SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 28, 2018

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

746

CA 18-00131

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

KIMBERLY RICKARD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

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

LAW OFFICE OF MICHAEL D. HOLLENBECK, BUFFALO (MICHAEL D. HOLLENBECK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered January 4, 2018. The order, insofar as appealed from, denied the motion of defendant for a protective order and granted in part the cross motion of plaintiff to compel the disclosure of defendant's claim file.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the first and second ordering paragraphs are vacated, and the motion for a protective order insofar as it seeks an in camera review is granted, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Following a motor vehicle accident in which plaintiff allegedly sustained serious physical injuries, plaintiff commenced this action to recover supplementary underinsured motorist (SUM) benefits pursuant to an automobile liability insurance policy issued by defendant. During discovery, plaintiff served upon defendant a notice to produce its entire SUM claim file. Defendant, relying upon *Lalka v ACA Ins. Co.* (128 AD3d 1508 [4th Dept 2015]), responded by providing plaintiff with the contents of the claim file up until the date of commencement of this action. During a pretrial conference, defendant made an offer to resolve the matter. In a follow-up letter, plaintiff demanded that defendant provide the entire claim file, including those parts generated after commencement of this action. Defendant moved for a protective order and alternative relief, including an in camera review, plaintiff cross-moved to compel disclosure of the entire claim file, and defendant filed a second motion, seeking dismissal of the complaint, which is not relevant on appeal. Supreme Court, inter alia, denied defendant's motion for a protective order and granted plaintiff's cross motion in part by directing defendant to provide plaintiff with "any and all documents in the claim file pertaining to

the payment or rejection of the subject claim including those prepared after the filing of this lawsuit up to the time the settlement offer was made . . . including reports prepared by Defendant's attorney(s)." Defendant appeals.

We note at the outset that defendant did not challenge plaintiff's notice to produce, which requested the entire claim file without designating any documents or categories of documents therein, on the ground that such request was palpably improper because it was overbroad or sought matter not "material and necessary" for the prosecution of plaintiff's action (CPLR 3101 [a]; *see* CPLR 3120 [1], [2]; *see generally Battease v State of New York*, 129 AD3d 1579, 1580 [4th Dept 2015]; *Heimbach v State Farm Ins.*, 114 AD3d 1221, 1222 [4th Dept 2014]), and that defendant's motion for a protective order was based upon the assertion that any documents contained in the claim file after the date of commencement were materials protected from discovery. Thus, the sole issue on appeal is whether defendant met its burden of establishing that those parts of the claim file withheld from discovery contain material that is protected from discovery. We conclude that defendant did not meet that burden.

To the extent that *Lalka* (128 AD3d at 1508) holds that any documents in a claim file created after commencement of an action in a SUM case in which there has been no denial or disclaimer of coverage are per se protected from discovery, it should not be followed. Rather, a party seeking a protective order under any of the categories of protected materials in CPLR 3101 bears "the burden of establishing any right to protection" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]; *see Heimbach*, 114 AD3d at 1222). " '[A] court is not required to accept a party's characterization of material as privileged or confidential' " (*Optic Plus Enters., Ltd. v Bausch & Lomb Inc.*, 37 AD3d 1185, 1186 [4th Dept 2007]). Ultimately, "resolution of the issue 'whether a particular document is . . . protected is necessarily a fact-specific determination . . . , most often requiring in camera review' " (*id.*, quoting *Spectrum Sys. Intl. Corp.*, 78 NY2d at 378).

Here, we conclude that defendant failed to meet its burden inasmuch as it relied solely upon the conclusory characterizations of its counsel that those parts of the claim file withheld from discovery contain protected material. We nonetheless further conclude that, under the circumstances of this case, the court abused its discretion by ordering the production of allegedly protected documents and instead should have granted the alternative relief requested by defendant, i.e., allowing it to create a privilege log pursuant to CPLR 3122 (b) followed by an in camera review of the subject documents by the court (*see Schindler v City of New York*, 134 AD3d 1013, 1014-1015 [2d Dept 2015]; *Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030, 1031 [4th Dept 2000]). We therefore reverse the order insofar as appealed from, vacate the first and second ordering paragraphs, grant the motion for a protective order insofar as it seeks an in camera review, and remit the matter to Supreme Court to determine the motion and the cross motion following an in camera review of the

allegedly protected documents.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

871

TP 18-00479

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

IN THE MATTER OF JULIO SMITH, PETITIONER,

V ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

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

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

872

TP 18-00567

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

IN THE MATTER OF RINALDO MCBRIDE, PETITIONER,

V ORDER

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

RINALDO MCBRIDE, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Livingston County [Robert B. Wiggins, A.J.], entered March 26, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

873

KA 15-00953

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD WALCOTT, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN 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 (Sara S. Farkas, J.), rendered January 9, 2015. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [5]), defendant contends that County Court abused its discretion in denying his motion to withdraw his guilty plea based upon his claim of innocence. Although that contention survives defendant's valid waiver of the right to appeal (*see People v Colon*, 122 AD3d 1309, 1309 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]), we conclude that it lacks merit. " 'A defendant is not entitled to withdraw his guilty plea based on a subsequent unsupported claim of innocence[] where[, as here,] the guilty plea was voluntarily made with the advice of counsel following an appraisal of all the relevant factors' " (*People v Fisher*, 28 NY3d 717, 726 [2017]). "The assertion of innocence by defendant in support of the motion is belied by his admission of guilt during the plea colloquy" (*People v Conde*, 34 AD3d 1347, 1347 [4th Dept 2006]; *see People v Newkirk*, 133 AD3d 1364, 1364 [4th Dept 2015], *lv denied* 26 NY3d 1148 [2016]; *People v Williams*, 103 AD3d 1128, 1129 [4th Dept 2013], *lv denied* 21 NY3d 915 [2013]; *see generally People v Haffiz*, 19 NY3d 883, 884-885 [2012]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

874

KA 15-00915

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY R. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered February 17, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that County Court erred in refusing to suppress identification testimony arising from three separate identification procedures, specifically two showups and a photo array. We reject that contention.

The first showup identification, which occurred during the course of the ongoing investigation, was conducted within 10 minutes of the crime and only a few blocks from the scene of the crime, and "the fact that [defendant] was handcuffed and standing next to a police officer during the showup identification procedure does not render the procedure unduly suggestive as a matter of law" (*People v Thompson*, 132 AD3d 1364, 1365 [4th Dept 2015], *lv denied* 27 NY3d 1156 [2016]; *see generally People v Robinson*, 8 AD3d 1028, 1029 [4th Dept 2004], *affd* 5 NY3d 738 [2005], *cert denied* 546 US 988 [2005]; *People v Walker*, 155 AD3d 1685, 1686 [4th Dept 2017], *lv denied* 30 NY3d 1109 [2018]). The second showup identification, which took place at the scene of the crime, occurred within 20 to 25 minutes of the crime (*see People v Ponder*, 42 AD3d 880, 881 [4th Dept 2007], *lv denied* 9 NY3d 925 [2007]) and was also conducted "in the course of a 'continuous, ongoing investigation' " (*People v Lewis*, 97 AD3d 1097, 1098 [4th Dept 2012], *lv denied* 19 NY3d 1103 [2012], quoting *People v Brisco*, 99 NY2d

596, 597 [2003]). Moreover, "the fact that the [witness] viewed defendant after he got out of a patrol car did not render th[at] procedure unduly suggestive" (*People v Owens*, 161 AD3d 1567, 1568 [4th Dept 2018]; *see also Robinson*, 8 AD3d at 1029). We thus conclude that "the showup[s were] reasonable under the circumstances–that is, . . . conducted in close geographic and temporal proximity to the crime–and the procedure[s] used [were] not unduly suggestive" (*Brisco*, 99 NY2d at 597).

Defendant contends that the photo array presented to the victim at the hospital was unduly suggestive because the victim was not shown an array without defendant's photograph in it. We reject that contention (*see People v Peterkin*, 153 AD3d 1568, 1569 [4th Dept 2017]). Defendant's remaining contentions concerning the identification procedures are raised for the first time on appeal and thus are not preserved for our review (*see e.g. People v Bakerx*, 114 AD3d 1244, 1247 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]; *Lewis*, 97 AD3d at 1097-1098; *People v Santiago*, 83 AD3d 1471, 1471 [4th Dept 2011], *lv denied* 17 NY3d 800 [2011]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the court erred in permitting witnesses to testify at trial about the identification procedures. Inasmuch as no objection was made to that testimony, defendant's contention is not preserved for our review (*see People v Marks*, 182 AD2d 1122, 1122-1123 [4th Dept 1992]; *People v Battee*, 94 AD2d 935, 936 [4th Dept 1983]). In any event, although testimony concerning a third-party's prior identification of a defendant is generally inadmissible (*see People v Buie*, 86 NY2d 501, 510 [1995]; *see also People v Patterson*, 93 NY2d 80, 82 [1999]; *but see* CPL 60.25 [1] [a]), we conclude that the testimony of a police officer concerning another citizen's identification of defendant during the second showup identification "served to 'complete the narrative of events leading up to defendant's [arrest]' " (*People v Corchado*, 299 AD2d 843, 844 [4th Dept 2002], *lv denied* 99 NY2d 581 [2003]; *see People v Cruz*, 214 AD2d 952, 952 [4th Dept 1995], *lv denied* 86 NY2d 793 [1995]). Moreover, defense counsel himself elicited the testimony concerning the first showup procedure.

We reject defendant's contention that counsel was ineffective in failing to object to the testimony about the second showup identification and in eliciting testimony concerning the first showup identification. Defense counsel's entire theory at trial was that the people who identified defendant as the perpetrator did so based solely on his clothes, which witnesses admitted were similar to clothes commonly worn by others in the neighborhood. Thus, the improper testimony did not affect the overall defense strategy. Viewing the evidence, the law and the circumstances of the case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's further contention, viewing the elements

of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is not unduly harsh or severe.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

875

KA 16-00200

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH J. TIDD, II, ALSO KNOWN AS KENNETH TIDD, II, ALSO KNOWN AS KENNETH J. TIDD, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 17, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal sexual act in the first degree (Penal Law § 130.50 [3]), defendant contends that his waiver of the right to appeal is invalid because it was not knowingly, voluntarily, and intelligently entered. We reject that contention. The record establishes that County Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017] [internal quotation marks omitted]; *see People v Simcoe*, 74 AD3d 1858, 1859 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]). In addition, the plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that "the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Gibson*, 147 AD3d 1507, 1507 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *see generally People v Ramos*, 7 NY3d 737, 738 [2006]). Defendant's valid waiver of the right to appeal forecloses his challenges to the severity of the sentence and the factual sufficiency of the plea allocution (*see Lopez*, 6 NY3d at 255; *Simcoe*, 74 AD3d at 1859.

By failing to move to withdraw the plea or vacate the judgment of

conviction, defendant failed to preserve for our review his contention that his plea was involuntary because it was entered too early in the prosecution to allow him sufficient time to consider the plea (*see People v Brown*, 9 AD3d 884, 885 [4th Dept 2004], *lv denied* 3 NY3d 671 [2004]). This case does not fall within the rare exception to the preservation requirement because the plea colloquy did not "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]).

We reject defendant's final contention that the court should have sua sponte ordered a competency evaluation pursuant to CPL article 730. " 'There is no evidence in the record that would have warranted the court to question defendant's competency or ability to understand the nature of the proceedings or the charge[]' " (*People v Padilla*, 151 AD3d 1700, 1701 [4th Dept 2017], *lv denied* 31 NY3d 1016 [2018]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

879

KA 18-00429

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRUNO LANGEVIN, DEFENDANT-APPELLANT.

GALLUZZO & ARNONE LLP, NEW YORK CITY (MATTHEW J. GALLUZZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered June 28, 2017. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree and sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal sexual act in the first degree (Penal Law § 130.50 [4]) and sexual abuse in the first degree (§ 130.65 [4]), defendant contends that County Court improperly charged the jury in response to a jury note about a potential deadlock during deliberations. We reject that contention. After less than three hours of deliberations, the jury sent a note asking "what happens if we can't agree on both charges." In response, the court instructed the jury that the court would "send [the jury] back in and tell you to keep working to come to an agreement because the law requires a unanimous jury verdict and it would relate to both charges. So I am going to ask you to continue your deliberations and *do your best* to come to an agreement on each of the charges. It's got to be unanimous" (emphasis added). Thus, although the court informed the jury that a verdict had to be unanimous, the court did not instruct the jury that a verdict was required. In our view, the court's "supplemental instruction viewed as a whole was simply encouraging rather than coercive and was appropriate in light of the fact that the . . . jury had been deliberating for less than four hours" (*People v Ford*, 78 NY2d 878, 880 [1991]; *see People v Thomas*, 113 AD3d 447, 447 [1st Dept 2014], *lv denied* 22 NY3d 1159 [2014]; *see generally People v Morgan*, 28 NY3d 516, 521-522 [2016]).

To the extent that defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to call an expert witness at the *Huntley* hearing and failure to call character witnesses at trial, that contention involves matters outside

the record on appeal and must therefore be raised by way of a motion pursuant to CPL article 440 (*see People v Chander*, 140 AD3d 1181, 1182-1183 [2d Dept 2016], *lv denied* 28 NY3d 1026 [2016]; *People v Washington*, 122 AD3d 1406, 1406 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]; *People v Kaminski*, 109 AD3d 1186, 1186 [4th Dept 2013], *lv denied* 22 NY3d 1088 [2014]). We have considered defendant's remaining allegation of ineffective assistance of counsel and, viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

883

CA 18-00578

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

PATRICIA A. WASHINGTON AND EDDIE T. LOPER, SR.,
PLAINTIFFS-RESPONDENTS,

V ORDER

MARIA E. MONAGAN AND NIAGARA MOHAWK POWER CORPORATION,
DEFENDANTS-APPELLANTS.

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

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 18, 2017. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

884

CA 17-01770

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

IN THE MATTER OF JOSEPH A. MASCIA,
PETITIONER-APPELLANT,

V ORDER

CITY OF BUFFALO, BYRON W. BROWN, INDIVIDUALLY, AND AS MAYOR OF THE CITY OF BUFFALO, MICHAEL A. SEAMAN, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, ALAN CORE, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, STANLEY FERNANDEZ, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, HAL D. PAYNE, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, DONNA BROWN, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, YVONNE MARTINEZ, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS AND BUFFALO MUNICIPAL HOUSING AUTHORITY, RESPONDENTS-RESPONDENTS.

HOGANWILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (WILLIAM P. MATHEWSON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF BUFFALO, AND BYRON W. BROWN, INDIVIDUALLY, AND AS MAYOR OF THE CITY OF BUFFALO.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS MICHAEL A. SEAMAN, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, ALAN CORE, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, STANLEY FERNANDEZ, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, HAL D. PAYNE, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, DONNA BROWN, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS, YVONNE MARTINEZ, INDIVIDUALLY, AND AS A MEMBER OF THE BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS AND BUFFALO MUNICIPAL HOUSING AUTHORITY.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 16, 2016 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the amended petition.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

885

CA 18-00039

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

JOHN J. SOPKOVICH AND CAROL A. SOPKOVICH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DONALD J. SMITH, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

LEWIS & LEWIS, P.C., JAMESTOWN (JOHN I. LAMANCUSO 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, Chautauqua County (Eugene F. Pigott, Jr., J.), entered September 20, 2017. The order granted the motion of defendant Donald J. Smith for summary judgment and dismissed the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint against defendant Donald J. Smith is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by John J. Sopkovich (plaintiff) when he and Donald J. Smith (defendant), a snowboarder, collided on a ski trail. Defendant moved for summary judgment dismissing the complaint against him, contending that plaintiff "assumed the risk of a collision with another downhill skier or snowboarder" and that defendant did not engage in any "reckless, intentional, or other risk-enhancing conduct not inherent in the activity." We conclude that Supreme Court erred in granting defendant's motion.

