town of Cheektowaga*, 20 NY2d 47, 51-52 [1967]; *Kossoff v Rathgeb-Walsh*, 3 NY2d 583, 588-590 [1958]; *Kerhonkson Lodge v State of New York*, 4 AD2d 575, 578 [3d Dept 1957]).

We conclude that neither party is entitled to summary judgment here because there exist triable issues of fact with respect to each cause of action. Initially, there is an issue of fact on the trespass and de facto taking causes of action whether "the natural contour of [defendant's] property, rather than the improvements made by [defendant] thereto, caused the diversion of surface water onto plaintiff[s'] land" (*Mount Zion Ministries Church, Inc. v Hines Color, Inc.*, 19 AD3d 1060, 1060 [4th Dept 2005], *lv denied* 5 NY3d 711 [2005]; *see Prachel v Town of Webster*, 96 AD3d 1365, 1366 [4th Dept 2012]; *see also Board of Educ., Union Free School Dist. No. 6 of Town of N. Hempstead v Town of N. Hempstead*, 261 App Div 1102, 1102 [2d Dept 1941]). In addition, on those causes of action, there are issues of fact whether the new culvert caused flooding damage to plaintiffs' property and whether defendant's employees physically trespassed onto plaintiffs' property and removed trees. There are also issues of fact whether defendant had a prescriptive easement for drainage of surface water by means of the culvert and, if so, whether defendant impermissibly expanded the easement by replacing the old culvert, which was 10 inches wide, with the new culvert, which is 15 inches wide (*see generally Zutt v State of New York*, 50 AD3d 1133, 1133 [2d Dept 2008]; *Vinciguerra v State of New York*, 262 AD2d 743, 745 [3d Dept 1999]; *Town of Hamburg v Gervasi*, 269 App Div 393, 394 [4th Dept 1945]). With respect to the private nuisance cause of action, there are triable issues of fact concerning, inter alia, whether the installation of the new culvert caused the damages alleged by plaintiffs and whether defendant acted reasonably in replacing the old culvert with the new culvert (*see generally Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977], *rearg denied* 42 NY2d 1102 [1977]; *Cangemi v Yeager*, 185 AD3d 1397, 1399 [4th Dept 2020]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

950

KA 19-01439

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWAYNE TURNER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered May 8, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contentions that County Court violated his due process rights by accepting his waiver of the right to appear at the SORA hearing (*see People v Poleun*, 119 AD3d 1378, 1378-1379 [4th Dept 2014], *affd* 26 NY3d 973 [2015]; *People v Slishevsky*, 174 AD3d 1399, 1399 [4th Dept 2019], *lv denied* 34 NY3d 908 [2020]; *People v Akinpelu*, 126 AD3d 1451, 1452 [4th Dept 2015], *lv denied* 25 NY3d 912 [2015]), by conducting the hearing in his absence (*see People v Wall*, 112 AD3d 900, 901 [2d Dept 2013]), and by allegedly failing to provide him with certain documents prior to the hearing (*see People v Wise*, 127 AD3d 834, 834-835 [2d Dept 2015], *lv denied* 25 NY3d 913 [2015]; *People v Montanez*, 88 AD3d 1278, 1279 [4th Dept 2011]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see People v Roman*, 179 AD3d 1455, 1455 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]).

We reject defendant's further contention that the court erred in assessing 15 points under risk factor 11. The SORA guidelines justify the addition of 15 points under risk factor 11 "if an offender has a substance abuse history *or* was abusing drugs . . . or alcohol at the time of the offense" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006] [emphasis added]). Thus, the

points are properly assessed where the People establish a history of substance abuse by clear and convincing evidence (*see People v Kowal*, 175 AD3d 1057, 1057 [4th Dept 2019]) inasmuch as "[a]n offender need not [have been] abusing alcohol or drugs at the time of the instant offense to receive points" for that risk factor (*People v Kunz*, 150 AD3d 1696, 1697 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017] [internal quotation marks omitted]; *see People v Arnold*, 156 AD3d 1447, 1448 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). Here, the evidence at the SORA hearing established that defendant had participated in an outpatient treatment program near the time of the underlying offense, that defendant had been referred to and engaged in substance abuse treatment while incarcerated, that defendant admitted to a history of drug use, and that he had been diagnosed as cannabis and alcohol dependent (*see Kunz*, 150 AD3d at 1697). Although defendant appears to have abstained from drug and alcohol use while incarcerated, a "recent history of abstinence while incarcerated is not necessarily predictive of his behavior when no longer under such supervision" (*id.*).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

959

CAF 18-02347

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF LINDSAY R. BETTS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WAYNE E. MOORE, RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered August 31, 2018 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, granted respondent's motion to dismiss the petition.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from that part of an order granting respondent father's motion to dismiss her petition seeking permission to relocate with the subject child from Ontario County to Monroe County.

On the mother's previous appeal from an order dismissing a prior petition seeking, inter alia, the same relief, we concluded that Family Court erred in dismissing the prior petition because the mother, upon a relocation petition, was not required "to establish a change in circumstances sufficient to warrant . . . a modification of the existing order of custody and visitation" (*Matter of Betts v Moore*, 175 AD3d 874, 874 [4th Dept 2019]). We nevertheless affirmed the order upon concluding, based on our review of the evidence from the hearing and the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 739-741 [1996]), that the mother failed to establish that the best interests of the child were served by the proposed relocation (*see Betts*, 175 AD3d at 875).

While the mother's previous appeal was pending, she filed the petition at issue on this appeal, alleging that the child's best interests would be served by permitting the relocation because, among other things, the child had been accepted into an advanced ballet school in Monroe County that would require significant weekly commute times from their current residence and the mother was working at a job, also in Monroe County, that offered advancement possibilities

that were being negatively impacted by the mother's commute. The child supported the mother's relocation request. The court granted the father's motion to dismiss the petition on the ground that the new petition suffered from the same flaw as the original petition, i.e., that there had been no change in circumstances. Our determination of the mother's previous appeal was released shortly after the court issued its decision.

We agree with the mother that the court erred in dismissing the petition without a hearing, and we therefore reverse the order insofar as appealed from. To survive a motion to dismiss, the mother's petition was required to allege facts sufficient to " 'establish[ ] the need for a hearing on the issue whether [her] relocation is in the best interests of the child' " (*Matter of Johnston v Dickes*, 178 AD3d 1454, 1455 [4th Dept 2019]), i.e., "that the child's life would 'be enhanced economically, emotionally and educationally' by the proposed relocation" (*Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]).