In support of his motion, defendant submitted, inter alia, his own deposition testimony and that of plaintiff. Plaintiff, an "advanced intermediate skier" who had been skiing for over 40 years, testified that he was "slow[ly]" skiing down a beginner trail when defendant merged onto that trail from an intermediate trail and "impacted [plaintiff] from the left." By contrast, defendant, an "advanced" snowboarder who was familiar with the trails, testified that he had already safely merged onto the beginner trail at an "average" or "normal" speed, was further down the beginner trail than plaintiff and was "very close to a complete stop" at the time of the collision, having observed plaintiff "going fast" "down the hill in a

straight line." It looked to defendant as if plaintiff was "out of control" and did not "ha[ve] the ability to make the turn" to avoid defendant. It is undisputed that both men suffered significant injuries, with plaintiff sustaining a broken leg, lacerated kidney and significant contusions to his left side and defendant sustaining broken ribs on the left side of his body and lacerations to his spleen, kidney and diaphragm.

In opposition to the motion, plaintiffs submitted, inter alia, an affidavit from an emergency room physician who was also an 11-year veteran of the National Ski Patrol. Based on his review of the depositions and other records related to the case, the expert opined that, given the nature and extent of plaintiff's injuries, "there [was] no question [that] the force with which [defendant] impacted [plaintiff's] left side and back was immense" and that plaintiff's injuries were "not consistent with [defendant's] deposition testimony" that he had come to or nearly come to a complete stop. The expert further opined that, "[g]iven that [plaintiff] was skiing slowly at the time of the collision, the severe injuries sustained by [both] men, and their unanimous testimony that the collision was severe, it [was] clear [that defendant] was snowboarding at an extremely high rate of speed at the time of the collision." The expert thus concluded that defendant had "unreasonably increased the risk of harm" to plaintiff by cutting across the beginner trail "at an extremely high rate of speed . . . knowing that there would be skiers and snowboarders traveling down [the beginner trail]" and that defendant's conduct constituted "an egregious breach of good and accepted snowboarding practices."

It is well settled that " '[d]ownhill skiing [and snowboarding] . . . contain[] inherent risks including, but not limited to, the risks of personal injury . . . which may be caused by . . . other persons using the facilities' (General Obligations Law § 18-101), and thus there generally is an inherent risk in downhill skiing and snowboarding that the participants in those sports might collide" (*Martin v Fiutko*, 27 AD3d 1130, 1131 [4th Dept 2006]; *see Farone v Hunter Mtn. Ski Bowl, Inc.*, 51 AD3d 601, 602 [1st Dept 2008], *lv denied* 11 NY3d 715 [2009]; *Zielinski v Farace*, 291 AD2d 910, 911 [4th Dept 2002], *lv denied* 98 NY2d 612 [2002]). It is also well settled, however, that participants in sporting endeavors will not be deemed to have assumed the risks of reckless, intentional or other risk-enhancing conduct not inherent in the sport (*see Morgan v State of New York*, 90 NY2d 471, 485 [1997]).

Moreover, inasmuch as "the assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury . . . , dismissal of a complaint as a matter of law is warranted [only] when on the evidentiary materials before the court no fact issue remains for decision by the trier of fact" (*Maddox v City of New York*, 66 NY2d 270, 279 [1985]; *see McKenney v Dominick*, 190 AD2d 1021, 1021 [4th Dept 1993]).

Here, even assuming, arguendo, that defendant established as a matter of law that he "did not engage in any reckless, intentional or

other risk-enhancing conduct not inherent in the activity of downhill skiing [or snowboarding] that caused or contributed to the accident" (*Moore v Hoffman*, 114 AD3d 1265, 1266 [4th Dept 2014] [internal quotation marks omitted]), we conclude that plaintiffs raised triable issues of fact whether defendant engaged in such conduct.

As in *Moore*, the record establishes that the collision was exceedingly violent and, inasmuch as we must accept as true plaintiff's testimony that he was the one who was skiing slowly (*see generally Haymon v Pettit*, 9 NY3d 324, 327 n [2007], *rearg denied* 10 NY3d 745 [2008]; *Bunk v Blue Cross & Blue Shield of Utica-Watertown*, 244 AD2d 862, 862 [4th Dept 1997]), there is "at least a question of fact . . . whether . . . defendant's speed in the vicinity and overall conduct was reckless" (*DeMasi v Rogers*, 34 AD3d 720, 721-722 [2d Dept 2006]; *see Moore*, 114 AD3d at 1266). Contrary to defendant's contention, the affidavit of plaintiffs' expert was neither conclusory nor speculative (*cf. Gern v Basta*, 26 AD3d 807, 808 [4th Dept 2006], *lv denied* 6 NY3d 715 [2006]).

Thus, we conclude that the court erred in granting defendant's motion and we therefore reverse the order, deny the motion and reinstate the complaint against defendant. Based on our determination, we do not address plaintiffs' remaining contentions.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

886

CA 18-00276

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

CHRISTIE WHITNEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JACOB R. PERROTTI, DEFENDANT-APPELLANT.

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

DEMPSEY & DEMPSEY, BUFFALO (CATHERINE B. DEMPSEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 16, 2017. The order granted the motion of plaintiff to vacate an arbitration award and denied the cross motion of defendant to confirm said award.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the cross motion is granted, and the arbitration award is confirmed.

Memorandum: Defendant appeals from an order that granted plaintiff's motion seeking to vacate an arbitration award and denied defendant's cross motion to confirm the arbitration award.

This case arose from a motor vehicle accident that occurred when plaintiff's vehicle was struck from behind by defendant's vehicle. Plaintiff commenced this negligence action, and the parties submitted the case to binding arbitration. Following the arbitration proceeding, which was not transcribed, the arbitrator determined that defendant's negligence was the sole cause of the accident but that plaintiff failed to establish that such negligence was a substantial factor in causing plaintiff to sustain a serious injury pursuant to Insurance Law § 5102 (d). Supreme Court granted plaintiff's motion to vacate the arbitration award and denied the cross motion on the ground that the arbitration award was "imperfectly made" because the arbitration proceeding was not transcribed and the arbitration award failed to set forth in detail the arbitrator's reasoning. We reverse the order, deny the motion, grant the cross motion, and confirm the award.

"It is well settled that judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]). As relevant here,

a court may vacate an arbitration award if it finds that the rights of a party were prejudiced when "an arbitrator . . . exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511 [b] [1] [iii]).

We agree with defendant that the arbitration award is not irrational. An arbitrator exceeds his or her power where, inter alia, the award is "irrational" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]), i.e., "there is no proof whatever to justify the award" (*Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1122 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013] [internal quotation marks omitted]). Where, however, "an arbitrator offers even a barely colorable justification for the outcome reached, the arbitration award must be upheld" (*id.* [internal quotation marks omitted]). Here, the arbitrator's determination is not irrational inasmuch as defendant submitted evidence establishing that plaintiff's injuries were not serious or were not caused by the accident (*see Matter of Mays-Carr [State Farm Ins. Co.]*, 43 AD3d 1439, 1440 [4th Dept 2007]; *see generally Doucette v Cuviello*, 159 AD3d 1528, 1529 [4th Dept 2018]; *Bleier v Mulvey*, 126 AD3d 1323, 1324 [4th Dept 2015]; *Cummings v Jiayan Gu*, 42 AD3d 920, 922 [4th Dept 2007]).

Plaintiff correctly concedes that the arbitrator did not "imperfectly execute[]" his power (CPLR 7511 [b] [1] [iii]), inasmuch as the arbitration award did not " 'leave[] the parties unable to determine their rights and obligations,' " fail to " 'resolve the controversy submitted or . . . create[] a new controversy' " (*Yoonessi v Givens*, 78 AD3d 1622, 1622-1623 [4th Dept 2010], *lv denied* 17 NY3d 718 [2011], quoting *Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]).

Additionally, "it is well established that an arbitrator's failure to set forth his [or her] findings or reasoning does not constitute a basis to vacate an award" (*Berman v Congregation Beth Shalom*, 171 AD2d 637, 637 [2d Dept 1991], *lv dismissed* 78 NY2d 889 [1991]; *see Tilbury Fabrics v Stillwater, Inc.*, 81 AD2d 532, 533 [1st Dept 1981], *affd* 56 NY2d 624 [1982]); *Finley v Manhattan Dev. Ctr., Off. of Mental Retardation*, 119 AD2d 425, 426 [1st Dept 1986]; *Matter of Reddick & Sons of Gouverneur v Carthage Cent. Sch. Dist. No. 1*, 91 AD2d 1182, 1182 [4th Dept 1983]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

888

CA 18-00173

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

MARILYN MCDONOUGH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TRANSIT ROAD APARTMENTS, LLC, AND PARK LANE LUXURY APARTMENTS, DEFENDANTS-APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered March 28, 2017. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Defendants appeal from an order denying their motion for summary judgment dismissing the complaint. The right to appeal from an intermediate order terminates upon the entry of a final judgment (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Deuser v Precision Constr. & Dev., Inc.*, 149 AD3d 1540, 1540 [4th Dept 2017]) and, because an amended judgment in favor of plaintiff was entered on July 19, 2018 following a bifurcated trial, defendants' appeal from the intermediate order must be dismissed (*see Deuser*, 149 AD3d at 1540; *see generally Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]). Defendants may raise their contentions in an appeal from the amended judgment (*see Deuser*, 149 AD3d at 1540).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

890

CA 18-00505

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

CHRISTOPHER D. NAUS, PLAINTIFF-RESPONDENT,

V ORDER

MARY A. MCINALLY, DEFENDANT-APPELLANT.

MUSCATO, DIMILLO & VONA, L.L.P., LOCKPORT (A. ANGELO DIMILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered September 18, 2017. The order, inter alia, terminated the maintenance obligation of plaintiff as of February 28, 2017.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

892

TP 17-01593

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

IN THE MATTER OF JERRY KNIGHT, PETITIONER,

V MEMORANDUM AND ORDER

JOHN COLVIN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

JERRY KNIGHT, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered September 7, 2017) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking review of a determination, following a tier II disciplinary hearing, that he violated various inmate rules, including rule 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]), rule 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]) and rule 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]). Contrary to petitioner's contention, the misbehavior report, the testimony of the author of that report, and the testimony of other witnesses at the administrative hearing constitute substantial evidence to support the charges (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]).

Contrary to petitioner's further contention, there is no indication in the record that "the determination of the Hearing Officer was influenced by [any] bias against petitioner. 'The mere fact that the Hearing Officer ruled against . . . petitioner is insufficient to establish bias' " (*Matter of Wade v Coombe*, 241 AD2d 977, 977 [4th Dept 1997]; *see Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [4th Dept 2011]). Petitioner was not improperly denied the right to call witnesses inasmuch as one of the requested witnesses refused to testify, and the requested witnesses would have provided testimony that was redundant or immaterial (*see* 7 NYCRR 254.5 [a]; *Matter of Encarnacion v Annucci*, 150 AD3d 1581, 1582 [3d Dept 2017],

lv denied 30 NY3d 903 [2017]; *Matter of Green v Sticht*, 124 AD3d 1338, 1339 [4th Dept 2015], *lv denied* 26 NY3d 906 [2015]).

Petitioner failed to exhaust his administrative remedies with respect to his remaining contentions, and thus this Court "has no discretionary power to reach" them (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]; *see Matter of Gray v Annucci*, 144 AD3d 1613, 1614 [4th Dept 2016], *lv denied* 29 NY3d 901 [2017]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

897

CAF 17-00431

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

IN THE MATTER OF CELESTE S., IZABELLA S.,
AND MIA S.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT;

MICHELLE S., RESPONDENT,
AND RICHARD B., RESPONDENT-APPELLANT.

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

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (James E. Walsh, Jr., J.), entered February 3, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined the subject children to be abused, severely abused and neglected by respondent Richard B.

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

Memorandum: Petitioner commenced this Family Court Act article 10 proceeding with a petition alleging, inter alia, that Richard B. (respondent), the paramour of the children's mother, respondent Michelle S., abused, severely abused and neglected the subject children by subjecting one of the subject children and the subject children's 16-year-old sister to sexual contact. After respondent was convicted of, inter alia, rape in the first degree and sexual abuse in the first degree arising from that sexual contact, petitioner moved for summary judgment on the petition. Respondent appeals from an order in which Family Court, inter alia, granted the motion and determined that he abused, severely abused and neglected the subject children. We affirm.

It is well settled that a party seeking summary judgment has the initial burden of submitting evidence in admissible form that establishes as a matter of law its entitlement to the relief sought (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In a case similar to this one, the Court of Appeals determined that there was "no reason why summary judgment is not an appropriate procedure in

proceedings under Family Court Act article 10" (*Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]), and that a petitioner may meet its initial burden by establishing that a respondent was convicted of sexual crimes involving the subject children and the crimes of which he "was convicted fell within the broad allegations of the . . . abuse petition" (*id.*).

Respondent contends that petitioner failed to meet its burden with respect to the issue whether he was legally responsible for the children within the meaning of the Family Court Act. We reject that contention. Pursuant to Family Court Act § 1012 (g), a " '[p]erson legally responsible' [for a child] includes the child's custodian[, which] may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child" (*see Matter of Kyle H.*, 198 AD2d 913, 913 [4th Dept 1993]). Here, petitioner met its burden with respect to that issue by submitting the hearsay statements of the subject children and their sister, along with respondent's admissions, which established that respondent was a " '[p]erson legally responsible' for the care of the children and, as such, was a proper party to the child protective proceeding" (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]). Although the statements of the subject children and their sister were hearsay, "[i]t is well settled that there is 'an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family [Court] Act § 1046 (a) (vi)' . . . , where, as here, the statements are corroborated" (*Matter of Mateo v Tuttle*, 26 AD3d 731, 732 [4th Dept 2006]; *see Matter of Ordona v Campbell*, 132 AD3d 1246, 1247 [4th Dept 2015]; *Matter of Sutton v Sutton*, 74 AD3d 1838, 1840 [4th Dept 2010]).

Respondent failed to preserve for our review his further contention that the court should have adjourned the proceeding pending the final resolution of his appeal from the criminal conviction (*see generally Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *Matter of Keara MM. [Naomi MM.]*, 84 AD3d 1442, 1444 [3d Dept 2011]).

We reject respondent's contention that he was denied effective assistance of counsel based on his attorney's failure to make certain motions or seek an adjournment pending final resolution of his criminal appeal. It is well settled that an attorney "cannot be deemed ineffective for failing to make a motion or response to a motion that is unlikely to be successful" (*Matter of Jamaal NN.*, 61 AD3d 1056, 1058 [3d Dept 2009], *lv denied* 12 NY3d 711 [2009]; *see Matter of Kenneth L. [Michelle B.]*, 92 AD3d 1245, 1246 [4th Dept 2012]). Furthermore, "[i]t is not the role of this Court to second-guess the attorney's tactics or trial strategy" (*Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351-1352 [4th Dept 2006], *lv denied* 7 NY3d 717 [2006]) and, based on our review of the record, we conclude that respondent received meaningful representation (*see*

id. at 1352).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

899

CAF 17-00180

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

IN THE MATTER OF JAYCE P.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

ASHLEY P., RESPONDENT-APPELLANT.

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

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered November 15, 2016 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined the subject child to be neglected.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

901

CAF 16-02062

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

IN THE MATTER OF CARMELA H.

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

MEMORANDUM AND ORDER

DANIELLE F., RESPONDENT-APPELLANT,
AND JAMES H., RESPONDENT.

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

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

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

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered October 4, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child was neglected by respondents and placed the subject child in the custody of petitioner.