Here, the mother alleged that she had specific employment advancement opportunities at her job in Monroe County, and "economic necessity . . . may present a particularly persuasive ground for permitting the proposed move" (*Tropea*, 87 NY2d at 739; *see Matter of Butler v Hess*, 85 AD3d 1689, 1690 [4th Dept 2011], *lv denied* 17 NY3d 713 [2011]). In addition, the mother alleged that the relocation would enhance the child's extracurricular activities, a factor that may support a relocation (*see Matter of James TT. v Shermaqiae UU.*, 184 AD3d 975, 977 [3d Dept 2020]; *cf. Matter of Southammavong v Sisen*, 141 AD3d 905, 906 [3d Dept 2016]). In addition, the Attorney for the Child indicated that the child favored the relocation, another factor that may support a relocation petition (*see Matter of Cindy F. v Aswad B.S.*, 176 AD3d 549, 550-551 [1st Dept 2019], *lv denied* 35 NY3d 903 [2020]). Consequently, the petition sufficiently alleged that the relocation would be in the child's best interests (*see generally Johnston*, 178 AD3d at 1455), and the court erred in dismissing it on the ground that it did not. Finally, to the extent that the decision indicates that the court dismissed the petition on the ground that the mother failed to allege a sufficient change in circumstances, that was error (*see Betts*, 175 AD3d at 874-875).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

979

CA 19-01399

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

SUSAN NOBILE AND SALVATORE NOBILE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PATRICIA R. TRAWINSKI, DOING BUSINESS AS
STOCKMAN'S TAVERN, DEFENDANT-APPELLANT.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (ERIC M. SHELTON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 1, 2019. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Susan Nobile (plaintiff) when she tripped and fell over a fire pit located at an outdoor tiki bar owned by defendant. Defendant appeals from an order denying her motion for summary judgment dismissing the complaint. We affirm.

A landowner "owe[s] people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition" (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]; *see Basso v Miller*, 40 NY2d 233, 241 [1976]; *Breau v Burdick*, 166 AD3d 1545, 1546 [4th Dept 2018]). In a negligence action alleging a breach of that duty, a defendant landowner may meet his or her initial burden on a motion for summary judgment by establishing that the alleged hazard did not constitute a dangerous condition (*see Smith v Szpilewski*, 139 AD3d 1342, 1342 [4th Dept 2016]; *Parslow v Leake*, 117 AD3d 55, 62 [4th Dept 2014]). A tripping hazard capable of causing injury may constitute a dangerous condition (*see e.g. Salim v Western Regional Off-Track Betting Corp., Batavia Downs*, 100 AD3d 1370, 1372 [4th Dept 2012]; *Camizzi v Tops, Inc.*, 244 AD2d 1002, 1002 [4th Dept 1997]), and "a landowner with knowledge of a dangerous condition that could be alleviated by illumination may owe a duty to provide adequate lighting" (*Sirface v County of Erie*, 55 AD3d 1401, 1402 [4th Dept 2008], *lv dismissed* 12 NY3d 797 [2009]; *cf. Lumpkin v 3171 Rochambeau*

Ave, LLC, 148 AD3d 511, 512 [1st Dept 2017]). According to deposition testimony submitted in support of defendant's motion here, at approximately 9:30 p.m. on the evening in question, plaintiff was walking back to her table from the bathroom. Plaintiff Salvatore Nobile, who was at the bar on the night of plaintiff's fall, testified that the lighting in "the whole area" was "poor." Although there was an amber light by the bathroom and lighting at the bar, there was no fire in the fire pit and there were no lights illuminating it. Plaintiff, rather than taking a lighted pathway back to her table, took a more direct route across a dark, grassy area. Plaintiff did not see the fire pit and tripped over it, injuring her shoulder. Given those facts, we conclude that defendant failed to meet her initial burden because her own evidentiary submissions raise issues of fact (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

We reject defendant's contention that Supreme Court erred in denying her motion on the ground that the condition of the fire pit was open and obvious. Although an open and obvious condition may be relevant to the issue of a plaintiff's comparative fault, it does not negate a defendant's duty to keep his or her premises reasonably safe (*see Cashion v Bajorek*, 126 AD3d 1354, 1354 [4th Dept 2015]; *Landahl v City of Buffalo*, 103 AD3d 1129, 1130 [4th Dept 2013]; *Lauricella v Friol*, 46 AD3d 1459, 1459 [4th Dept 2007]). Finally, we reject defendant's contention that plaintiff's conduct was the sole proximate cause of her injuries (*see Lauricella*, 46 AD3d at 1460).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

998

CAF 19-00944

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

IN THE MATTER OF JAYDA W.

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

MEMORANDUM AND ORDER

CHRISTINA W., RESPONDENT-RESPONDENT.

SANDY S., APPELLANT.

BETHANIE H. AND TYLER S., INTERVENORS-RESPONDENTS.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (ERIN WELCH FAIR OF COUNSEL), FOR PETITIONER-RESPONDENT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), ATTORNEY FOR THE CHILD.

LISA DIPOALA HABER, SYRACUSE, FOR INTERVENORS-RESPONDENTS.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered March 8, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Sandy L.S. v Onondaga County Dept. of Children and Family Servs.* (— AD3d — [Nov. 20, 2020] [4th Dept 2020]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

999

CAF 19-00912

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

IN THE MATTER OF SANDY L.S., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES AND CHRISTINA J.W., RESPONDENTS-RESPONDENTS.

BETHANIE H. AND TYLER S., INTERVENORS-RESPONDENTS.
(APPEAL NO. 2.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (ERIN WELCH FAIR OF COUNSEL), FOR RESPONDENT-RESPONDENT ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), ATTORNEY FOR THE CHILD.

LISA DIPOALA HABER, SYRACUSE, FOR INTERVENORS-RESPONDENTS.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered February 21, 2019 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: In appeal No. 1, appellant—the subject child's great aunt (aunt)—appeals from an order in a proceeding pursuant to Social Services Law § 384-b that, inter alia, terminated respondent mother's parental rights, ordered that petitioner-respondent Onondaga County Department of Children and Family Services (DCFS) is authorized to consent to the child's adoption and ordered that the preadoptive foster parents, intervenors Bethanie H. and Tyler S. (foster parents), could petition to adopt the child. In appeal No. 2, the aunt appeals from an order in a proceeding pursuant to Family Court Act articles 6 and 10 that dismissed her petition seeking custody of the child. We affirm.

Initially, we dismiss the aunt's appeal from the order in appeal

No. 1 because she is not aggrieved by that order, insofar as it merely terminated the mother's parental rights and freed the child for adoption (*see Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1775-1776 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]; *see generally* CPLR 5511). Regardless, we may reach all of the aunt's contentions in our review of the order appealed from in appeal No. 2.

In appeal No. 2, the aunt contends that DCFS did not comply with the statutory requirement to contact her and inform her of her right to seek to become a foster parent or otherwise obtain custody of the child (*see* Family Ct Act § 1017 [1]), and that she should therefore not be "penalized" for failing to seek such relief within 12 months of foster care placement (*see* Family Ct Act § 1028-a; Social Services Law § 383 [3]). We reject that contention. At all relevant times, the aunt knew that the child had been placed in foster care, and yet did not express any interest in seeking foster care placement or custody of the child until two years after the child was born. Indeed, the record establishes that, shortly after the child was born, the aunt had declined to be considered a resource for the child because she was already overwhelmed with caring for the child's siblings. Thus, even assuming, arguendo, that DCFS violated its statutory duty to inform the aunt of her right to seek to become a foster parent or obtain custody of the child, we conclude that reversal is not required because the aunt was not prejudiced by such error (*see Matter of Giohna R. [John R.]*, 179 AD3d 1508, 1510 [4th Dept 2020], *lv dismissed in part and denied in part* 35 NY3d 1003 [2020]).

Furthermore, contrary to the aunt's contention, the evidence adduced at the dispositional hearing established that it was in the child's best interests to be freed for adoption rather than to be placed in the custody of the aunt (*see Matter of Aaliyah H. [Mary H.]*, 134 AD3d 1574, 1574-1575 [4th Dept 2015], *lv denied* 27 NY3d 906 [2016]; *Matter of Cheyanne V.*, 55 AD3d 1383, 1383-1384 [4th Dept 2008]). Custody petitions filed by extended family of a child should be considered during the dispositional stage of a termination of parental rights proceeding (*see Matter of Carl G. v Oneida County Dept. of Social Servs.*, 24 AD3d 1274, 1275 [4th Dept 2005]). When making a determination on an extended family member's custody petition, there is no presumption favoring the child's natural extended family (*see Matter of Peter L.*, 59 NY2d 513, 516 [1983]; *Matter of Zarlia Loretta J.*, 23 AD3d 317, 317 [1st Dept 2005]; *see generally Matter of Amber W. v Erie County Children's Servs.*, 185 AD3d 1445, 1445-1446 [4th Dept 2020]). Indeed, a "nonparent relative of the child does not have 'a greater right to custody' than the child's foster parents" (*Matter of Matthew E. v Erie County Dept. of Social Servs.*, 41 AD3d 1240, 1241 [4th Dept 2007]; *see Matter of Gordon B.B.*, 30 AD3d 1005, 1006 [4th Dept 2006]; *see generally Matter of Thurston v Skellington*, 89 AD3d 1520, 1520 [4th Dept 2011]).

Family Court's determination that it is in the best interests of the child to free her for adoption by the foster parents is entitled to great deference (*see Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]), and we see no reason to disturb the

court's determinations. Although the record establishes that the aunt is loving and could provide the child with a suitable home, we nevertheless conclude that the best interests of the child supported freeing her for adoption, rather than awarding custody to the aunt (*see generally Matter of Lundyn S. [Al-Rahim S.]*, 144 AD3d 1511, 1512 [4th Dept 2016], *lv denied* 29 NY3d 901 [2017]). We note that the child has been in the care of the foster parents since she was five weeks old, has developed relationships with the foster parents' extended family, and has known no other home (*see Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1502 [4th Dept 2015]; *Matter of Sophia M.G.K. [Tracy G.K.]*, 132 AD3d 1377, 1378 [4th Dept 2015], *lv denied* 26 NY3d 914 [2015]). Indeed, the child has bonded with the foster parents, who ensured that she was happy, healthy, and well provided for (*see Burke H.*, 134 AD3d at 1502; *Matter of Chastity Imani Mc.*, 66 AD3d 782, 782 [2d Dept 2009]). We also note that foster parents of a child who has been placed in their home for 12 months or longer are to be given "preference and first consideration" for adoption in the event that the child becomes eligible for adoption (Social Services Law § 383 [3]).

Furthermore, while the aunt presently has custody of the child's siblings and there is a preference for keeping siblings together, that rule is not absolute and may be overcome where it is not in the best interests of the child (*see Matter of Curry v Reese*, 145 AD3d 1475, 1476 [4th Dept 2016]; *Matter of Luke v Luke*, 90 AD3d 1179, 1182 [3d Dept 2011]; *Matter of Colleen F. v Frank K.*, 49 AD3d 1228, 1230 [4th Dept 2008]). Here, we conclude that it is not in the subject child's best interests to reside with the aunt merely because she had custody of the subject child's siblings, especially in light of the fact that the subject child has never resided with her siblings (*see Matter of Ender M.Z.-P. [Olga Z.]*, 109 AD3d 834, 836 [2d Dept 2013], *lv denied* 22 NY3d 863 [2014]). Moreover, the relationship that the child currently has with her siblings was initiated and encouraged by the foster parents (*see Matter of Joseph P. [Edwin P.]*, 143 AD3d 529, 530 [1st Dept 2016], *lv denied* 28 NY3d 1110 [2016]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1000

CAF 19-01017

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

IN THE MATTER OF JANAE R., JEREMIAH R.,
AND JAVAR B.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ANTANET R., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered April 16, 2019 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent mother appeals from an order determining that she neglected the subject children. Contrary to the mother's contention, the out-of-court statements of the children were sufficiently corroborated by the mother's testimony and by the cross-corroboration of each child's statements with the statements of the other children (*see* § 1046 [a] [vi]; *Matter of Timothy B. [Paul K.]*, 138 AD3d 1460, 1461 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016]; *Matter of Isaiah S.*, 63 AD3d 948, 949 [2d Dept 2009]; *Matter of Nicholas L.*, 50 AD3d 1141, 1142 [2d Dept 2008]).

With respect to the mother's further contention that Family Court erred in conducting an in camera interview with two of the children outside the presence of the mother's attorney, we conclude that any error is harmless inasmuch as " '[t]here is no indication that the court considered, credited, or relied upon [the in camera interview] in reaching its determination' " (*Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]; *see Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1001

CAF 20-00695

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

IN THE MATTER OF CHRISTOPHER J. TARTAGLIA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KIMBERLY M. TARTAGLIA, RESPONDENT-APPELLANT.

MICHAEL D. SCHMITT, ROCHESTER, FOR RESPONDENT-APPELLANT.

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

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered September 27, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, directed that the parties ensure that the subject children have no contact with a particular individual.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that granted petitioner father's petition for modification of the custody and visitation provisions in the judgment of divorce by, inter alia, prohibiting the mother's male friend from having any contact with the parties' two children. The male friend is the ex-husband of the father's current wife and is a parent of the subject children's stepsiblings. As a preliminary matter, we decline to address the father's request, set forth in his respondent's brief, to dismiss the mother's appeal. That request is based on the father's allegations in his brief that the mother failed to settle the trial transcript pursuant to CPLR 5525 (c), but we may not "consider a statement of fact appearing only in the brief of a party, even if such statement [is] not disputed" (*Ditmars-31' St. Dev. Corp. v Punia*, 17 AD2d 357, 360 [2d Dept 1962]; *see also People v Alizadeh*, 87 AD2d 418, 426 [1st Dept 1982]).

Contrary to the mother's contention, Family Court properly declined to entertain her general motion to dismiss the petition after the father rested his case-in-chief, but before the court conducted the *Lincoln* hearing requested by the Attorney for the Children (*see*

Matter of Noble v Brown, 137 AD3d 1714, 1714-1715 [4th Dept 2016]).