It is hereby ORDERED that said appeal from the order insofar as it concerns the disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order determining that she derivatively neglected the subject child. Contrary to the mother's contention, we conclude that petitioner established that " 'the neglect . . . of the child's older siblings was so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still existed' . . . , and that the mother failed to address the problems that led to the neglect findings with respect to her other children" (*Matter of Burke H. [Tiffany H.]*, 117 AD3d 1568, 1568 [4th Dept 2014]; *cf. Matter of Dana T. [Anna D.]*, 71 AD3d 1376, 1376 [4th Dept 2010]). The prior neglect findings, which ultimately led to findings of permanent neglect and the termination of the mother's parental rights (*Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1314 [4th Dept 2015], *lv denied* 25 NY3d 909 [2015]), were based in part on domestic violence in the home and unstable and unsuitable housing conditions. The record establishes that those conditions continued without improvement through September 24, 2013, the date on which the order terminating the mother's parental rights

was entered. Furthermore, the evidence at the hearing established that those conditions remained unresolved through October 8, 2015, the date on which the instant petition was filed. A counselor testified that, in July 2014, the mother and respondent father fought so bitterly during couples' therapy that their counselors had to separate them for their own safety. Police reports admitted in evidence indicated that, in October 2014, the father called the police because the mother punched and scratched him in an argument over money and that, in March 2015, the mother called the police seeking an order of protection against the father. The latter report indicated that the mother and the father had broken up and that the father wanted the mother to remove her possessions from his home. Furthermore, petitioner's caseworker testified that, during a visit to the father's home in October 2015, there was the "overwhelming smell" of a dead animal.

The mother's challenges to the dispositional provisions contained in the order, which were entered upon the consent of the parties, are not properly before us because "no appeal lies from that part of an order entered on consent" (*Matter of Charity M. [Warren M.]* [appeal No. 2], 145 AD3d 1615, 1617 [4th Dept 2016]). To the extent that the mother contends that her attorney provided ineffective assistance at the dispositional hearing, her contention has been rendered moot by the expiration of the relevant dispositional provisions (*see Matter of Wendy J.*, 219 AD2d 874, 874 [4th Dept 1995]).

Furthermore, we reject the mother's contention that she was denied effective assistance of counsel based on her attorney's failure to call a particular psychologist as a witness. That psychologist had previously performed an evaluation of the mother, and Family Court received the report of his evaluation in evidence. Upon reviewing that report, we conclude that the mother's attorney was not ineffective for declining to call the psychologist as a witness because " 'the record fails to reflect that the desired testimony would have been favorable' " (*Matter of Pfalzer v Pfalzer*, 150 AD3d 1705, 1706 [4th Dept 2017], *lv denied* 29 NY3d 918 [2017]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

903

CA 18-00237

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

IN THE MATTER OF THOMAS C. TURNER AND KINGSLEY STANARD, PETITIONERS-PLAINTIFFS-APPELLANTS,

V ORDER

MUNICIPAL CODE VIOLATIONS BUREAU OF CITY OF ROCHESTER AND CITY OF ROCHESTER, RESPONDENTS-DEFENDANTS-RESPONDENTS.

SANTIAGO BURGER LLP, PITTSFORD (MICHAEL A. BURGER OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (MAUREEN K. GILROY OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 28, 2017 in a CPLR article 78 proceeding and declaratory judgment action. The judgment declared that sections 202 and 307.1 of the Property Maintenance Code of New York State are not unconstitutional and that the determination of respondents-defendants that petitioner-plaintiff Thomas C. Turner violated said Code has a rational basis and is not arbitrary or capricious.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

904

CA 18-00563

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

MARY HERNANDEZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-APPELLANT.

KRISTEN E. SMITH, CORPORATION COUNSEL, SYRACUSE (MARY L. D'AGOSTINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREENE & REID, PLLC, SYRACUSE (JUSTIN P. ST. LOUIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 1, 2018. 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 reversed on the law without costs, defendant's motion is granted and the complaint is dismissed.

Memorandum: Plaintiff broke her ankle when she tripped on a deformed sidewalk in defendant City of Syracuse. Plaintiff thereafter commenced this negligence action, and defendant moved for summary judgment dismissing the complaint on the ground that it did not receive prior written notice of the alleged defect. Supreme Court denied the motion, and we now reverse.

Defendant met its initial burden on the motion by establishing that it did not receive prior written notice of the allegedly defective sidewalk as required by Syracuse City Charter § 8-115 (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Craig v Town of Richmond*, 122 AD3d 1429, 1429 [4th Dept 2014]; *Hall v City of Syracuse*, 275 AD2d 1022, 1023 [4th Dept 2000]). Contrary to plaintiff's contention, "it is well established that [a] 'verbal or telephonic communication to a municipal body that is reduced to writing [does not] satisfy a prior written notice requirement' " (*Tracy v City of Buffalo*, 158 AD3d 1094, 1094 [4th Dept 2018], quoting *Gorman v Town of Huntington*, 12 NY3d 275, 280 [2009]), and "it is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals" (*Calcano v Rodriguez*, 91 AD3d 468, 469 [1st Dept 2012]). Contrary to the court's determination, "constructive notice of the allegedly dangerous condition is not an exception to the requirement of prior written notice contained in the [Syracuse] City Charter" (*Hall*, 275 AD2d at 1023; *see Amabile v City of Buffalo*, 93

NY2d 471, 475-476 [1999]).

In opposition, plaintiff failed to raise a triable issue of fact concerning whether defendant "affirmatively created the defect through an act of negligence . . . that immediately result[ed] in the existence of a dangerous condition" (*Yarborough*, 10 NY3d at 728 [internal quotation marks omitted]), and mere "speculation that [defendant] created the allegedly dangerous condition is insufficient to defeat the motion" (*Hall*, 275 AD2d at 1023; *see Mallory v City of New Rochelle*, 41 AD3d 556, 557 [2d Dept 2007]).

We have considered and rejected plaintiff's various challenges to the admissibility of the affidavits of defendant's employees. Defendant's remaining contentions are academic in light of our determination.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

905

CA 17-02094

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

WAC, INC., PLAINTIFF-RESPONDENT,

V ORDER

WEAVER MACHINE & TOOL CO., INC. AND VICTOR G. IANNO, JR., DEFENDANTS-APPELLANTS.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (GREGORY D. ERIKSEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 7, 2017. The order granted plaintiff's motion for summary judgment.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

906

CA 18-00558

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

STEVEN MILLER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN KENDALL, JR., AND DANIEL CAVERLY,
DEFENDANTS-RESPONDENTS.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered June 26, 2017. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that he allegedly sustained when he fell on a "slippery, wet and moss covered step" located on premises owned by defendants. We reject plaintiff's contention that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint. It is well established that "[a] landowner is liable for a dangerous or defective condition on [its] property when the landowner created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it" (*Keene v Marketplace*, 114 AD3d 1313, 1314 [4th Dept 2014] [internal quotation marks omitted]; *see Pommerenck v Nason*, 79 AD3d 1716, 1716 [4th Dept 2010]). We note that, "by briefing the issue of constructive notice only, [plaintiff has] abandoned any claims that defendants had actual notice of or created the dangerous condition" (*Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1397 [4th Dept 2017]). Furthermore, "[b]y submitting evidence that demonstrated that the defect was not visible and apparent," including a photograph of the steps taken 45 minutes after the accident and plaintiff's deposition testimony, "defendant[s] established that [they] did not have constructive notice of the defect" (*Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 858 [4th Dept 2005]; *see Anderson v Justice*, 96 AD3d 1446, 1447 [4th Dept 2012]). Plaintiff failed to raise an issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*,

49 NY2d 557, 562 [1980]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

907

CA 17-02023

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

KRISTY MONTANARO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT M. WEICHERT AND SUSAN M. WEICHERT,
DEFENDANTS-APPELLANTS.

ROBERT M. WEICHERT, DEFENDANT-APPELLANT PRO SE.

SUSAN M. WEICHERT, DEFENDANT-APPELLANT PRO SE.

CNY FAIR HOUSING, INC., SYRACUSE (CONOR J. KIRCHNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 23, 2016. The judgment awarded money damages to plaintiff.

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

Memorandum: Defendants appeal from a judgment awarding money damages to plaintiff following an inquest, which occurred after Supreme Court determined that defendants were in default for failing to answer the amended complaint. Although defendant Robert M. Weichert is a former attorney (*see Matter of Weichert*, 40 AD2d 261, 266 [4th Dept 1973], *lv denied* 33 NY2d 514 [1973]), both defendants appear pro se in this appeal. In prior appeals, this Court affirmed an order granting plaintiff leave to serve the amended complaint (*Montanaro v Weichert* [appeal No. 1], 145 AD3d 1563 [4th Dept 2016]) and dismissed defendants' appeal from a decision in which Supreme Court granted plaintiff's motion for a default judgment (*Montanaro v Weichert* [appeal No. 2], 145 AD3d 1564 [4th Dept 2016]).

On this appeal, defendants contend that the court should have dismissed the amended complaint on several grounds, including the expiration of the statute of limitations, plaintiff's purported failure to comply with Executive Law §§ 296, 297 and 300, and plaintiff's purported lack of credibility at an administrative hearing that occurred before plaintiff commenced this action. We note that those contentions concern the basis for a finding of liability, but liability here is based on defendants' default in answering the amended complaint (*see Curiale v Ardra Ins. Co.*, 88 NY2d 268, 279 [1996]). It is well settled that "no appeal lies from an order [or

judgment] entered on default" (*Calaci v Allied Interstate, Inc.* [appeal No. 2], 108 AD3d 1127, 1128 [4th Dept 2013]; *see* CPLR 5511), and thus the appeal must be dismissed.

Defendants' remedy was to move to vacate the default judgment, then appeal from an order denying their motion to vacate the default judgment (*see generally Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1196 [4th Dept 2013]). It appears that at least one of the defendants moved to vacate the default judgment and the court denied that motion and, although an appeal from a judgment brings up for review "any non-final judgment or order which necessarily affects the final judgment" (CPLR 5501 [a] [1]), no such non-final order is included in the record on appeal. Defendants, "as the appellant[s], submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028 [4th Dept 1994]; *see Elwell v Shumaker*, 158 AD3d 1133, 1134-1135 [4th Dept 2018]; *Resetarits Constr. Corp. v City of Niagara Falls*, 133 AD3d 1229, 1229 [4th Dept 2015]).

Finally, although defendants moved to settle the record and the court declined to include that order in the record on appeal, "[t]he remedy for an adverse determination of such a motion is an appeal from the order embodying the determination" of the motion to settle the record (*Meyer v Doyle Chevrolet*, 234 AD2d 1016, 1016 [4th Dept 1996]; *see e.g. Chaudhuri v Kilmer*, 158 AD3d 1276, 1276 [4th Dept 2018]; *Mosey v County of Erie* [appeal No. 3], 148 AD3d 1576, 1576 [4th Dept 2017]). Here, even assuming, arguendo, that an appeal from the judgment brings up for review the order settling the record (*see generally* CPLR 5501 [a] [1]), we note that defendants do not address that order in their brief on appeal. Defendants' brief reference to that order in their reply brief does not require a different result because "it is well settled that contentions that are raised for the first time in a reply brief are not properly before us" (*Murnane Bldg. Contrs., LLC v Cameron Hill Constr., LLC*, 159 AD3d 1602, 1605 [4th Dept 2018]; *see Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1144 [4th Dept 2014]; *Turner v Canale*, 15 AD3d 960, 961 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

910

CA 17-02085

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

VILLAGE OF SOLVAY, PLAINTIFF-RESPONDENT,

V ORDER

RANA J. ZAHRAN AND STEVEN'S FOOD MARKET, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

LAW OFFICES OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL R. ROSE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 11, 2017. The order granted the motion of plaintiff for a preliminary injunction.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

911

CA 18-00119

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

VILLAGE OF SOLVAY, PLAINTIFF-RESPONDENT,

V ORDER

RANA J. ZAHRAN AND STEVEN'S FOOD MARKET, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

LAW OFFICES OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL R. ROSE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 12, 2017. The order denied the motion of defendants for leave to reargue their motion to dismiss and/or to vacate a prior order.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Schaefer v Brookdale Univ. Hosp. & Med. Ctr.*, 46 AD3d 662, 662 [2d Dept 2007]; *Tarabochia v Smith*, 87 AD2d 609, 609-610 [2d Dept 1982]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

913

CA 18-00585

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

KATHLEEN MISSERT, PLAINTIFF-RESPONDENT,

V ORDER

SOULE ROAD ASSOCIATES, LLC, AND SUMMIT REALTY MANAGEMENT, LLC, DEFENDANTS-APPELLANTS.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LYNN LAW FIRM, SYRACUSE (MARTIN A. LYNN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 5, 2018. The order denied defendants' motion for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 14, 2018,

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

914

TP 18-00151

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

IN THE MATTER OF DANIEL BORDEN AND MARIA BORDEN,
PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE
AND MALTREATMENT, OFFICE OF CHILDREN & FAMILY
SERVICES, RESPONDENT.

WILLIAM R. HITES, BUFFALO, FOR PETITIONERS.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, BUFFALO (JENNIFER L. CLARK OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Timothy J. Walker, A.J.], entered January 25, 2018) to review a determination of respondent. The determination denied the request of petitioners that an indicated report be amended to unfounded.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul respondent's determination, after a fair hearing, denying their request to amend to unfounded an indicated report of maltreatment. Contrary to petitioners' contention, we conclude that respondent's determination is supported by substantial evidence (*see Matter of Arbogast v New York State Off. of Children & Family Servs., Special Hearing Bur.*, 119 AD3d 1454, 1454-1455 [4th Dept 2014]; *Matter of Fechter v New York State Off. of Children & Family Servs.*, 107 AD3d 1583, 1584 [4th Dept 2013]). Petitioners' contention that their testimony refuted the allegations of maltreatment and suggested that the child was coached "raised issues of credibility for the factfinder . . . , and the factfinder's assessment of credibility will not be disturbed where, as here, 'it is supported by substantial evidence' " (*Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1493-1494 [4th Dept 2016]; *see Matter of Emerson v New York State Off. of Children & Family Servs.*, 148 AD3d 1627, 1627-1628 [4th Dept

2017]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

915

TP 18-00207

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

IN THE MATTER OF DOMINIQUE LEEPER, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, III, OF COUNSEL), FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Chautauqua County [James H. Dillon, J.], entered February 1, 2018) to review a determination of respondent. The determination denied the request of petitioner to seal indicated reports.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination, following a fair hearing, finding that two indicated reports of maltreatment against her are relevant and reasonably related to employment in child care (*see* Social Services Law § 422 [8] [c] [ii]). Contrary to petitioner's contention, we conclude that the determination is supported by substantial evidence (*see Matter of Garzon v New York State Off. of Children & Family Servs.*, 85 AD3d 1603, 1604 [4th Dept 2011]). The evidence presented at the hearing established that, on two occasions over the course of approximately 11 years, petitioner subjected her children to violent outbursts, during which she destroyed property, physically assaulted a family friend, who cared for the oldest child, in the children's presence, and choked the oldest child (*see Matter of DeRoberts v New York State Off. of Children & Family Servs.*, 155 AD3d 1556, 1557 [4th Dept 2017]; *Garzon*, 85 AD3d at 1604; *Matter of Castilloux v New York State Off. of Children & Family Servs.*, 16 AD3d 1061, 1062 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]). Petitioner also admitted, with respect to additional behavior underlying the second indicated report, that less than two years before the hearing she had been abusing marihuana to the point of being unable to care for her children. Although she testified at the hearing that she had

been rehabilitated, petitioner engaged in repeated acts of maltreatment and acknowledged that she had never attended professional counseling to address that behavior. The record thus supports the finding that petitioner failed to recognize and address the causes of her detrimental behaviors and that she may therefore engage in those behaviors again (*see Matter of Velez v New York State Off. of Children*, 157 AD3d 575, 576 [1st Dept 2018]). Based upon the foregoing, we perceive no reason to disturb respondent's determination that petitioner's acts of maltreatment are relevant and reasonably related to employment in child care. We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

917

TP 18-00440

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

IN THE MATTER OF JOSEPH MCGOWAN, PETITIONER,

V ORDER

NUNZIO DOLDO, SUPERINTENDENT, CAPE VINCENT CORRECTIONAL FACILITY, RESPONDENT.

JOSEPH MCGOWAN, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [James P. McClusky, J.], entered March 15, 2018) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

918

TP 18-00143

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

IN THE MATTER OF KRISTEN WARREN, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, OFFICE OF CHILDREN & FAMILY SERVICES, RESPONDENT.

WILLIAM R. HITES, BUFFALO, FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Paul Wojtaszek, J.], entered January 19, 2018) to review a determination of respondent. The determination denied petitioner's request that an indicated report be amended to unfounded and sealed.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, made after a fair hearing, denying her request to amend to unfounded an indicated report of maltreatment with respect to children at petitioner's daycare center and to seal the amended report (*see* Social Services Law § 422 [8] [c] [ii]). "At an administrative expungement hearing, a report of child . . . maltreatment must be established by a fair preponderance of the evidence" (*Matter of Reynolds v New York State Off. of Children & Family Servs.*, 101 AD3d 1738, 1738 [4th Dept 2012] [internal quotation marks omitted]), and "[o]ur review . . . is limited to whether the determination [is] supported by substantial evidence in the record on the petitioner['s] application for expungement" (*Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774 [4th Dept 2009], *lv denied* 15 NY3d 705 [2010] [internal quotation marks omitted]; *see Matter of Arbogast v New York State Off. of Children & Family Servs., Special Hearing Bur.*, 119 AD3d 1454, 1454 [4th Dept 2014]). Here, contrary to petitioner's contention, we conclude that the evidence of maltreatment, including testimony that petitioner left two infants and a toddler upstairs in her home without supervision while she took the older children in her care for a 25-minute walk around the cul-de-sac and thereafter remained outside with the older

children for an additional 25 to 30 minutes while the three babies were inside the house without supervision, constitutes substantial evidence to support the determination (*see Matter of Stead v Joyce*, 147 AD3d 1317, 1318 [4th Dept 2017]; *see generally Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1493 [4th Dept 2016]). Although the testimony of petitioner that she asked a neighbor to listen to the baby monitor while she was away conflicted with the evidence presented by respondent, it "is not within this Court's discretion to weigh conflicting testimony or substitute its own judgment for that of the administrative finder of fact" (*Matter of Ribya BB. v Wing*, 243 AD2d 1013, 1014 [3d Dept 1997]; *see Matter of Emerson v New York State Off. of Children & Family Servs.,* 148 AD3d 1627, 1628 [4th Dept 2017]).

We further conclude that substantial evidence supports the determination that petitioner's maltreatment of the children is "relevant and reasonably related" to her employment as a childcare provider (*Matter of Velez v New York State Off. of Children*, 157 AD3d 575, 576 [1st Dept 2018]). "Petitioner's refusal to take responsibility for [her] actions, acknowledge that [she] endangered the child[ren], or appreciate the seriousness of [her] conduct, demonstrated that [she] is likely to commit maltreatment again—a factor reasonably related to [her] potential employment in the childcare field" (*id.*).

Finally, even assuming, arguendo, that the delay between the commencement of the investigation into the allegations that petitioner maltreated children in her care and the date of respondent's determination violated the reporting requirements set forth in 18 NYCRR 432.2 (b) (3) (iv), we reject petitioner's contention that the expungement of petitioner's indicated record is an appropriate remedy for that procedural irregularity.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

919

KA 16-00002

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. WESLEY, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM 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 December 17, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]) and grand larceny in the fourth degree (§ 155.30 [1]). We reject defendant's contention that the showup procedure was unduly suggestive because he was standing next to a vehicle matching the description given by the witness (*see People v Williams*, 118 AD3d 1478, 1479 [4th Dept 2014], *lv denied* 24 NY3d 1090 [2014]; *see generally People v Brisco*, 99 NY2d 596, 597 [2003]). To the extent that defendant's contention that he was denied effective assistance of counsel survives his plea (*cf. People v Abdulla*, 98 AD3d 1253, 1254 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]), we conclude that it is without merit (*see People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]; *see generally People v Ford*, 86 NY2d 397, 404 [1995]). Defendant's challenge to the factual sufficiency of the plea allocution is not preserved for our review because he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Pryce*, 148 AD3d 1625, 1625-1626 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v Saddler*, 144 AD3d 1520, 1520-1521 [4th Dept 2016], *lv denied* 28 NY3d 1188 [2017]). This case does not fall within the rare exception to the preservation rule (*see People v Lopez*, 71 NY2d 662, 666 [1988]). Finally, the

sentence is not unduly harsh or severe.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

923

OP 18-00393

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

IN THE MATTER OF DAVID M. BLY, PETITIONER,

V MEMORANDUM AND ORDER

HON. WILLIAM M. BOLLER, ACTING SUPREME COURT JUSTICE, RESPONDENT.

JASON R. DIPASQUALE, BUFFALO, FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul the determination of respondent. The determination denied petitioner's application for a firearm permit.

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

Memorandum: Petitioner commenced this original CPLR article 78 proceeding pursuant to CPLR 506 (b) (1) seeking to annul the determination of respondent denying petitioner's application for a permit to carry a concealed firearm. Contrary to petitioner's contention, the determination is not arbitrary and capricious. "A licensing officer has broad discretion in determining whether to grant or deny a permit under Penal Law § 400.00 (1)" (*Matter of Papineau v Martusewicz*, 35 AD3d 1214, 1214 [4th Dept 2006]; *see Matter of Fromson v Nelson*, 178 AD2d 479, 479 [2d Dept 1991]; *Matter of Covell v Aison*, 153 AD2d 1001, 1002 [3d Dept 1989], *lv denied* 74 NY2d 615 [1989]), and "[t]he failure of petitioner to report on his application [a] prior arrest[] provided a sufficient basis to deny the application" (*Papineau*, 35 AD3d at 1214; *see Matter of DiMonda v Bristol*, 219 AD2d 830, 830 [4th Dept 1995]; *Matter of Conciatori v Brown*, 201 AD2d 323, 323 [1st Dept 1994]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

924

OP 18-00409

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

IN THE MATTER OF CARMEN BRITT AND CARMEN BRITT,
AS EXECUTOR OF THE ESTATE OF LULA BAITY,
DECEASED, PETITIONER,

V ORDER

DIANE Y. DEVLIN, JUSTICE, NEW YORK STATE SUPREME
COURT, RESPONDENT.

LOUIS ROSADO, BUFFALO, FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to compel respondent to hear and determine petitioner's motion to restore his actions, and for other relief.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 2 and 11, 2018,

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

929

CA 18-00339

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

IN THE MATTER OF JEFF SHIELDS, KEVIN COSTELLO, ERIC MINISCE AND BRIAN RITCHIE, PETITIONERS-APPELLANTS,

V ORDER

BARRY VIRTS, IN HIS OFFICIAL CAPACITY AS SHERIFF OF WAYNE COUNTY, WAYNE COUNTY SHERIFF'S OFFICE, CHARLES DYE, IN HIS OFFICIAL CAPACITY AS WAYNE COUNTY HUMAN RESOURCES DIRECTOR, WAYNE COUNTY OFFICE OF HUMAN RESOURCES-CIVIL SERVICE, COUNTY OF WAYNE, JAMES J. DUNLAP, ANDREW J. ROSE, THOMAS J. VANETTEN, BRANDON G. BURNETT, ANTHONY J. SENECAL, LACEY L. HENDERSHOT, THOMAS Z. MUNZERT, BRANDON C. LANTRY AND SAMUEL J. ROSS, RESPONDENTS-RESPONDENTS.

ENNIO J. CORSI, NEW YORK STATE LAW ENFORCEMENT OFFICERS UNION, COUNCIL 82, AFSCME, AFL-CIO, ALBANY, FOR PETITIONERS-APPELLANTS.

BOYLAN CODE LLP, ROCHESTER (MARK A. COSTELLO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered April 27, 2017 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

930

CA 18-00410

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

TAMMI L. AYOTTE, PLAINTIFF-RESPONDENT,

V ORDER

JAMES CONNER, III, PARENT AND NATURAL GUARDIAN
OF TERRELL CONNER, DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, ROCHESTER (GARY H. ABELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEVALK, POWER, LAIR & WARNER, P.C., SODUS (SEAN D. LAIR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered October 25, 2017. The order, inter alia, allowed the action to proceed upon the amended summons and complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 17 and 20, 2018, and filed in the Wayne County Clerk's Office on April 27, 2018,

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

933

CA 18-00040

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

MARC DYKES, PLAINTIFF-RESPONDENT,

V ORDER

LSREF4 LIGHTHOUSE CORPORATE ACQUISITIONS, LLC, AS SUCCESSOR BY MERGER TO HOME PROPERTIES, INC., HOME PROPERTIES, L.P., AND LIGHTHOUSE MANAGEMENT SERVICES, LLC, DEFENDANTS-APPELLANTS.

LITTLER MENDELSON, P.C., FAIRPORT (MARGARET A. CLEMENS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (JEFFREY J. HARRADINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 16, 2017. The order and judgment, inter alia, awarded legal fees to plaintiff.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 8, 2018,

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

940.1

CA 18-00576

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

LUANN MINER AND RONALD MINER,
PETITIONERS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

HEATHER MINER, RESPONDENT,
AND DARRYL WELCH, RESPONDENT-PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILDREN,
APPELLANT.

KATHLEEN E. GAINES, NIAGARA FALLS, FOR PETITIONERS-RESPONDENTS-APPELLANTS.

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RICHARD L. SULLIVAN OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered February 26, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject children to respondent-petitioner Darryl Welch.

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, petitioners-respondents, the maternal grandparents of the subject children (grandparents), and the Attorney for the Children (AFC) appeal from an order that, inter alia, denied the grandparents' custody petition and granted the petition of respondent-petitioner father awarding the father sole custody of the subject children, with visitation to the grandparents. We affirm.

"It is well established that, as between a parent and a nonparent, the parent has a superior right of custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [4th Dept 1998], quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]).

Further, Supreme Court's factual findings "are entitled to great deference, and will not be set aside where, as here, they are supported by the record" (*Matter of Cambridge v Cambridge*, 13 AD3d 443, 444 [2d Dept 2004]).

Contrary to the contention of the grandparents and the AFC, the grandparents failed to establish extraordinary circumstances based on an "extended disruption of custody" inasmuch as the longest period of time that the grandparents had custody of the children was seven months, after which the father regained custody of the children for a period of time (*Matter of Suarez v Williams*, 26 NY3d 440, 448 [2015]; *cf. Matter of Orlowski v Zwack*, 147 AD3d 1445, 1447 [4th Dept 2017]; *see generally* Domestic Relations Law § 72 [2] [b]). Contrary to the further contention of the grandparents and the AFC, the grandparents failed to establish extraordinary circumstances based on the father's alleged history of domestic abuse. At the fact-finding hearing, the father disputed the allegations that he had engaged in acts of domestic violence against the mother, and the evidence established that the domestic violence charges were dismissed (*see generally Matter of Aylward v Baily*, 91 AD3d 1135, 1136 [3d Dept 2012]; *Matter of Ramos v Ramos*, 75 AD3d 1008, 1012 [3d Dept 2010]).

In light of our determination, this Court need not reach the issue of the best interests of the children (*see Bennett*, 40 NY2d at 548; *Matter of Jody H. v Lynn M.*, 43 AD3d 1318, 1318 [4th Dept 2007]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

940

CA 18-00597

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

JAMES A. WAWRZYNIAK AND PATRICIA WAWRZYNIAK,
PLAINTIFFS-RESPONDENTS,

V ORDER

JOEL PAULL, D.D.S., ET AL., DEFENDANTS,
ROBERT JOHN BUHITE, D.D.S., AND JANE
BREWER, D.D.S., DEFENDANTS-APPELLANTS.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (LAURA C. DOOLITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 8, 2017. The order, insofar as appealed from, denied those parts of the motion of defendants seeking summary judgment dismissing the complaint against defendants Robert John Buhite, D.D.S., and Jane Brewer, D.D.S.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

942

KA 17-01367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered March 9, 2017. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, we conclude that his waiver of the right to appeal during the plea colloquy was valid (*see generally People v Sanders*, 25 NY3d 337, 340-341 [2015]). The fact that the appeal waiver was not reduced to writing is of no moment where, as here, the oral waiver was adequate (*see People v Handly*, 122 AD3d 1007, 1008 [3d Dept 2014]; *see also People v Renert*, 143 AD3d 1016, 1016-1017 [3d Dept 2016], *lv denied* 28 NY3d 1126 [2016]). Further, while it may have been the better practice for County Court to ask defendant whether he discussed the appeal waiver with defense counsel (*see People v Lester*, 141 AD3d 951, 953 [3d Dept 2016], *lv denied* 28 NY3d 1185 [2017]; *People v Belile*, 137 AD3d 1460, 1461 [3d Dept 2016]), the court was not required to engage in any particular litany and, based on "all of the relevant factors surrounding the waiver," we conclude that the record established defendant's knowing, voluntary and intelligent waiver of the right to appeal (*Sanders*, 25 NY3d at 341).

The valid waiver of the right to appeal encompasses defendant's challenge to the factual sufficiency of the plea allocution (*see People v Oswold*, 151 AD3d 1756, 1756 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]; *People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016]), and his contention that the sentence is unduly harsh and severe (*see People v Lococo*, 92 NY2d 825, 827 [1998]). Finally, by pleading guilty, defendant forfeited his

challenge to the court's *Sandoval* ruling (*see People v Ingram*, 128 AD3d 1404, 1404 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

946

KA 16-00219

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMANDALEE LARREGUI, DEFENDANT-APPELLANT.

CATHERINE H. JOSH, ROCHESTER, 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 December 2, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, robbery in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [3]), under a theory of accomplice liability (*see* § 20.00). The case arose from an incident in which two women posing as prostitutes lured the victim into an ambush by two or three masked men, who assaulted the victim with a piece of metal rebar, held a gun to his head, and stole $200 in cash. Two of the alleged accomplices entered pleas of guilty and agreed to testify against defendant and two other alleged accomplices, who were indicted and tried jointly.

Defendant contends that the evidence is legally insufficient to support the conviction because the testimony of her accomplices was not supported by the requisite corroborative evidence (*see* CPL 60.22 [1]). That contention is not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not " 'specifically directed' at [that] alleged error" (*People v Gray*, 86 NY2d 10, 19 [1995]). In any event, the testimony of the victim, as well as that of an eyewitness who observed defendant and her accomplices emerge from the place where the robbery had occurred, " 'tend[ed] to connect the defendant with the commission of the crime in such a way as [could] reasonably satisfy the jury that the accomplice[s] [were] telling the truth' " (*People v Reome*, 15 NY3d 188, 192 [2010]; *see* CPL 60.22 [1]; *People v Hilkert*, 145 AD3d 1609, 1609-1610 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]).