We reject the mother's contention that the father failed to establish that there had been the requisite change of circumstances warranting an inquiry into the best interests of the children (*see Matter of Chromczak v Salek*, 173 AD3d 1750, 1751 [4th Dept 2019]). Contrary to the mother's further contention, there is a sound and substantial basis in the record supporting the court's determination that the mother and father should ensure that the mother's male friend has no contact with the subject children (*see id.* at 1752; *Matter of Lynn X. v Donald X.*, 162 AD3d 1276, 1278 [3d Dept 2018]). The court has wide discretion over visitation matters, and it has the power to impose restrictions on the interactions of children with third parties if it is in the children's best interests (*see Chromczak*, 173 AD3d at 1751-1752; *Lynn X.*, 162 AD3d at 1278; *Matter of David J. v Leeann K.*, 140 AD3d 1209, 1212 [3d Dept 2016]). Here, the father presented unrefuted evidence establishing that the mother and her male friend had begun a friendship, perhaps an intimate friendship, despite the fact that the mother and the father had previously had concerns over the friend's contact with the subject children based on the friend's past behavior with his own children. The father testified regarding an incident during which the subject children became frightened and tearful when they saw the friend's vehicle in their mother's driveway when the children were returning to the mother's home after weekend visitation with the father. The father further testified, inter alia, that the friend's own children have had orders of protection against him in the past. The statements of the oldest subject child during the *Lincoln* hearing also provided support for the court's determination. We see no reason to disturb the court's determination that it was in the best interests of the subject children to be shielded from contact with the mother's male friend (*see Chromczak*, 173 AD3d at 1751-1752).

The mother's contention that the court's bias against her deprived her of a fair and impartial verdict is not preserved for our review inasmuch as she failed to make a motion for the court to recuse itself (*see id.* at 1750). In any event, in order to be disqualifying, the alleged bias must stem from "an extrajudicial source or some basis other than what the [court] learned from [its] participation in the case" (*Matter of McDonald v Terry*, 100 AD3d 1531, 1531 [4th Dept 2012] [internal quotation marks omitted]). Here, the mother does not allege any such extrajudicial source of the court's alleged bias. To the extent that the mother contends that her constitutional rights to due process and to confer with her attorney were violated, we note that those contentions are not preserved for our review because the mother failed to make those specific objections during the proceedings (*see Matter of Reska v Browne*, 182 AD3d 1052, 1053 [4th Dept 2020]; *Matter of Brandon v King*, 137 AD3d 1727, 1729 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016]).

We have examined the mother's remaining contentions and conclude

that none warrants reversal or modification of the order.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1016

KA 18-02268

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. HILL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered September 6, 2018. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]). We affirm.

Most of defendant's contentions are forfeited by his guilty plea. First, defendant's *Brady* claim is forfeited by his guilty plea because the alleged *Brady* material was disclosed *before* the plea (*cf. People v Wilson*, 159 AD3d 1600, 1601 [4th Dept 2018]; *People v DeLaRosa*, 48 AD3d 1098, 1098-1099 [4th Dept 2008], *lv denied* 10 NY3d 861 [2008]). Second, defendant's related contention that the alleged *Brady* material was subject to disclosure under CPL former 240.20 (1) (d) is also forfeited by the guilty plea (*see People v Salters*, — AD3d —, 2020 NY Slip Op 05662, *1 [4th Dept 2020]). Third, by pleading guilty, defendant forfeited his contention that the first and second counts of the indictment are multiplicitous (*see People v Cole*, 118 AD3d 1098, 1099-1100 [3d Dept 2014]; *People v Nichols*, 32 AD3d 1316, 1317 [4th Dept 2006], *lv denied* 8 NY3d 848 [2007], *reconsideration denied* 8 NY3d 988 [2007]). Fourth, by pleading guilty, defendant forfeited his challenge to the legal sufficiency of the evidence before the grand jury (*see People v Hansen*, 95 NY2d 227, 233 [2000]; *People v Fioretti*, 155 AD3d 1662, 1664 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). Fifth, by pleading guilty, defendant "forfeited review of his claim that the prosecutor's conduct before the [g]rand [j]ury impaired its integrity" (*People v Bowen*, 122 AD2d 64, 64 [2d Dept 1986]; *see People v Manragh*, 32 NY3d 1101, 1102-1103 [2018]; *Hansen*, 95 NY2d at 230-233).

Defendant's remaining contention does not require reversal or modification of the judgment.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1021

CAF 19-00689

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

IN THE MATTER OF MODESTY B., AMEER B.,
DIMITRI C., JR. AND SHEKERIA C.
---------- MEMORANDUM AND ORDER
MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

DIMITRI C., AND SHEKERIA R.-S.,
RESPONDENTS-APPELLANTS.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR RESPONDENT-APPELLANT DIMITRI C.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR RESPONDENT-APPELLANT SHEKERIA R.-S.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILDREN.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered March 5, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected 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 10, respondents father and mother each appeal from an order entered after a fact-finding hearing that, inter alia, adjudged them to have neglected the subject children. We affirm. Contrary to respondents' contentions, a sound and substantial basis in the record supports Family Court's determination that they neglected the subject children (*see Matter of Henry G. [Danny T.]*, 175 AD3d 1802, 1802 [4th Dept 2019]; *Matter of Rashawn J. [Veronica H.-B.]*, 159 AD3d 1436, 1436-1437 [4th Dept 2018]). Respondents' remaining contentions are without merit.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1022

CAF 19-02132

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

IN THE MATTER OF DANYEL J. AND JOHN J.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALAN J., RESPONDENT-APPELLANT,
AND LEEANN B., RESPONDENT.

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

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

MELISSA L. KOFFS, CHAUMONT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Daniel R. King, A.J.), entered October 1, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondents with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject children. We reject the father's contention that Family Court erred in denying his request for new assigned counsel. "The right of an indigent party to assigned counsel under the Family Court Act is not absolute" (*Matter of Destiny V. [Mark V.]*, 107 AD3d 1468, 1469 [4th Dept 2013]; *see Matter of Anthony J.A. [Jason A.A.]*, 180 AD3d 1376, 1378 [4th Dept 2020], *lv denied* 35 NY3d 902 [2020]). A party seeking the appointment of new assigned counsel " 'must establish that good cause for release existed necessitating dismissal of assigned counsel' " (*Anthony J.A.*, 180 AD3d at 1378; *see Destiny V.*, 107 AD3d at 1469). The father failed to establish good cause here.

Insofar as the father preserved for our review his further contention that the court erred in admitting hearsay evidence at the fact-finding hearing, we conclude that any error is harmless because "the court placed minimal, if any, reliance on" the statements in question (*Matter of Higgins v Higgins*, 128 AD3d 1396, 1397 [4th Dept 2015]; *see Matter of Carl B. [Crystale L.]*, 178 AD3d 1456, 1456 [4th Dept 2019], *lv denied* 35 NY3d 903 [2020]) and, "even without reference

to [the statements], the clear and convincing proof presented at the fact-finding hearing established the [father's] permanent neglect of the child[ren]" (*Carl B.*, 178 AD3d at 1456-1457; *see Matter of Bryson M. [Victoria M.]*, 184 AD3d 1138, 1139 [4th Dept 2020]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1043

CAF 19-00428

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

IN THE MATTER OF HAYDEN A.

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

ORDER

KAREN A., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

KAREN J. DOCTER, FAYETTEVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered February 15, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1044

CAF 19-00653

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

IN THE MATTER OF HAYDEN A.

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

MEMORANDUM AND ORDER

KAREN A., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

KAREN J. DOCTER, FAYETTEVILLE, ATTORNEY FOR THE CHILD.

Appeal from a corrected order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered March 15, 2019 in a proceeding pursuant to Social Services Law § 384-b. The corrected order, among other things, terminated respondent's parental rights with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the denial of her attorney's request for an adjournment and the corrected order is reversed on the law without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from a corrected order entered upon her default that, inter alia, determined that the subject child had been abandoned and terminated the mother's parental rights with respect to that child. The mother failed to appear at the fact-finding hearing on the petition to terminate her parental rights and, although her attorney was present at the hearing, she did not participate. Thus, we conclude that the mother's unexplained failure to appear at the hearing constituted a default (*see Matter of Lastanzea L. [Lakesha L.]*, 87 AD3d 1356, 1356 [4th Dept 2011], *lv dismissed in part and denied in part* 18 NY3d 854 [2011]; *Matter of Tiara B.* [appeal No. 2], 64 AD3d 1181, 1181-1182 [4th Dept 2009]). Although "[n]o appeal lies from an order entered upon the default of the appealing party" (*Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]; *see Matter of Maria P. [Anthony P.]*, 182 AD3d 1028, 1029 [4th Dept 2020]), the appeal nevertheless brings up for review any issue that was subject to contest in the proceedings

below, i.e., Family Court's failure to grant the request of the mother's attorney for an adjournment (*see Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386-1387 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]; *Matter of Paulino v Camacho*, 36 AD3d 821, 822 [4th Dept 2007]).

We agree with the mother that the court abused its discretion in failing to grant her attorney's request for an adjournment (*see generally Matter of Anthony M.*, 63 NY2d 270, 283 [1984]). Under the unique circumstances of this case, i.e., that the court was aware of the mother's history of mental illness, that this was the first request for an adjournment on the mother's behalf, and that the child's situation would remain unaltered if the adjournment had been granted, the court improperly denied the request for an adjournment (*see generally Matter of Sullivan v Sullivan*, 173 AD3d 1844, 1845 [4th Dept 2019]; *Matter of Nicole J.*, 71 AD3d 1581, 1582 [4th Dept 2010]). In addition, we conclude that the court abused its discretion in failing to grant an adjournment because of the serious concerns about the mother's competency to assist in her own defense, which raised an issue whether it was necessary for the court to continue the appointment of a guardian ad litem (*see generally Matter of Jesten J.F. [Ruth P.S.]*, 167 AD3d 1527, 1528-1529 [4th Dept 2018]; *Matter of Mary H. [Sanders-Spencer]*, 126 AD3d 794, 795 [2d Dept 2015]; *Sarfaty v Sarfaty*, 83 AD2d 748, 749 [4th Dept 1981]). We therefore reverse the corrected order and remit the matter to Family Court for further proceedings on the petition.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1046

CAF 19-01877

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

IN THE MATTER OF JOSHUA J. GASDIK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HEATHER WINIARZ, RESPONDENT-APPELLANT.

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

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

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered September 11, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the petition for permission to relocate with the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the petition and vacating the 4th through 16th ordering paragraphs, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, granted petitioner father's petition for permission to relocate with the subject child to the State of North Carolina. We agree with the mother that Family Court erred in determining that the father met his burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests, and we thus conclude that the court's determination lacks a sound and substantial basis in the record (*cf. Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]).

In *Matter of Tropea v Tropea* (87 NY2d 727 [1996]), the Court of Appeals set forth the factors that should be considered in determining an application to relocate and emphasized that "no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome" (*id*. at 738). The best interests of the child are the predominant concern and, in making that determination, consideration and appropriate weight must be given to all of the relevant factors (*see Matter of Fleisher v Fleisher*, 151

AD3d 1768, 1769 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]).

In its decision, the court considered the relevant *Tropea* factors but erred in applying those factors to the facts and circumstances in the case at bar. Contrary to the court's determination, the father "failed to establish that the child's life would be enhanced economically, emotionally and educationally by the proposed relocation" (*Matter of Shepherd v Stocker*, 159 AD3d 1441, 1442 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Betts v Moore*, 175 AD3d 874, 875 [4th Dept 2019]; *Matter of Eason v Bowick*, 165 AD3d 1592, 1592 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]). While the father established that he will enjoy greater economic job opportunities in North Carolina, those nominal financial gains will be negated by the greater cost of living in the area of North Carolina where he will be relocating. Additionally, as noted by the court, the father had unrealistic goals for housing in North Carolina. Notably, the father testified that he was presently paying monthly rent of $900 for a home in Olean, New York, but wanted to purchase a home in North Carolina for between $200,000 and $250,000. He acknowledged that he could not afford a home within that price range on his own and would need the financial assistance of family, his employer, and his fiancée. There is no evidence in the record, however, that anyone had committed to providing that needed assistance or had the financial ability to do so. The father also failed to establish that the child would receive a better education in North Carolina inasmuch as there is no evidence in the record comparing the schools in North Carolina to those in Olean, New York (*see Betts*, 175 AD3d at 875; *Shepherd*, 159 AD3d at 1442; *Matter of Hirschman v McFadden*, 137 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016]). Furthermore, the father admitted that he had "zero" family living in North Carolina. On the other hand, the father's mother currently lives in Olean, New York, and the father's aunt lives nearby in Wellsville, New York. The maternal grandmother, great-grandmother and great-grandfather all live in Olean, New York. The father therefore failed to establish that he and the child would receive similar support residing in North Carolina (*see Hirschman*, 137 AD3d at 1613). In our view, the only factor that fully supported the father's request for relocation was a "fresh start," away from Olean, New York, where he and the mother struggled with an opiate addiction. That factor, standing alone, is insufficient to warrant relocation (*see Matter of Jones v Tarnawa*, 26 AD3d 870, 871 [4th Dept 2006], *lv denied* 6 NY3d 714 [2006]).

In view of our determination, the court's visitation schedule must be revisited inasmuch as it was based upon the child's relocation to North Carolina. We therefore modify the order by denying the petition and vacating the 4th through 16th ordering paragraphs, and we remit the matter to Family Court to fashion an appropriate visitation schedule with the father in Olean, New York and the mother in Hamburg, New York.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1063

KA 18-02218

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SERENA L. SNYDER, ALSO KNOWN AS SERENA R. SNYDER,
ALSO KNOWN AS SERENA LYNN SNYDER,
DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered September 7, 2018. The judgment convicted defendant upon a plea of guilty of bail jumping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of bail jumping in the second degree (Penal Law § 215.56). The charge arose from defendant's failure to appear at proceedings related to her violation of the terms of her probation. The grand jury charged defendant by indictment with one count of bail jumping in the second degree. Thereafter, defendant made an omnibus motion requesting, inter alia, that County Court dismiss the indictment on the ground that the evidence presented to the grand jury was insufficient because the failure to appear at a violation of probation proceeding does not constitute a failure to appear "in connection with a charge against [her] of committing a felony" within the meaning of the statute (§ 215.56). The court denied that part of defendant's omnibus motion.