Defendant further contends that the guilty verdict was repugnant because one of her codefendants was acquitted on all counts of the indictment. That contention also is not preserved for our review inasmuch as defendant " 'failed to object to the alleged repugnancy of the verdict before the jury was discharged' " (*People v Madore*, 145 AD3d 1440, 1441 [4th Dept 2016], *lv denied* 29 NY3d 1034 [2017]). In any event, the jury verdict acquitting that codefendant does not negate a necessary element of the crimes of which defendant was convicted (*see People v McLaurin*, 50 AD3d 1515, 1516 [4th Dept 2008]; *see generally People v Tucker*, 55 NY2d 1, 7 [1981], *rearg denied* 55 NY2d 1039 [1982]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury (*see People v Woolson*, 122 AD3d 1353, 1355 [4th Dept 2014], *lv denied* 25 NY3d 1078 [2015]; *see also People v Gibson*, 89 AD3d 1514, 1515 [4th Dept 2011], *lv denied* 18 NY3d 924 [2012]), and we decline to disturb the jury's determination.

Defendant contends that Supreme Court abused its discretion in allowing the eyewitness to testify about an incident that occurred nearly one month after the robbery (*see generally People v Molineux*, 168 NY 264, 293-294 [1901]). Specifically, the eyewitness testified that defendant came to the eyewitness's home, tried to break down the door, and threatened the eyewitness with violence for talking to the police. Contrary to the People's assertion, defendant preserved her contention for our review (*see* CPL 470.05 [2]). Nevertheless, we reject her contention. " 'Evidence of threats made by the defendant against one of the People's witnesses, although evidence of prior bad acts, [is] admissible on the issue of consciousness of guilt' " (*People v Pugh*, 236 AD2d 810, 812 [4th Dept 1997], *lv denied* 89 NY2d 1099 [1997]; *see People v McCommons*, 143 AD3d 1150, 1154 [3d Dept 2016], *lv denied* 29 NY3d 999 [2017]). We conclude that the court did not abuse its discretion in determining that the probative value of that evidence outweighed its potential for prejudice (*see generally People v Cass*, 18 NY3d 553, 560 [2012]).

Defendant failed to preserve for our review her contention that the court abused its discretion in allowing the prosecutor to speak to the attorney of a prosecution witness during a recess in that witness's testimony (*see People v Cruz*, 23 AD3d 1109, 1110 [4th Dept 2005], *lv denied* 6 NY3d 811 [2006]; *see also People v Williams*, 56 AD3d 700, 700 [2d Dept 2008], *lv denied* 12 NY3d 763 [2009]). In any event, that contention lacks merit. The prosecutor informed the court that the witness, who was one of defendant's alleged accomplices, was giving testimony contrary to what the witness had previously told the prosecutor. The court ruled that the witness's testimony would remain in the record, but allowed the prosecutor to speak to the witness's attorney, who in turn spoke to the witness. Thereafter, defense

counsel cross-examined the witness regarding the nature of the latter conversation. Here, "[f]aced with the need to make sure the court's truth-seeking function was not impaired . . . [,] the court chose a sound middle path that allowed the People a chance to rehabilitate their case to some extent, yet fully protected both defendant's right to cross-examination and the jury's authority to make informed determinations as to facts and credibility" (*People v Branch*, 83 NY2d 663, 667 [1994]). Thus, we conclude that the court's ruling was not an abuse of discretion (*see id.* at 668; *People v Clark*, 139 AD3d 1368, 1370 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]).

Defendant also failed to preserve for our review her contention that prosecutorial misconduct deprived her of a fair trial inasmuch as she failed to object to any of the alleged improprieties (*see People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]; *People v Simmons*, 133 AD3d 1227, 1228 [4th Dept 2015]). In any event, we conclude that " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Pendergraph*, 150 AD3d 1703, 1704 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]).

We reject defendant's contention that she was denied effective assistance of counsel. 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]).

We also reject defendant's contention that the cumulative effect of the court's alleged errors deprived her of a fair trial (*see People v Boyd*, 159 AD3d 1358, 1359-1360 [4th Dept 2018], *lv denied* 31 NY3d 1145 [2018]; *People v Spirles*, 136 AD3d 1315, 1317 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* — US —, 137 S Ct 298 [2016]). Finally, the sentence is not unduly harsh or severe.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

948

KA 15-01992

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUFINO LOPEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 23, 2015. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [2]), defendant contends that he was improperly sentenced as a second felony offender inasmuch as the predicate conviction, i.e., burglary in the third degree in the State of Connecticut, is not equivalent to any New York felony. While that contention survives defendant's waiver of the right to appeal (*see People v Murdie*, 134 AD3d 1353, 1354 [3d Dept 2015]; *People v Iliff*, 96 AD3d 974, 975 [2d Dept 2012]), defendant failed to preserve it for our review (*see People v Jurgins*, 26 NY3d 607, 612 [2015]; *People v Hall*, 149 AD3d 1610, 1610 [4th Dept 2017]). Although there is a "narrow exception to [the] preservation rule permitting appellate review when a sentence's illegality is readily discernible from the . . . record" (*People v Santiago*, 22 NY3d 900, 903 [2013]; *see People v Sumter*, 157 AD3d 1125, 1126 [3d Dept 2018]), this case does not fall within that narrow exception because resolution of the question whether the Connecticut conviction is the equivalent of a New York felony requires "resort to outside facts, documentation or foreign statutes" (*People v Samms*, 95 NY2d 52, 57 [2000]; *see People v Diaz*, 115 AD3d 483, 484 [1st Dept 2014], *lv denied* 23 NY3d 1036 [2014]). Inasmuch as "[a] CPL 440.20 motion is the proper vehicle for raising a challenge to a sentence as 'unauthorized, illegally imposed or otherwise invalid as a matter of law' (CPL 440.20 [1]), and a determination of second felony offender status is an aspect of the sentence" (*Jurgins*, 26 NY3d at 612), we

decline to exercise our power to review defendant's contention in the interest of justice.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

949

KA 17-00457

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERAMI LOZADA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 22, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), defendant contends that the conviction of murder in the second degree is not supported by legally sufficient evidence with respect to the issue of his intent, and that the verdict is contrary to the weight of the evidence regarding that issue. Initially, we note that defendant failed to preserve his legal sufficiency contention for our review inasmuch as he failed to move for a trial order of dismissal on that ground (*see People v Carncross*, 14 NY3d 319, 324-325 [2010]; *People v Gray*, 86 NY2d 10, 19 [1995]). In any event, defendant's contention lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction of murder in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "The element of intent is rarely proved 'by an explicit expression of culpability by the perpetrator' " (*People v Bueno*, 18 NY3d 160, 169 [2011], quoting *People v Barnes*, 50 NY2d 375, 381 [1980]). "It is well established that a defendant's [i]ntent to kill may be inferred from [his] conduct as well as the circumstances surrounding the crime . . . , and that a jury is entitled to infer that a defendant intended the natural and probable consequences of his acts" (*People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]

[internal quotation marks omitted]). Here, the People presented evidence that the victim was unarmed and killed by a single gunshot to the head, fired by defendant at very close range, while the victim was holding groceries and beer in his hands. Consequently, we conclude that the evidence was legally sufficient to establish defendant's intent to kill the victim. In addition, viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, County Court did not err in imposing consecutive sentences on the count of murder in the second degree and the count of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3). Contrary to the People's contention, "[a]lthough defendant . . . failed to preserve for our review his contention that the court erred in imposing consecutive sentences, preservation of that contention is not required" (*People v Ferguson-Johnson*, 55 AD3d 1340, 1340-1341 [4th Dept 2008], *lv denied* 11 NY3d 897 [2008]; *see People v Houston*, 142 AD3d 1397, 1399 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]).

With respect to the merits, where a defendant is charged with criminal possession of a weapon pursuant to Penal Law § 265.03 (3), as well as a crime involving use of that weapon, "[s]o long as [the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible" (*People v Brown*, 21 NY3d 739, 751 [2013]). Here, "the evidence [is] legally sufficient to establish that he possessed the murder weapon in the car on the way to the shooting, and thus 'there was a completed possession, within the meaning of [section 265.03 (3)], before the shooting took place' " (*People v Evans*, 132 AD3d 1398, 1399 [4th Dept 2015], *lv denied* 26 NY3d 1087 [2015]). Defendant's contention concerning the location of the crime as set forth in the indictment as limited by the bill of particulars does not require a different result, inasmuch as the bill of particulars indicated that the possession in violation of section 265.03 (3) took place at a specific address, and the evidence is sufficient to establish that defendant possessed the weapon in a car in the parking lot at that address before he formed the intent to shoot the victim with it.

We reject defendant's contention that he was denied effective assistance of counsel based on his attorney's failure to conduct an adequate cross-examination of certain prosecution witnesses. Contrary to defendant's contention, "[s]peculation that a more vigorous cross-examination might have [undermined the credibility of a witness] does not establish ineffectiveness of counsel" (*People v Adams*, 247 AD2d 819, 819 [4th Dept 1998], *lv denied* 91 NY2d 1004 [1998]; *see People v Black*, 137 AD3d 1679, 1680 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]; *People v Bassett*, 55 AD3d 1434, 1438 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]). Upon 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]).

Finally, the sentence is not unduly harsh or severe.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

951

OP 18-00347

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

IN THE MATTER OF MICHAEL S. AND DEBRA R.,
ON BEHALF OF DANYAL S. AND ZACKERY S.,
PETITIONERS,

V MEMORANDUM AND ORDER

CHRISTA P., ZACKERY S., YATES COUNTY FAMILY
COURT, YATES COUNTY DEPARTMENT OF SOCIAL
SERVICES AND YATES COUNTY CHILD PROTECTIVE
SERVICES, RESPONDENTS.

MICHAEL S., PETITIONER PRO SE.

Proceeding pursuant to CPLR article 70 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 7002 [b] [2]) to produce the subject children.

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

Memorandum: Petitioners Michael S. (petitioner) and his paramour, Debra R., commenced this proceeding pursuant to CPLR article 70 seeking, inter alia, a judgment directing respondents to produce the subject children. We dismiss the petition.

Petitioners seek production of the children on the ground that they are suitable persons with whom the children should be placed following the children's removal from the parental home (*see* Family Ct Act § 1017 [1] [a]). The preferred procedure for seeking such relief is for petitioner, the children's grandfather, to make a motion to intervene in the underlying child neglect proceedings pursuant to article 10 of the Family Court Act (*see* § 1035 [f]; *Matter of Demetria FF. [Tracy GG.]*, 140 AD3d 1388, 1388-1390 [3d Dept 2016]). Petitioner may also commence a proceeding for custody of the children pursuant to article 6 of the Family Court Act (*see Matter of Linda S. v Krishnia S.*, 50 AD3d 805, 806 [2d Dept 2008]; *see also Demetria FF.*, 140 AD3d at 1388). We note that petitioner previously filed petitions for custody of the children pursuant to article 6, but he failed to appear at the ensuing hearing. Family Court subsequently dismissed the petitions without prejudice. There is no indication in the record that petitioner made any attempt to intervene in the article 10 proceeding or to renew the article 6 proceeding. We thus conclude that petitioners have failed to demonstrate "the existence of any

extraordinary circumstances that would warrant a departure from traditional orderly procedure" (*People ex rel. Karen FF. v Ulster County Dept. of Social Servs.*, 79 AD3d 1187, 1188 [3d Dept 2010]; *see People ex rel. Tuszynski v Stallone*, 117 AD3d 1472, 1472 [4th Dept 2014], *lv denied* 23 NY3d 908 [2014]).

Insofar as petitioners seek a change of venue or an investigation into the underlying proceedings in Family Court, such relief is not available by means of a petition pursuant to CPLR article 70 (*see* CPLR 7002 [a]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

957

CA 17-00426

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

INMATE M., CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125930.)

INMATE M., CLAIMANT-APPELLANT PRO SE.

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

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered April 27, 2016. The order, among other things, granted defendant's cross motion to dismiss the claim.

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

Memorandum: Claimant, an inmate at a correctional facility, previously commenced a CPLR article 78 proceeding challenging the pat frisk procedure outlined in the Department of Corrections and Community Supervision's Directive No. 4910 (B) (1) (the directive), alleging that he was sexually assaulted during an authorized pat frisk conducted in accordance with the directive. Claimant alleged that the directive violates, inter alia, the Eighth Amendment of the United States Constitution, New York Constitution, article I, § 5, Penal Law § 130.52, Correction Law §§ 112 and 137 (5), and Civil Rights Law § 79-c, and he sought a judgment rescinding the pat frisk policy set forth in the directive and awarding monetary damages for the extreme mental anguish that he suffered as a result of the pat frisk. Supreme Court dismissed the petition, determining that "[p]etitioner's reliance on the Eighth Amendment's prohibition against cruel and unusual punishment is misplaced in the context of this proceeding. The pat frisk directive, as written, does not 'create inhumane prison conditions . . . [or] the infliction of pain or injury' " (*Matter of Morrow v Annucci*, 50 Misc 3d 554, 556 [Sup Ct, Cayuga County 2015]), and that the directive " 'is reasonably related to legitimate penological interests and pass[es] constitutional muster' " (*id.* at 557).

Claimant thereafter filed the instant claim based on the same incident, seeking damages and an order determining that the directive is unconstitutional. We conclude that defendant established that the

instant claim repeats the challenge to the constitutionality of the directive that claimant made in his CPLR article 78 petition, and that issue was fully and fairly litigated and was necessarily decided in the prior proceeding (*cf. Rivera v State of New York*, 91 AD3d 1331, 1332 [4th Dept 2012]; *Margerum v City of Buffalo*, 63 AD3d 1574, 1580 [4th Dept 2009]; *see generally Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 348-349 [1999]). Thus, "both res judicata and collateral estoppel operate to preclude [claimant] from litigating [that] issue again" in the Court of Claims (*Matter of Martin v Central Off. Review Comm. of N.Y. State Dept. of Correctional Servs.*, 69 AD3d 1237, 1238 [3d Dept 2010]).

We further conclude that the court properly dismissed claimant's constitutional tort claim inasmuch as "no . . . claim [for constitutional tort] will lie where the claimant has an adequate remedy in an alternate forum" (*Shelton v New York State Liq. Auth.*, 61 AD3d 1145, 1150 [3d Dept 2009]; *see LM Bus. Assoc., Inc. v State of New York*, 124 AD3d 1215, 1218-1219 [4th Dept 2015], *lv denied* 25 NY3d 905 [2015]; *Deleon v State of New York*, 64 AD3d 840, 840 [3d Dept 2009], *lv denied* 13 NY3d 712 [2009]). Here, claimant had an adequate remedy in an alternate forum. Indeed, he raised the same issues and sought the same relief as here in his prior CPLR article 78 petition.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

958

CA 18-00570

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

GARY CHWOJDAK AND KAREN CHWOJDAK,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MICHAEL D. SCHUNK, DEFENDANT-RESPONDENT.

LAW OFFICE OF FRANCIS M. LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark Montour, J.), entered November 9, 2017. The order granted in part the motion of defendant for partial summary judgment and denied the cross motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Gary Chwojdak (plaintiff) sustained when a vehicle operated by defendant collided with a vehicle operated by plaintiff. The collision occurred while plaintiff's vehicle was legally stopped at a red light in the left-turn-only lane and the vehicle operated by defendant veered from a through-traffic lane and struck plaintiff's vehicle from behind.

Contrary to plaintiffs' contention, Supreme Court properly denied that part of their cross motion seeking partial summary judgment on the issue of negligence inasmuch as defendant raised a triable issue of fact concerning the applicability of the emergency doctrine. Under the emergency doctrine, " 'when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the [driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context' . . . , provided the [driver] has not created the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001], quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991], *rearg denied* 77 NY2d 990 [1991]; *see Lifson v City of Syracuse*, 17 NY3d 492, 497 [2011]). Generally, the issues whether an emergency existed and

whether the driver's response thereto was reasonable are for the trier of fact (*see Patterson v Central N.Y. Regional Transp. Auth. [CNYRTA]*, 94 AD3d 1565, 1566 [4th Dept 2012], *lv denied* 19 NY3d 815 [2012]; *Mitchell v City of New York*, 89 AD3d 1068, 1069 [2d Dept 2011]; *Schlanger v Doe*, 53 AD3d 827, 828 [3d Dept 2008]).