On appeal, defendant contends that the indictment is jurisdictionally defective because it does not include an allegation that she failed to appear "in connection with a charge against [her] of committing a felony" (Penal Law § 215.56). We reject that contention. " '[A]n indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime' " (*People v Marshall*, 299 AD2d 809, 810 [4th Dept 2002], quoting *People v Iannone*, 45 NY2d 589, 600 [1978]). Here, the indictment returned by the grand jury specifically referred to Penal

Law § 215.56 (*see generally People v Shanley*, 15 AD3d 921, 922 [4th Dept 2005], *lv denied* 4 NY3d 856 [2005]), and its terms explicitly accused defendant of having violated every element of that offense, including that she failed to appear "in connection with a charge against her of committing a felony." To the extent that, rather than alleging a jurisdictional defect in the indictment, defendant contends on appeal, as she argued in her omnibus motion, that the evidence presented to the grand jury is legally insufficient (*see generally Iannone*, 45 NY2d at 600), defendant's contention is not properly before us. "It is well established that a defendant who pleads guilty may not challenge on appeal the sufficiency . . . of the evidence before the grand jury" (*People v Colon*, 151 AD3d 1915, 1919 [4th Dept 2017]; *see People v Johnson*, 92 AD3d 897, 898 [2d Dept 2012]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1077

KA 18-00303

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY EDWARDS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 5, 2017. The judgment convicted defendant, upon a jury verdict, of resisting arrest.

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 resisting arrest (Penal Law § 205.30), defendant contends that the evidence is legally insufficient to support the conviction. We reject that contention.

"A person is guilty of resisting arrest when he [or she] intentionally prevents or attempts to prevent a police officer . . . from effecting an authorized arrest of himself [or herself] or another person" (*id.*). "An arrest is 'authorized' if, but only if, it 'was premised on probable cause' " (*People v Finch*, 23 NY3d 408, 416 [2014], quoting *People v Jensen*, 86 NY2d 248, 253 [1995]). "When determining whether the police had probable cause to arrest, the 'inquiry is not as to defendant's guilt but as to the sufficiency for arrest purposes of the grounds for the arresting officer's belief that [the defendant] was guilty' " (*People v Shulman*, 6 NY3d 1, 25-26 [2005], *cert denied* 547 US 1043 [2006]). Here, contrary to defendant's contention, the evidence is legally sufficient to establish that the arrest of defendant was based on probable cause and thus was authorized (*cf. People v Howard*, 132 AD3d 1266, 1267-1268 [4th Dept 2015]). Contrary to defendant's further contention that the evidence was legally insufficient with respect to defendant's intent to resist arrest, we conclude that "the jury could have rationally inferred that defendant intended to" prevent the officers from effecting an arrest (*People v Barboni*, 21 NY3d 393, 405 [2013]). Consequently, the verdict is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). With respect to defendant's challenges to the credibility of the witnesses' testimony, " 'the jury was in the best position to assess the credibility of the witness[es] and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v McCall*, 177 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020]).

We reject defendant's further contention that Supreme Court erred in denying his motion to set aside the verdict based on juror misconduct. It is well settled that "not every misstep by a juror rises to the inherently prejudicial level at which reversal is required automatically" (*People v Brown*, 48 NY2d 388, 394 [1979]; *see People v Bell*, 307 AD2d 1047, 1047-1049 [2d Dept 2003], *lv denied* 1 NY3d 568 [2003]). "A motion to set aside a verdict under CPL 330.30 (2) may be granted where it is shown that improper conduct by a juror prejudiced a substantial right of the defendant" (*People v Gonzales*, 228 AD2d 722, 722 [3d Dept 1996], *lv denied* 88 NY2d 1021 [1996]; *see People v Irizarry*, 83 NY2d 557, 561 [1994]). Upon our review of the evidence from the hearing, however, we conclude that the record supports the court's conclusion that the actions of the jurors at issue had no impact on the jury's determinations and thus did not prejudice a substantial right of defendant (*see People v Tubbs*, 115 AD3d 1009, 1012-1013 [3d Dept 2014]; *People v Carmichael*, 68 AD3d 1704, 1705-1706 [4th Dept 2009], *lv denied* 14 NY3d 798 [2010]). We have reviewed defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1078

KA 19-02224

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK GATLING, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Richard M. Healy, J.), dated October 16, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). As defendant correctly contends and contrary to the People's contention, County Court failed to comply with Correction Law § 168-n (3), pursuant to which the court was required to set forth the findings of fact and conclusions of law upon which it based its determination. The standardized form order—which the court merely read into the record when rendering its oral decision—indicated without elaboration that the court was entirely adopting the case summary and risk assessment instrument prepared by the Board of Examiners of Sex Offenders, listed the risk factor point assessments contained therein, and denied in conclusory fashion defendant's request for a downward departure. That was inadequate to fulfill the statutory mandate (*see People v Dean*, 169 AD3d 1414, 1415 [4th Dept 2019]; *People v Cullen*, 53 AD3d 1105, 1106 [4th Dept 2008]; *People v Marr*, 20 AD3d 692, 693 [3d Dept 2005]; *see generally People v Smith*, 11 NY3d 797, 798 [2008]). We therefore hold the case, reserve decision, and remit the matter to County Court for compliance with Correction Law § 168-n (3).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1081

KA 17-01969

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUASHAR NEIL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (James W. McCarthy, J.), rendered April 26, 2017. The judgment convicted defendant upon a jury verdict of attempted murder in the first degree, attempted assault in the first degree, criminal possession of a weapon in the second degree (three counts), criminal use of a firearm in the second degree, unlawful fleeing a police officer in a motor vehicle in the third degree, reckless driving, and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]). Defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to clear up the misimpression, which defense counsel created, that defendant was involved in a similar crime one month prior to the subject crime. Defendant also contends that he was denied effective assistance of counsel based on defense counsel's cross-examination of the expert fingerprint examiners about whether their work was verified. We reject those contentions because defendant failed to meet his burden of showing "the absence of strategic or other legitimate explanations for counsel's challenged actions" (*People v Lopez-Mendoza*, 33 NY3d 565, 572 [2019] [internal quotation marks omitted]; *see People v Ambers*, 26 NY3d 313, 320 [2015]; *People v Norman*, 183 AD3d 1240, 1242 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]).