Here, plaintiffs established a prima facie case of negligence by submitting evidence that defendant's vehicle struck plaintiff's stopped vehicle from behind (*see Pitchure v Kandefer Plumbing & Heating*, 273 AD2d 790, 790 [4th Dept 2000]; *see also Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015]). Defendant, however, raised an issue of fact whether he was faced with a sudden and unexpected situation, i.e., a total loss of visibility because of a gust of snow or "whiteout," and whether he acted reasonably under the circumstances (*see generally Barnes v Dellapenta*, 111 AD3d 1287, 1288 [4th Dept 2013]). Defendant submitted his own deposition testimony, in which he testified that, although visibility was poor on the date of the collision because of heavy snow and winds, he was able to differentiate the lanes of travel and discern traffic signals and vehicles around him. Defendant further testified that he was traveling at a reduced rate of speed out of caution because of the poor conditions, and did not experience a loss of visibility until shortly before the collision. Defendant also submitted plaintiff's deposition testimony that the weather was "fine" and it was not snowing prior to the collision, and that there were "other vehicles on the road" and "normal traffic patterns." Defendant thus raised an issue of fact whether he was confronted with a "sudden and temporary whiteout constitut[ing] a qualifying emergency" (*id.*; *see generally Barber v Young*, 238 AD2d 822, 823-824 [3d Dept 1997]).

Contrary to plaintiffs' contention, we conclude that there is an issue of fact concerning the reasonableness of defendant's actions when he was faced with the purported emergency, including his failure to apply the brakes immediately upon losing visibility and veering into the left-turn-only lane (*see generally Phelps v Ranger*, 87 AD3d 1387, 1388 [4th Dept 2011]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

959

CA 17-01040

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

IN THE MATTER OF TIMOTHY MCDANIEL,
PETITIONER-APPELLANT,

V ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 5, 2017 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Jackson v Annucci*, 159 AD3d 1437, 1438 [4th Dept 2018]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

966

KA 13-00989

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS ESTRUCH, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER 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 (Dennis S. Cohen, J.), rendered January 17, 2013. The judgment convicted defendant, upon a jury verdict, of reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of reckless endangerment in the first degree (Penal Law § 120.25). Contrary to defendant's contention, he was not denied his right to counsel by County Court's refusal to grant his request for new counsel inasmuch as defendant did not make a "seemingly serious request[]" for new counsel (*People v Sides*, 75 NY2d 822, 824 [1990]).

We reject defendant's contention that he was denied his right to be present at a material stage of trial (*see generally People v Roman*, 88 NY2d 18, 26 [1996], *rearg denied* 88 NY2d 920 [1996]). The conversations between the court and defense counsel regarding defendant's competency did not require defendant's presence (*see People v Kimes*, 37 AD3d 1, 30-31 [1st Dept 2006], *lv denied* 8 NY3d 881 [2007], *reconsideration denied* 9 NY3d 846 [2007]; *People v Horan*, 290 AD2d 880, 884 [3d Dept 2002], *lv denied* 98 NY2d 638 [2002]). In any event, those conversations were repeated on the record when defendant was present, thus obviating any possible error (*see People v Purcelle*, 107 AD3d 1050, 1051 [3d Dept 2013]; *People v Forte*, 243 AD2d 578, 578 [2d Dept 1997], *lv denied* 91 NY2d 891 [1998]).

Finally, the court did not err in failing to sua sponte order a competency examination (*see* CPL 730.30 [1]; *People v Bryant*, 117 AD3d 1591, 1591 [4th Dept 2014], *lv denied* 23 NY3d 1034 [2014]; *see*

generally People v Tortorici, 92 NY2d 757, 765 [1999], *cert denied* 528 US 834 [1999]). The record supports the court's determination that "[d]efendant's remarks . . . were suggestive of a[n] obstructionist frame of mind, not an incompetent one" (*People v Johnson*, 145 AD3d 1109, 1110 [3d Dept 2016], *lv denied* 29 NY3d 949 [2017]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

970

KA 17-00071

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH FARLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 11, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that Supreme Court erred in denying his challenge for cause to a prospective juror. We agree. We therefore reverse the judgment and grant defendant a new trial.

During jury selection, the prospective juror at issue (hereafter, juror) stated that she knew a potential witness, a trauma surgeon who treated the victim for knife wounds inflicted by defendant. The surgeon had been the juror's trauma surgeon two years earlier, and the juror was under the surgeon's care for 14 days. Throughout that period, the juror saw the surgeon at least once a day, but she had not seen him since then. The juror stated: "I do think that he did a very good job. He saved my life." The juror repeatedly asserted, however, that she would not let her personal feelings about the surgeon interfere with her ability to assess the evidence objectively and that she would afford both sides a fair trial. Defendant challenged the juror for cause based on her relationship with the surgeon, arguing that an assertion of impartiality cannot cure an implied bias. The court denied the challenge, reasoning that there was no implied bias because the juror insisted that she could be objective and return a verdict based on the evidence. Defendant then exercised his last peremptory challenge to excuse the juror.

A prospective juror may be challenged for cause on, inter alia, the ground that he or she has some relationship to a prospective witness at trial of a nature that "is likely to preclude [the prospective juror] from rendering an impartial verdict" (CPL 270.20 [1] [c]). Such a relationship gives rise to what is known as "an 'implied bias' . . . that requires automatic exclusion from jury service regardless of whether the prospective juror declares that the relationship will not affect her ability to be fair and impartial" (*People v Furey*, 18 NY3d 284, 287 [2011], citing *People v Rentz*, 67 NY2d 829, 831 [1986] and *People v Branch*, 46 NY2d 645, 650 [1979]), and "cannot be cured with an expurgatory oath" (*id.*). Not every potential juror-witness relationship necessitates disqualification, but courts are "advised . . . to exercise caution in these situations by leaning toward 'disqualifying a prospective juror of dubious impartiality' " (*id.*, quoting *Branch*, 46 NY2d at 651). Relevant factors for the court to consider in determining whether disqualification is necessary include the nature of the relationship and the frequency of contact (*see id.*; *People v Guldi*, 152 AD3d 540, 542 [2d Dept 2017], *lv denied* 30 NY3d 1019 [2017]). The denial of a challenge for cause has been upheld where the relationship at issue arose in a professional context and "was distant in time and limited in nature" (*People v Scott*, 16 NY3d 589, 595 [2011]; *see People v Stanford*, 130 AD3d 1306, 1308-1309 [3d Dept 2015], *lv denied* 26 NY3d 1043 [2015]). Conversely, the Court of Appeals has required disqualification where the relationship was "essentially professional" but "also somewhat intimate" (*Rentz*, 67 NY2d at 831).

We conclude that the juror's testimony indicated a likelihood that her relationship to the surgeon was of a nature that would preclude her from rendering an impartial verdict. The juror was in the hospital for an extended period of time suffering from an unspecified trauma. During that time, the surgeon was primarily responsible for the juror's care, and they had contact on at least a daily basis. Most significantly, the juror was convinced that the surgeon had saved her life. Thus, although the relationship arose in a professional context, it was, at least from the juror's perspective, something more than a mere professional relationship.

In light of the nature of the relationship and the frequency of the contact, we conclude that the court erred in denying the challenge for cause (*see Furey*, 18 NY3d at 287; *Guldi*, 152 AD3d at 542). The erroneous denial of a challenge for cause constitutes reversible error where, as here, the defendant exercised a peremptory challenge to excuse the prospective juror and exhausted his peremptory challenges prior to the completion of jury selection (*see* CPL 270.20 [2]; *People v Cahill*, 2 NY3d 14, 49-50 [2003]).

Defendant further contends that the court erred in refusing to charge assault in the second degree (Penal Law § 120.05 [4]) as a lesser included offense of assault in the first degree under Penal Law § 120.10 (1). Because we are granting defendant a new trial, we address that contention in the interest of judicial economy, and we reject it. We note that a person is guilty of assault in the second degree under that subdivision where he or she "recklessly causes

serious physical injury to another person by means of a deadly weapon or a dangerous instrument" (§ 120.05 [4]). Although it is theoretically impossible to commit assault in the first degree under section 120.10 (1) without at the same time committing assault in the second degree under section 120.05 (4) (*see People v Green*, 56 NY2d 427, 435 [1982], *rearg denied* 57 NY2d 775 [1982]; *see generally* CPL 1.20 [37]), we conclude that "there is no reasonable view of the evidence that would support a finding that defendant committed the lesser offense but not the greater" (*People v Archibald*, 148 AD3d 1794, 1795 [4th Dept 2017], *lv denied* 29 NY3d 1075 [2017]; *see People v Wolff*, 103 AD3d 1264, 1265 [4th Dept 2013], *lv denied* 21 NY3d 948 [2013]). Here, the surgeon testified that the victim suffered eight knife wounds, which included a "penetrat[ing]" wound to the front of the chest and two "significant" wounds to the side of the chest and the back. Furthermore, the surgeon testified that the victim lost a liter of blood, approximately one-fifth of his total blood supply, and that he would have died had he not received medical treatment. That evidence would have been inconsistent with a finding that defendant acted with mere recklessness (*see People v Rivera*, 23 NY3d 112, 124 [2014]; *People v Lopez*, 72 AD3d 593, 593 [1st Dept 2010], *lv denied* 15 NY3d 807 [2010]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

972

KA 16-02095

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM E. NEWTON, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered October 3, 2016. The judgment convicted defendant, upon a jury verdict, of arson in the third degree and reckless endangerment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of arson in the third degree (Penal Law § 150.10 [1]) and reckless endangerment in the second degree (§ 120.20). Defendant contends that the evidence is legally insufficient to establish that he intentionally set fire to his vehicle. We reject that contention (*see People v Dale*, 71 AD3d 1517, 1517 [4th Dept 2010], *lv denied* 15 NY3d 749 [2010], *reconsideration denied* 15 NY3d 803 [2010]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence, viewed in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), is legally sufficient to establish that the fire started on the front passenger seat of the vehicle and not in the wiring underneath the seat or in the engine, and that defendant had the opportunity and the motive to set the fire. Thus, there was "[a] valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, we cannot conclude that the jury failed to

give the evidence the weight it should be accorded (*see generally id.*; *People v Bowyer*, 91 AD3d 1338, 1338-1339 [4th Dept 2012], *lv denied* 18 NY3d 955 [2012]).

Finally, we note that the certificate of conviction incorrectly recites that defendant was convicted of reckless endangerment in the second degree under Penal Law § 120.25 and it must therefore be amended to reflect that he was convicted of that crime under Penal Law § 120.20 (*see People v Green*, 132 AD3d 1268, 1269 [4th Dept 2015], *lv denied* 27 NY3d 1069 [2016], *reconsideration denied* 28 NY3d 930 [2016]; *People v Guppy*, 92 AD3d 1243, 1243 [4th Dept 2012], *lv denied* 19 NY3d 961 [2012]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

975

KA 15-01574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE STRONG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered January 16, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, assault in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), assault in the second degree (§ 120.05 [3]), and resisting arrest (§ 205.30). We affirm.

In September 2013, a police officer operating a marked patrol vehicle observed defendant driving a van with one inoperative headlight. The officer engaged his vehicle's overhead lights and siren and attempted to stop the van, but defendant refused to stop. Officers in two police vehicles pursued the van. During the pursuit, someone in the van threw a long, black object from the rear passenger door. Thereafter, the van slowed, and an unidentified man jumped out and fled. Defendant eventually stopped the van, exited it, and then held his hands in front of his face in a boxing stance. When the officers attempted to place defendant in handcuffs, he flailed his arms violently. After the officers handcuffed defendant, one of the officers felt wrist pain; that officer was later diagnosed with a broken wrist. The officers recovered the black object that was thrown from the van, i.e., a 12-gauge shotgun, during the ensuing investigation and found a 12-gauge shotgun shell during an inventory search of the vehicle.

Defendant contends that County Court erred in instructing the jury on the automobile presumption because the evidence established

that the weapon belonged to the passenger who fled the vehicle. We reject that contention. "[T]he presence of a firearm in a private automobile, other than a stolen vehicle, 'is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except . . . if such weapon, instrument or appliance is found upon the person of one of the occupants therein' " (*People v Lemmons*, 40 NY2d 505, 509 [1976], quoting Penal Law § 265.15 [3]). Here, there was no evidence indicating whether it was defendant or his passenger who brought the shotgun into the van. The evidence established, at most, that someone other than defendant handled the shotgun and disposed of it while defendant was driving the van. We conclude that "there was no 'clearcut' evidence at trial that the shotgun was found in the possession of a specified passenger in the vehicle other than defendant . . . [, and thus] the '[automobile] presumption's applicability [was] properly left to the trier of fact under an appropriate charge' " (*People v Collins*, 105 AD3d 1378, 1379 [4th Dept 2013], *lv denied* 21 NY3d 1003 [2013]; *cf. People v Willingham*, 158 AD3d 1158, 1159 [4th Dept 2018]).

Defendant further contends that the court committed reversible error when it conducted a *Sandoval* hearing in his absence (*see generally People v Dokes*, 79 NY2d 656, 658 [1992]). We reject that contention as well. Although the record establishes that the court conducted off-the-record discussions with respect to the *Sandoval* issue with the prosecutor and defense counsel in defendant's absence, the court thereafter held a de novo hearing at which it afforded defendant a meaningful opportunity to participate (*see People v Vargas*, 201 AD2d 963, 964 [4th Dept 1994], *lv denied* 83 NY2d 859 [1994]). The court then issued a favorable ruling that was consistent with defendant's position at the de novo hearing. "Because defendant was afforded an opportunity to participate at that de novo hearing, reversal is not required" (*People v Bartell*, 234 AD2d 956, 956 [4th Dept 1996], *lv denied* 89 NY2d 983 [1997]; *see People v Reid*, 117 AD3d 1448, 1449 [4th Dept 2014], *lv denied* 23 NY3d 1041 [2014]).

Defendant also contends that he was denied effective assistance of counsel based on defense counsel's failure to introduce at the suppression hearing a photograph that allegedly disproved an officer's testimony at the hearing that he saw the shotgun shell in plain view. We reject that contention. Generally, defense counsel is not constitutionally ineffective where he or she overlooks a potentially useful piece of evidence, particularly where the evidence does not provide defendant with a completely dispositive defense (*see People v Turner*, 5 NY3d 476, 480-481 [2005]). Here, the photograph did not contradict the officer's testimony because it did not depict the location of the shotgun shell at the time the officer looked into the vehicle, but instead showed its location during the subsequent inventory search. We also reject defendant's contention that defense counsel was ineffective in failing to move to reopen the suppression hearing based on that photograph. "A suppression motion may be renewed 'upon a showing by the defendant[] that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the

motion' " (*People v Smith*, 158 AD3d 1081, 1082 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018], quoting CPL 710.40 [4]). Here, a motion to reopen the suppression hearing would have failed because the photographs were available at the time of the hearing.

Viewing the evidence in light of the elements of the crimes of assault in the second degree and resisting arrest 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 with respect to those counts (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is not unduly harsh or severe.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

976

CA 18-00244

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

JOSEPH ANDALORO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAISY CHARLES, DEFENDANT,
AND PATRICIA FLOYD-ECHOLS, DEFENDANT-RESPONDENT.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FERRARA FIORENZA P.C., EAST SYRACUSE (HEATHER M. COLE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered August 23, 2017. The order granted the motion of defendant Patricia Floyd-Echols for summary judgment dismissing the complaint against her.