Defendant's contention that he was denied a fair trial by prosecutorial misconduct on summation is unpreserved for appellate review, and we decline to exercise our power to review it as a matter

of discretion in the interest of justice (*see People v Rogers*, 186 AD3d 1046, 1049 [4th Dept 2020]). Furthermore, even assuming, arguendo, that an objection by defense counsel to the conduct in question would have had a chance of success (*see generally People v Caban*, 5 NY3d 143, 152 [2005]), we conclude that the failure of defense counsel to object to the prosecutor's isolated comment, which "was not so egregious or improper as to deny defendant a fair trial . . . , did not render defense counsel ineffective" (*People v Kilbury*, 83 AD3d 1579, 1580 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011] [internal quotation marks omitted]). Upon our review of the record, we conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [defendant's] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

We reject defendant's contention that he was deprived of a fair trial based on the cumulative effect of the alleged errors. Finally, the sentence is not unduly harsh or severe.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1082

KAH 19-01293

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

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

V MEMORANDUM AND ORDER

MATTHEW THOMS, SUPERINTENDENT, FIVE POINTS
CORRECTIONAL FACILITY AND ANTHONY J. ANNUCCI,
COMMISSIONER, NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT

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

Appeal from a judgment (denominated order) of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered January 22, 2019 in a habeas corpus proceeding. The judgment, inter alia, 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, claiming that he was denied effective assistance of counsel on his direct appeal due to appellate counsel's conflict of interest. He now appeals from a judgment that, inter alia, denied the petition. We affirm. Regardless of petitioner's contention that he could not have raised that claim on his direct appeal precisely because he was denied effective assistance of appellate counsel, a proceeding for a writ of habeas corpus is not the appropriate proceeding in which to raise such a claim inasmuch as the remedy for ineffective assistance of appellate counsel is a new appeal, not immediate release from custody (*see People ex rel. Smith v Burge*, 11 AD3d 907, 908 [4th Dept 2004], *lv denied* 4 NY3d 701 [2004]; *People ex rel. Rivera v Smith*, 244 AD2d 944, 944 [4th Dept 1997], *lv denied* 91 NY2d 808 [1998]). Petitioner's claim is properly the subject of a motion for a writ of error coram nobis (*see People ex rel. Williams v Sheahan*, 145 AD3d 1517, 1518 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]; *People ex rel. Williams v Griffin*, 114 AD3d 976, 976 [3d Dept 2014]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1083

KA 19-00343

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFTON SEYMORE, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered October 10, 2018. The judgment convicted defendant upon a plea of guilty of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [7]), arising from an altercation defendant had with another inmate while confined in a correctional facility on a prior conviction. We note at the outset that defendant does not challenge the validity of his waiver of the right to appeal (*see People v Rosado-Thomas*, 181 AD3d 1166, 1166 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]). Defendant contends that his plea was not knowingly, intelligently, and voluntarily entered. Although that contention survives the unchallenged appeal waiver (*see People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Seaberg*, 74 NY2d 1, 10 [1989]), defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we conclude that this case does not fall within the narrow exception to the preservation requirement (*see id.* at 666). In any event, the record demonstrates that defendant knowingly, voluntarily, and intelligently entered the guilty plea (*see People v Seeber*, 4 NY3d 780, 781-782 [2005]).

Defendant's challenge to the sufficiency of the factual allegations in the indictment does not survive the guilty plea or the appeal waiver (*see People v Guerrero*, 28 NY3d 110, 116 [2016]; *People v Oswold*, 151 AD3d 1756, 1757 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]; *People v Briggs*, 147 AD3d 1077, 1077 [2d Dept 2017], *lv denied* 29 NY3d 1076 [2017]). Contrary to defendant's further assertion, the record establishes that defendant did not request a bill of particulars from the People pursuant to the requirements of CPL 200.95. Even assuming, arguendo, that such a request was made, any

contention by defendant that he was denied due process of law by the People's failure to comply with a demand for a bill of particulars would be precluded by the appeal waiver (*see People v Vanvleet*, 126 AD3d 1359, 1360 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]).

Defendant's contention that County Court erred in denying his request for substitution of his first attorney during a proceeding prior to the plea is "encompassed by the plea and the waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *see People v Wellington*, 169 AD3d 1440, 1441 [4th Dept 2019], *lv denied* 33 NY3d 982 [2019]). As previously stated, however, defendant's challenge to the voluntariness of the plea is not preserved for our review (*see People v Rolfe*, 83 AD3d 1219, 1220 [3d Dept 2011], *lv denied* 17 NY3d 809 [2011]). In any event, to the extent that defendant's contention implicates the voluntariness of the plea, it is without merit inasmuch as the record establishes that defendant was, in fact, represented by a second attorney by the time of the plea proceeding, during which defendant expressed no concerns with the second attorney and instead confirmed that he was satisfied with that attorney's advice and representation (*see People v Lewicki*, 118 AD3d 1328, 1328-1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

Defendant contends that he was denied effective assistance of counsel, which rendered his plea involuntary, based on the first attorney's alleged failures to request a bill of particulars, investigate witnesses, demand other items of discovery, and sufficiently communicate with him. Defendant's contention survives his guilty plea and appeal waiver "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; *see People v Miller*, 161 AD3d 1579, 1580 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "received an advantageous plea, and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]). Defendant's contention that the first attorney was ineffective based on his failure to request a bill of particulars is without merit (*see People v Granger*, 96 AD3d 1669, 1670 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]; *People v Moyer*, 75 AD3d 1004, 1007 [3d Dept 2010]; *People v Neal*, 56 AD3d 1211, 1211 [4th Dept 2008], *lv denied* 12 NY3d 761 [2009]). Defendant's contention otherwise " 'involves matters outside the record on appeal and, thus, it must be raised by way of a motion pursuant to CPL article 440' " (*People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019]; *see People v Goodwin*, 159 AD3d 1433, 1435 [4th Dept 2018]; *People v Resto*, 147 AD3d 1331, 1334-1335 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]).

Defendant also contends that his third attorney, who appeared at sentencing on defendant's behalf after defendant waived his appearance, was ineffective because he had no knowledge of the case. We reject that contention. The record establishes that, although the third attorney had only recently taken over the case, he "was sufficiently familiar with the case and defendant's background to provide meaningful representation at sentencing" and appropriately advocated for defendant at sentencing (*People v Saladeen*, 12 AD3d 1179, 1180 [4th Dept 2004], *lv denied* 4 NY3d 767 [2005]). We conclude that, "given the nature of defendant's criminal record and the criminal conduct herein, . . . no [further] statement made by [the third attorney] at sentencing 'would have had an impact on the sentence imposed' " (*id.*).

Defendant's challenge to the severity of his sentence "is foreclosed by his unchallenged waiver of the right to appeal" (*Rosado-Thomas*, 181 AD3d at 1167; *see People v Putman*, 163 AD3d 1461, 1461 [4th Dept 2018]). Finally, we note that the plea proceeding and the sentence reflect defendant's status as a second violent felony offender (Penal Law § 70.04 [1] [a], [b]), and the record thus confirms that the court merely misstated at sentencing that defendant was a second felony offender rather than a second violent felony offender (*see People v Camp*, 134 AD3d 1470, 1471 [4th Dept 2015], *lv denied* 27 NY3d 1066 [2016]; *People v Feliciano*, 108 AD3d 880, 881 n 1 [3d Dept 2013], *lv denied* 22 NY3d 1040 [2013]). Inasmuch as the certificate of conviction and uniform sentence and commitment form incorrectly reflect that defendant was sentenced as a second felony offender, they must be amended to reflect that he was sentenced as a second violent felony offender (*see People v Mobayed*, 158 AD3d 1221, 1223 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *People v Carducci*, 143 AD3d 1260, 1263 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1084

CAF 19-00244

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

IN THE MATTER OF STEVEN D., JR. AND AMANDA D.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

STEVEN D., SR., AND NICOLE S.,
RESPONDENTS-APPELLANTS.

BETH A. RATCHFORD, CANANDAIGUA, FOR RESPONDENT-APPELLANT STEVEN D., SR.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT NICOLE S.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELLEN VANCLEAVE, BATH, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered January 2, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother and respondent father each appeal from an order that, inter alia, terminated their parental rights to the subject children on the ground of permanent neglect. We affirm.

We reject the parents' contentions that petitioner Monroe County Department of Human Services (DHS) failed to establish by clear and convincing evidence that it made the requisite diligent efforts to reunite them with their children (*see* Social Services Law § 384-b [7] [a]). The record amply establishes that DHS presented both parents with myriad services and resources to strengthen their relationship with the children, including parenting classes, therapeutic counseling, individual coaching, and mentoring (*see Matter of Carl B., Jr. [Carl B., Sr.]*, 181 AD3d 1161, 1162-1163 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]; *Matter of Brooke T. [Terri T.]*, 175 AD3d 1842, 1842 [4th Dept 2019]; *Matter of Gina Rachel L.*, 44 AD3d 367, 368 [1st Dept 2007]). DHS also coordinated supervised visits between the

parents and the subject children (*see Matter of Janette G. [Julie G.]*, 181 AD3d 1308, 1308 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]).

We further conclude that DHS established by clear and convincing evidence that, despite its diligent efforts, both parents failed to adequately plan for the return of the children (*see* Social Services Law § 384-b [7] [a]). Although both parents did, in fact, participate in the services DHS provided, they did not improve their ability "to accept responsibility and modify their behavior" accordingly (*Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]), nor did they gain "insight into the problems that led to the removal of the child[ren] and continued to prevent the child[ren's] safe return" (*Matter of D'Angel M.-B. [Donell M.-B.]*, 173 AD3d 1764, 1765 [4th Dept 2019], *lv denied* 34 NY3d 911 [2020] [internal quotation marks omitted]; *see Matter of Cayden L.R. [Melissa R.]*, 108 AD3d 1154, 1155 [4th Dept 2013], *lv denied* 22 NY3d 866 [2014]; *Matter of Rachael N. [Christine N.]*, 70 AD3d 1374, 1374 [4th Dept 2010], *lv denied* 15 NY3d 708 [2010]).

Even assuming, arguendo, that, as both parents contend, Family Court erred in refusing to qualify one of the mother's witnesses as an expert (*see Rook v 60 Key Ctr.*, 239 AD2d 926, 927-928 [4th Dept 1997]), we conclude that the error was harmless because, given the circumstances of the case, the outcome would have been the same had the witness been qualified as an expert (*see Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1085

CAF 19-00285

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

IN THE MATTER OF RANDY P. LANE, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROXANNE RAWLEIGH, RESPONDENT-RESPONDENT.

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

JOAN MERRY, HORNELL, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered December 17, 2018 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 reversed on the law without costs, the motion is denied, the petition is reinstated and the matter is remitted to Family Court, Allegany County, for further proceedings in accordance with the following memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 6 seeking to modify a prior order of custody and visitation entered January 26, 2012 (2012 order). The father appeals from an order granting respondent's motion insofar as it sought to dismiss the petition on the ground that the father had not complied with the provision (mental health treatment provision) of an April 2010 order of custody and visitation (2010 order) requiring him to successfully complete mental health treatment before petitioning for modification of the custody or visitation arrangements set forth in the 2010 order. We reverse.

As an initial matter, we note that the mental health treatment provision of the 2010 order is no longer in effect inasmuch as the 2010 order was superseded by the 2012 order (*see generally Matter of Tristyn R. [Jacqueline Z.]* [appeal No. 2], 144 AD3d 1611, 1612 [4th Dept 2016]; *Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576 [4th Dept 2014]), which granted custody to respondent and awarded the father monthly visitation but did not include a mental health treatment provision with respect to the father. In any event, "[a]lthough a court may include a directive to obtain counseling as a component of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" (*Matter of Ordona v Cothern*, 126 AD3d 1544, 1546 [4th Dept 2015]; *see Matter of Avdic v Avdic*, 125 AD3d 1534, 1535 [4th Dept

2015]). Family Court therefore "lacked the authority to condition any future application for modification of [the father's] visitation on [his] participation in mental health counseling" (*Matter of Vieira v Huff*, 83 AD3d 1520, 1522 [4th Dept 2011]). Thus, we conclude that the court erred in granting the motion based on the father's alleged failure to comply with the mental health treatment provision set forth in the 2010 order.

We further conclude that the father made a sufficient evidentiary showing of a change in circumstances to require a hearing with respect to the allegations in the petition (*see Matter of Isler v Johnson*, 118 AD3d 1504, 1505 [4th Dept 2014]). We therefore reverse the order, deny the motion, reinstate the petition, and remit the matter to Family Court for further proceedings on the petition.

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court

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

1092

CA 20-00595

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

HILLARY RIFKIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM ILECKI, DEFENDANT-APPELLANT.

JENNIFER M. LORENZ, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM, LLC, WILLIAMSVILLE (MICHAEL J. COLLETTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered November 27, 2019. The order, inter alia, directed defendant to pay monthly child support of $4,970 and awarded plaintiff interim counsel fees of $5,500.

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

Memorandum: In this action for divorce and ancillary relief, defendant appeals from an order that, inter alia, directed him to pay temporary monthly child support of $4,970 and awarded plaintiff interim counsel fees of $5,500. We affirm.

"The Child Support Standards Act [CSSA] provides the formulas to be applied to the parties' income and the factors to be considered in determining a *final* award of child support (*see* Domestic Relations Law § 240 [1-b]). Courts considering applications for *pendente lite* child support may, in their discretion, apply the CSSA standards and guidelines, but they are not required to do so" (*Davydova v Sasonov*, 109 AD3d 955, 957 [2d Dept 2013] [internal quotation marks omitted]). Thus, contrary to defendant's contention, Supreme Court was "not required to calculate [defendant's pendente lite] child support obligation pursuant to the CSSA" (*Vistocco v Jardine*, 116 AD3d 842, 843 [2d Dept 2014]; *see* § 236 [B] [7] [a]; *Hof v Hof*, 131 AD3d 579, 581 [2d Dept 2015]). With respect to defendant's contention that the court erred in its calculations, imputation of income, and application of the statutory factors, it is well settled that "[t]he remedy for any claimed inequity in [an] award[] of temporary . . . child support . . . is a speedy trial where the respective finances of the parties can be ascertained and a permanent award based on the evidence may be made" (*Tabor v Tabor*, 39 AD2d 640, 640 [4th Dept 1972] [internal quotation marks omitted]; *see Baxter v Baxter*, 162 AD3d 1743, 1743-1744 [4th Dept 2018]).

Finally, contrary to defendant's further contention, the court did not abuse its discretion in awarding plaintiff interim counsel fees (*see* Domestic Relations Law § 237; *Johnson v Chapin*, 12 NY3d 461, 467 [2009], *rearg denied* 13 NY3d 888 [2009]; *Vistocco*, 116 AD3d at 844).

Entered: November 20, 2020

Mark W. Bennett
Clerk of the Court