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

Memorandum: Plaintiff appeals from an order that granted the motion of Patricia Floyd-Echols (defendant) for summary judgment dismissing the complaint against her. We reject plaintiff's sole contention on appeal that Supreme Court erred in determining that defendant established as a matter of law that plaintiff did not suffer special damages, a requisite element of plaintiff's malicious prosecution cause of action (*see generally Thyroff v Nationwide Mut. Ins. Co.*, 57 AD3d 1433, 1435 [4th Dept 2008], *appeal dismissed* 12 NY3d 911 [2009], *lv denied* 13 NY3d 710 [2009]; *Rossi v Attanasio*, 48 AD3d 1025, 1028-1029 [3d Dept 2008]). Defendant established that the allegations of damages contained in plaintiff's complaint and deposition testimony were insufficient to constitute a "concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" (*Engel v CBS, Inc.*, 93 NY2d 195, 205 [1999]) and plaintiff failed to raise a triable issue of material fact in response thereto. In light of our conclusion, we need not address defendant's alternative bases for affirmance (*see generally Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1526 [4th Dept 2016]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

979

CA 17-01767

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

THE STEELE LAW FIRM, P.C., PLAINTIFF-RESPONDENT,

V ORDER

STEVEN L. AARON, F & K SUPPLY INC., DOING BUSINESS AS FOWLER AND KEITH SUPPLY CO., NEVER MORE NOW CORP., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (VICTOR L. PRIAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered June 13, 2017. The order, among other things, granted in part the motion of plaintiff for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

980

CA 17-01768

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

THE STEELE LAW FIRM, P.C., PLAINTIFF-RESPONDENT,

V ORDER

STEVEN L. AARON, F & K SUPPLY INC., DOING BUSINESS AS FOWLER AND KEITH SUPPLY CO., NEVER MORE NOW CORP., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (VICTOR L. PRIAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered July 11, 2017. The judgment awarded plaintiff money damages.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

983

CA 18-00603

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

SUSAN M. BURNS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JANE M. KROENING, DEFENDANT-APPELLANT.

FITZGERALD & ROLLER, P.C., BUFFALO (DEREK J. ROLLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered December 22, 2017. The order granted that part of the cross motion of plaintiff seeking summary judgment on the issue of defendant's negligence, granted the cross motion of plaintiff to amend her bill of particulars and denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and dismissing the complaint, as amplified by the amended bill of particulars dated November 6, 2017, with respect to the significant limitation of use and permanent consequential limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a motor vehicle accident in a parking lot. We reject defendant's contention that Supreme Court abused its discretion in granting plaintiff's cross motion seeking leave to amend the bill of particulars to allege that she sustained a serious injury under the 90/180-day category (*see Ellis v Emerson*, 34 AD3d 1334, 1336 [4th Dept 2006]). Plaintiff's cross motion was made before a note of issue was filed (*cf. Stewart v Dunkleman*, 128 AD3d 1338, 1339-1340 [4th Dept 2015], *lv denied* 26 NY3d 902 [2015]), and it is well settled that leave to amend a bill of particulars shall be freely granted (*see Scarangello v State of New York*, 111 AD2d 798, 799 [2d Dept 1985]; *Cardy v Frey*, 86 AD2d 968, 969 [4th Dept 1982]; *see generally* CPLR 3025 [b]).

With respect to defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), we

note that plaintiff opposed only those parts of the motion concerning the fracture and 90/180-day categories. Plaintiff has therefore abandoned her claims with respect to the significant limitation of use and permanent consequential limitation of use categories of serious injury (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 297 [2001]; *Gatti v Schwab*, 140 AD3d 1640, 1640 [4th Dept 2016]; *Feggins v Fagard*, 52 AD3d 1221, 1222 [4th Dept 2008]). Thus, we modify the order by granting defendant's motion with respect to those categories.

We reject defendant's contention that the court erred in denying her motion with respect to the fracture category of serious injury. Defendant failed to meet her initial burden of establishing that plaintiff's alleged thumb fracture was not related to the accident (*see Kolios v Znack*, 237 AD2d 333, 333 [2d Dept 1997]). In any event, plaintiff raised a triable issue of fact through the affirmation of her treating physician, who opined that the thumb fracture was causally related to the accident (*see Haddadnia v Saville*, 29 AD3d 1211, 1212 [3d Dept 2006]). Defendant also failed to meet her initial burden with respect to the 90/180-day category (*see James v Thomas*, 156 AD3d 1440, 1441 [4th Dept 2017]; *see also Hartley v White*, 63 AD3d 1689, 1690 [4th Dept 2009]). Defendant's brief focuses on plaintiff's proof submitted in support of her cross motion for summary judgment with respect to the issue of serious injury, but the court denied that part of the cross motion and plaintiff did not appeal. Inasmuch as defendant failed to meet her initial burden of demonstrating entitlement to judgment as a matter of law with respect to the 90/180-day category, the burden never shifted to plaintiff to demonstrate the existence of material issues of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

985

CA 18-00612

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

TIROUI MACRI AND THOMAS MACRI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOSEPH M. KOTRYS, DEFENDANT-APPELLANT.

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

GROSS SHUMAN P.C., BUFFALO (SARAH P. RERA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 5, 2018. The order granted the motion of plaintiffs for partial summary judgment on the issue of negligence and to dismiss certain affirmative defenses.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part with respect to the issue of negligence and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Tiroui Macri (plaintiff) when the vehicle in which she was a passenger was rear-ended by a vehicle driven by defendant. Supreme Court thereafter granted plaintiffs' motion for partial summary judgment on the issue of negligence and dismissing defendant's first and fifth affirmative defenses. Defendant now appeals. Preliminarily, we note that defendant has abandoned any challenge to the court's dismissal of his first and fifth affirmative defenses (*see Mata v Gress*, 17 AD3d 1058, 1058 [4th Dept 2005]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We agree with defendant, however, that the court erred in granting summary judgment in plaintiffs' favor on the issue of negligence, and we therefore modify the order accordingly.

"It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle . . . In order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision . . . One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle . . . , and such an explanation is sufficient to

overcome the inference of negligence and preclude an award of summary judgment" (*Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015] [internal quotation marks omitted]; *see Brooks v High St. Professional Bldg., Inc.*, 34 AD3d 1265, 1266 [4th Dept 2006]; *Chepel v Meyers*, 306 AD2d 235, 237 [2d Dept 2003]). Here, defendant averred that he was traveling behind the vehicle in which plaintiff was a passenger when it stopped suddenly at a green light and that, despite his efforts, he could not stop in time to avoid a collision. Plaintiff offered a contrary account in her affidavit. Thus, there is an issue of fact sufficient to defeat plaintiffs' motion with respect to the issue of negligence (*see Tate*, 125 AD3d at 1398-1399; *Mata*, 17 AD3d at 1059).

Finally, we note that the portions of defendant's deposition upon which plaintiffs rely are outside the record on appeal and have not been considered (*see Eastern Concrete Materials, Inc./NYC Concrete Materials v DeRosa Tennis Contrs., Inc.*, 139 AD3d 510, 512 [1st Dept 2016]; *Kanter v Pieri*, 11 AD3d 912, 913 [4th Dept 2004]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

986.1

KA 16-01230

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHANNA ROMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered April 29, 2010. The appeal was held by this Court by order entered April 27, 2018, the decision was reserved and the matter was remitted to Oneida County Court for further proceedings (160 AD3d 1492).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on July 30, 2018, and by the attorneys for the parties on July 16 and August 13, 2018,

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

987

KA 16-00721

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

XAVIER NELSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Victoria M. Argento, J.), rendered January 8, 2015. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (§ 160.15 [4]) involving a separate incident. County Court sentenced defendant to concurrent terms of incarceration.

Defendant contends that his guilty plea in appeal No. 1 should be vacated because his statements during the plea colloquy described an intentional shooting and negated the elements of depraved indifference and recklessness. At the outset, we agree with defendant that his challenge implicates the voluntariness of the plea and thus survives his waiver of the right to appeal (*see People v Jones*, 64 AD3d 1158, 1158 [4th Dept 2009], *lv denied* 13 NY3d 860 [2009]; *People v Maynard*, 59 AD3d 1031, 1031-1032 [4th Dept 2009]). Defendant did not move to withdraw the plea or vacate the judgment of conviction, however, and he thus failed to preserve his challenge for our review (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement inasmuch " 'as defendant made no statements during the plea allocution that negated an element of the crime or otherwise called into doubt his guilt or the voluntariness of his plea' " (*People v Davis*, 136 AD3d 1220, 1221 [3d Dept 2016], *lv denied* 27 NY3d 1068 [2016]; *see People v*

Lopez, 71 NY2d 662, 666 [1988]). During the plea colloquy, defendant admitted that he and his codefendant fired multiple gunshots in the direction of a group of people, which constitutes "a quintessential example of depraved indifference to human life" (*People v Timmons*, 78 AD3d 1241, 1243 [3d Dept 2010], *lv denied* 16 NY3d 837 [2011]; *see People v Ramos*, 19 NY3d 133, 136 [2012]). Contrary to defendant's contention, we conclude that his statements during the plea colloquy did not suggest that he was "guilty of an intentional shooting [and] no other" (*People v Wall*, 29 NY2d 863, 864 [1971]), nor did they trigger the court's duty to "inquire further to ensure that defendant's guilty plea [was] knowing and voluntary" (*Lopez*, 71 NY2d at 666).

In light of our determination in appeal No. 1, there is no basis to reverse the judgment in appeal No. 2 and vacate defendant's plea of guilty (*see People v Richardson*, 132 AD3d 1313, 1316 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]; *cf. People v Fuggazzatto*, 62 NY2d 862, 863 [1984]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

988

KA 14-02219

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD M. DALTON, DEFENDANT-APPELLANT.

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

RONALD M. DALTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered September 2, 2014. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the second degree and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal sale of a controlled substance in the second degree (Penal Law § 220.41 [1]), and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]), defendant contends that County Court erred in admitting in evidence a recording of the subject transaction made by law enforcement agents and in allowing the jury to review a transcript of that recording, which was also made by those agents. We reject those contentions. It is well settled that the determination whether to permit the admission of a recording in evidence lies in the sound discretion of the trial court (*see People v Rivera*, 257 AD2d 172, 176 [1st Dept 1999], *affd* 94 NY2d 908 [2000]; *People v Cleveland*, 273 AD2d 787, 788 [4th Dept 2000], *lv denied* 95 NY2d 864 [2000]), and that there is no abuse of discretion in admitting in evidence recordings having parts that "are less than clear, [so long as] they are not 'so inaudible and indistinct that the jury would have to speculate concerning [their] contents' and would not learn anything relevant from them" (*People v Jackson*, 94 AD3d 1559, 1561 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]; *see Cleveland*, 273 AD2d at 788). "Moreover, 'it is also within [the] court's discretion to allow the use of transcripts as an assistance once audibility [is] established . . . [The fact] [t]hat

the transcripts were not made by an independent third party does not affect the tapes' admissibility once they are found to be audible . . . This is particularly so [where, as, here,] the transcripts themselves are not admitted [in] evidence' " (*People v Lopez*, 119 AD3d 1426, 1428 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015]; *see People v McIntosh*, 158 AD3d 1289, 1291 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Here, we conclude that the court did not abuse its discretion in admitting in evidence the recordings or in permitting the jury to review the transcript while the recording was being played.

Assuming, arguendo, that defendant's initial motion for a trial order of dismissal was sufficiently specific to preserve his contention that the conviction is not supported by legally sufficient evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that defendant nevertheless failed to preserve his contention for our review because he neglected to renew his motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). In any event, viewing the evidence in the light most favorable to the People, as we must (*see People v Conway*, 6 NY3d 869, 872 [2006]; *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence "is legally sufficient [inasmuch as] there is [a] valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime[s] has been proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 113 [2011]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Assuming, arguendo, that defendant preserved for our review his contention that the court erred in declining to order a new presentence investigation report or to strike certain information from that report (*cf. People v Richardson*, 142 AD3d 1318, 1319 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Pedro*, 134 AD3d 1396, 1397 [4th Dept 2015]; *see also People v Jones*, 114 AD3d 1239, 1242 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014], 25 NY3d 1166 [2015]), we perceive no reason to disturb the sentence on that ground where, as here, there is no "indication that the court relied upon allegedly erroneous information in the presentence report in imposing the sentence" (*People v Jaramillo*, 97 AD3d 1146, 1148 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]; *see People v Judd*, 111 AD3d 1421, 1423 [4th Dept 2013], *lv denied* 23 NY3d 1039 [2014]). To the extent that such information could cause any prejudice to defendant subsequent to the sentencing proceeding, the court noted that the sentencing minutes containing defendant's challenge to the information at issue would be appended to the presentence investigation report, and we conclude that this relief "was sufficient to prevent such prejudice" (*People v Serrano*, 81 AD3d 753, 754 [2d Dept 2011], *lv denied* 17 NY3d 801 [2011]; *see People v Rogers*, 156 AD3d 1350, 1350 [4th Dept 2017], *lv denied* 31 NY3d 986 [2018]).

Defendant failed to preserve for our review his contention in his pro se supplemental brief that he was deprived of a fair trial by prosecutorial misconduct (*see People v Bastian*, 83 AD3d 1468, 1468-1469 [4th Dept 2011], *lv denied* 17 NY3d 813 [2011]). In any event, that contention is based on matters outside the record on appeal and thus must be raised by a motion pursuant to CPL article 440 (*see People v Hoeft*, 42 AD3d 968, 969 [4th Dept 2007], *lv denied* 9 NY3d 962 [2007]; *see generally People v Williams*, 48 AD3d 1108, 1109 [4th Dept 2008], *lv denied* 10 NY3d 872 [2008]).

We have considered the remaining contentions in defendant's main and pro se supplemental briefs, and we conclude that they lack merit.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

990

TP 18-00230

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

IN THE MATTER OF CLARENCE GOURDINE, PETITIONER,

V MEMORANDUM AND ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 22, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 102.10 (7 NYCRR 270.2 [B] [3] [i]) and as modified the determination is confirmed without costs, and respondent is directed to expunge all references to the violation of that rule from petitioner's institutional record.

Memorandum: Petitioner commenced this CPLR article 78 proceeding to annul respondent's tier III disciplinary determination finding him guilty of forgery under inmate rule 116.12 (7 NYCRR 270.2 [B] [17] [iii]), providing false information under inmate rule 107.20 (7 NYCRR 270.2 [B] [8] [iii]), and making threats under inmate rule 102.10 (7 NYCRR 270.2 [B] [3] [i]). The forgery and false information charges relate to petitioner's admitted act of adding a typewritten notation to a medical limitation form issued by a nurse at Attica Correctional Facility. The threats charge stems from a letter that petitioner wrote in which he promised to sue a particular prison guard if the guard failed to adequately address one of petitioner's complaints within a certain time frame.

Preliminarily, we note that petitioner has not raised any issue concerning the forgery charge under inmate rule 116.12. He has thus

abandoned any challenge to respondent's determination of guilt on that particular charge (*see Matter of Hynes v Goord*, 30 AD3d 652, 653 [3d Dept 2006]).

Addressing the remaining violations, we agree with respondent that substantial evidence supports the determination that petitioner violated inmate rule 107.20, which prohibits an inmate from providing an "incomplete, *misleading* and/or false statement or information" (7 NYCRR 270.2 [B] [8] [iii] [emphasis added]). Although the hearing evidence does not establish that petitioner's typewritten addition to the medical limitation form constitutes "false" information, the notation nevertheless qualifies as "misleading" information regarding its source.

We agree with petitioner, however, that respondent's determination of guilt on the threats charge under inmate rule 102.10 must be annulled. Although respondent correctly notes that "an inmate need not threaten violence in order to be found guilty of [making threats under rule 102.10]" (*Matter of Sinclair v Annucci*, 151 AD3d 1511, 1511-1512 [3d Dept 2017]), a statement cannot be a "threat" within the meaning of inmate rule 102.10 unless, at the very minimum, it conveys an intent to do something illegal, improper, or otherwise prohibited (*see e.g. id.* at 1511; *Matter of Cabassa v Kuhlmann*, 173 AD2d 973, 973-974 [3d Dept 1991], *lv denied* 78 NY2d 858 [1991]). Here, petitioner did not convey an intent to do anything illegal, improper, or otherwise prohibited. To the contrary, petitioner merely conveyed his intent to exercise his constitutional right to access the courts (*see generally Lewis v Casey*, 518 US 343, 349-355 [1996]; *Bounds v Smith*, 430 US 817, 821-831 [1977]), and he cannot be penalized for "threatening" to do something, i.e., file a lawsuit, that he has every legal right to do. As the United States Supreme Court has explained, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional' " (*Bordenkircher v Hayes*, 434 US 357, 363 [1978], *reh denied* 435 US 918 [1978], quoting *Chaffin v Stynchcombe*, 412 US 17, 32 n 20 [1973]). Moreover, respondent's interpretation of the word "threat" in this context would effectively nullify the protections afforded by Correction Law § 138 (4), which bars an inmate from being "disciplined for making written or oral statements, demands, or requests involving a change of institutional conditions, policies, rules, regulations, or laws affecting an institution."

Respondent's reliance on *Matter of Vazquez v Senkowski* (251 AD2d 832 [3d Dept 1998]) is misplaced. In that case, the inmate both promised to sue the complaining guard and stated that, if his particular request was denied, "he would tell the inmates the [guard's] name" (*id.* at 833). Viewed in context, the latter statement was at least an implied threat of physical harm to the guard. Here, in contrast, petitioner did not threaten to physically harm anyone.

We therefore modify the determination by granting the petition in

part and annulling that part of the determination finding petitioner guilty of violating inmate rule 102.10, and we direct respondent to expunge all references thereto from petitioner's institutional record. The matter need not be remitted to respondent for reconsideration of the penalty, however, because no loss of good time was imposed and petitioner has already served the penalty imposed.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

991

KA 15-02001

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROSS P. DUPONT, II, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered November 12, 2015. The judgment convicted defendant, upon his plea of guilty, of aggravated criminal contempt.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of aggravated criminal contempt (Penal Law § 215.52 [1]). County Court initially imposed a one-year term of interim probation. The court informed defendant that, if he complied with the terms of interim probation, the court would impose a five-year term of probation. Defendant, however, repeatedly violated those terms. At sentencing, the court stated that "the only way" it could secure defendant a plea bargain involving probation was to help negotiate a plea agreement with "specific terms," including a "severe sanction" in the event that he violated the terms of interim probation. The court then stated that it had to "keep [its] word," presumably to the People, because otherwise it would be unable to secure the "same opportunity for another defendant who is in a similar situation." The court further stated that it was "compelled" to impose an indeterminate term of incarceration of 2⅓ to 7 years, which is the maximum legal sentence (*see* Penal Law § 70.00 [2] [d]; [3] [b]).

Defendant contends that the court failed to exercise its discretion at sentencing. We agree. "[T]he sentencing decision is a matter committed to the exercise of the *court's* discretion . . . made only after careful consideration of all facts available at the time of sentencing" (*People v Farrar*, 52 NY2d 302, 305 [1981]; *see People v*

Dowdell, 35 AD3d 1278, 1280 [4th Dept 2006], *lv denied* 8 NY3d 921 [2007]). "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*Farrar*, 52 NY2d at 305-306; *see* Penal Law § 1.05 [5]). Here, the court indicated that it was bound by its agreement with the People to impose a particular sentence (*see Dowdell*, 35 AD3d at 1280). We therefore modify the judgment by vacating the sentence and we remit the matter to County Court for resentencing.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

992

KA 15-00365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

XAVIER NELSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Victoria M. Argento, J.), rendered January 8, 2015. 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.

Same memorandum as in *People v Nelson* ([appeal No. 1] — AD3d — [Sept. 28, 2018] [4th Dept 2018]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

993

KA 15-01392

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEADRION HILL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered August 14, 2015. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [3]), and resisting arrest (§ 205.30). Defendant contends that he did not validly waive the right to a jury trial because he did not sign the waiver in open court as required by article I, § 2 of the New York Constitution and CPL 320.10 (2). Defendant's contention is not preserved for our review (*see People v Magnano*, 158 AD2d 979, 979 [4th Dept 1990], *affd* 77 NY2d 941 [1991], *cert denied* 502 US 864 [1991]; *People v Ashkar*, 130 AD3d 1568, 1569 [4th Dept 2015], *lv denied* 26 NY3d 142 [2016]; *People v Moran*, 87 AD3d 1312, 1312 [4th Dept 2011], *lv denied* 19 NY3d 976 [2012]), and, in any event, lacks merit. "Although the transcript of the waiver proceedings does not conclusively establish that defendant signed the written waiver in open court, we note that the waiver form, which was signed by defendant, defense counsel, and the trial judge, expressly states that the waiver was made in open court" on June 9, 2015 (*Moran*, 87 AD3d at 1312). Additionally, County Court expressly stated at the start of the trial that, "on the 9th of June, 2015, here in court, [defendant] waived his right to a trial by jury and executed a waiver of jury trial here in open court. He signed it, you signed it, and I signed approving the waiver." Thus, the record establishes that defendant signed the waiver in open court.

Defendant further contends that the evidence is legally

insufficient to support the physical injury element of the assault in the second degree count. We reject that contention and conclude that there is legally sufficient evidence that the officer sustained a physical injury (*see* Penal Law § 120.05 [3]), i.e., "impairment of physical condition or substantial pain" (§ 10.00 [9]). It is well settled that " 'substantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). The relevant factors in assessing "whether enough pain was shown to support a finding of substantiality" (*id.*) include the nature of the injury, viewed objectively; the victim's subjective description of the injury and his or her pain; whether the victim sought medical treatment for the injury; and the motive of the defendant, i.e., whether he or she intended to inflict pain (*see id.* at 447-448; *People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]). The trial evidence establishes that the injuries sustained by the officer when defendant kicked him included a bruised shin with a possible blood clot that required the officer to take several days off of work and necessitated pain medication, caused the officer to seek medical attention on the day of the incident, and remained tender and swollen when he sought further treatment at a later date. The emergency room physician that treated the officer testified that the officer sustained an injury having "uniquely severe swelling and tenderness, which [was] consistent with a very significant severe blow." Further, the evidence demonstrated that defendant kicked the officer and bit another officer in an apparent attempt to cause them enough pain to prevent the officers from completing the arrest, thereby establishing that defendant's motive was to inflict pain. Thus, viewing the evidence in the light most favorable to the People, as we must (*see People v Reed*, 22 NY3d 530, 534 [2014], *rearg denied* 23 NY3d 1009 [2014]), "a rational person could conclude that the trial evidence was legally sufficient to support [the] conviction" (*People v Smith*, 6 NY3d 827, 829 [2006], *cert denied* 548 US 905 [2006]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

The sentence is not unduly harsh or severe.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

995

CAF 17-00254

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

IN THE MATTER OF NEVAEH S.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES ORDER
CHILD PROTECTIVE UNIT, PETITIONER-RESPONDENT;

TONEI W., RESPONDENT-APPELLANT.

MARYBETH D. BARNET, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

GARY L. CURTISS, COUNTY ATTORNEY, CANANDAIGUA (JENNIFER L. WORRALL OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered January 31, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

996

CAF 18-00456

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

IN THE MATTER OF THOMAS A.R. FANIZZI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARYROSE DELFORTE-FANIZZI, RESPONDENT-APPELLANT.

LISA A. SADINSKY, ROCHESTER, FOR RESPONDENT-APPELLANT.

PHILIPPONE LAW OFFICES, ROCHESTER (CHRISTOPHER M. HUDAK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered August 23, 2017 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's written objections to the order of the Support Magistrate.

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 4, respondent mother appeals from an order denying her objections to an order of a Support Magistrate directing a downward modification of the child support obligation of petitioner father. We affirm.

Family Court "may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances" (Family Ct Act § 451 [3] [a]). "In addition, . . . the court may modify an order of child support where . . . three years have passed . . . or . . . there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted" (§ 451 [3] [b] [i], [ii]). We note that the grounds listed in Family Court Act § 451 (3) (b) do not require the party seeking modification to establish a change in circumstances (*see Matter of Harrison v Harrison*, 148 AD3d 1630, 1631-1632 [4th Dept 2017]). Thus, the Family Court Act provides three separate grounds upon which a party may seek to modify a child support order.

The mother contends that the father failed to establish a substantial change in circumstances (*see* Family Ct Act § 451 [3] [a]). We reject that contention. Loss of employment may constitute a substantial change in circumstances, provided that the party seeking

to modify the order shows that "the termination occurred through no fault of [his or her own] and the [party] has diligently sought re-employment" (*Jelfo v Jelfo*, 81 AD3d 1255, 1257 [4th Dept 2011] [internal quotation marks omitted]; *see Matter of Fragola v Alfaro*, 45 AD3d 684, 685 [2d Dept 2007]). Here, the father testified at the hearing that he was terminated from his position as general manager of a printing services company, which had an annual salary of $115,000, because upper management disagreed with his decision to purchase a digital printing press. He also testified that the company was in financial peril and, since his termination, the company closed one of its facilities and had barely enough work to continue operating its remaining facility. Furthermore, the father testified that he applied to more than 300 jobs in New York, Pennsylvania, New Hampshire and Utah, and contacted various employment agencies; but, without a four-year college degree, he was unable to obtain employment at his prior level of compensation. After a 19-month job search, the father ultimately accepted a position that paid less than one fourth of his prior salary. The record thus establishes that he was terminated through no fault of his own and that he diligently sought reemployment (*see Matter of Preischel v Preischel*, 193 AD2d 1118, 1118-1119 [4th Dept 1993]; *see also Matter of Smith v McCarthy*, 143 AD3d 726, 727-728 [2d Dept 2016]).

Inasmuch as the father established a substantial change in circumstances warranting a modification of child support (*see* Family Ct Act § 451 [3] [a]), we need not consider his alternative ground for affirmance, i.e., that he experienced a reduction in his gross income of 15% or more (*see* § 451 [3] [b] [ii]).

The mother further contends that the Support Magistrate erred in imputing only $64,000 in income to the father. We reject that contention. Given the father's level of education and the results of his extensive job search, we conclude that the Support Magistrate did not abuse her discretion in refusing to impute additional income to him (*see generally Hurley v Hurley*, 71 AD3d 1470, 1470 [4th Dept 2010]). Contrary to the mother's further contention, we conclude that the Support Magistrate properly deviated from the presumptive support obligation calculated under the Child Support Standards Act (CSSA) (*see generally* Family Ct Act § 413). The Support Magistrate issued written findings of fact in which she properly applied the CSSA guidelines, set forth the relevant statutory factors and reasons why it would be "unjust or inappropriate" to require the father to pay his presumptive obligation, and supported those reasons with facts in the record (§ 413 [1] [f], [g]; *see Matter of Smith v Jefferson County Dept. of Social Servs.*, 149 AD3d 1539, 1540 [4th Dept 2017]).

We have reviewed the mother's remaining contention, and we conclude that it does not compel reversal or modification of the order.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1001

CA 18-00273

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

TRUDY MENEAR AND CHARLES MENEAR,
PLAINTIFFS-RESPONDENTS,

V ORDER

KWIK FILL, ET AL., DEFENDANTS,
MOTOR COACH INDUSTRIES, INC., MOTOR COACH INDUSTRIES INTERNATIONAL, INC., AND MOTOR COACH INDUSTRIES, LTD., DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (MOLLY M. RYAN OF COUNSEL), AND HARTLINE, DACUS, BARGER, DREYER, LLP, DALLAS, TEXAS, FOR DEFENDANTS-APPELLANTS.

BOTTAR LEONE, PLLC, SYRACUSE (AARON J. RYDER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered October 31, 2017. The order, among other things, granted in part plaintiffs' motion for a protective order.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 1, 2018,

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1004

CA 18-00361

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

SHANTAE R. MARTINEZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, ROCHESTER POLICE DEPARTMENT AND JEREMY NASH, DEFENDANTS-RESPONDENTS.

PARISI & BELLAVIA, LLP, ROCHESTER (JAMES E. MASLYN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (PATRICK BEATH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Monroe County (William K. Taylor, J.), entered May 11, 2017. The amended order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries that she sustained when the vehicle in which she was a passenger (plaintiff's vehicle) collided with a Rochester Police Department patrol vehicle. Plaintiff now appeals from an amended order that, inter alia, granted defendants' motion for summary judgment dismissing the complaint. We affirm.

Pursuant to Vehicle and Traffic Law § 1104, the driver of an authorized emergency vehicle, including a "police vehicle" (§ 101), who is responding to a police call may "[p]roceed past a steady red signal . . . , but only after slowing down as may be necessary for safe operation" (§ 1104 [b] [2]; *see* § 114-b; *see generally Kabir v County of Monroe*, 16 NY3d 217, 230-231 [2011]). An officer engaged in such privileged conduct cannot be held liable unless his or her conduct demonstrates a reckless disregard for the safety of others (*see* § 1104 [e]) or, in other words, "rises to the level of recklessness" (*Saarinen v Kerr*, 84 NY2d 494, 497 [1994]). In order to establish recklessness, "there must be evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*Frezzell v City of New York*, 24 NY3d 213, 217 [2014] [internal quotation marks omitted]).

Here, in support of their motion, defendants established that defendant Jeremy Nash was responding to a police call with his emergency lights and sirens activated when he slowed his patrol vehicle and then entered the intersection against a red light, whereupon plaintiff's vehicle entered the intersection with a green light and struck the side of the patrol vehicle. Thus, we conclude that defendants established as a matter of law that Nash's conduct did not rise to the level of reckless disregard for the safety of others (*see generally Szczerbiak v Pilat*, 90 NY2d 553, 556-557 [1997]). We also conclude that plaintiff failed to raise a triable issue of fact in opposition to the motion (*see Williams v Fassinger*, 119 AD3d 1368, 1369 [4th Dept 2014], *lv denied* 24 NY3d 912 [2014]; *Herod v Mele*, 62 AD3d 1269, 1270 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to plaintiff's contention, "[t]he officer's alleged violation of internal guidelines [of the Rochester Police Department] . . . failed to establish that his conduct was reckless" (*Teitelbaum v City of New York*, 300 AD2d 649, 650 [2d Dept 2002], *lv denied* 100 NY2d 513 [2003]; *see generally Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1005

CA 18-00307

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

SCOT LUTHER, PLAINTIFF-APPELLANT,

V ORDER

PAYQUICKER, LLC, PAUL BELDHAM,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 11, 2017. The order, among other things, denied plaintiff's motion for partial summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 7 and 8, 2018, and filed in the Monroe County Clerk's Office on May 8, 2018,

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1008

TP 18-00186

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

IN THE MATTER OF BURNELL MCLEOD, PETITIONER,

V ORDER

STEWART ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

BURNELL A. MCLEOD, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Russell P. Buscaglia, A.J.], entered December 4, 2017) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1009

KA 18-00398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMERSON VERNON, JR., DEFENDANT-APPELLANT.

MATTHEW D. NAFUS, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (KEVIN M. LINDER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered December 8, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal 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]), defendant contends that Supreme Court erred in refusing to suppress a handgun that the police found during a search of defendant's person and statements subsequently made by defendant to the police on the ground that the search of defendant was not lawful. We reject that contention.

At a suppression hearing, the People presented the testimony of a police officer who had been involved in 40 or 50 firearms-related arrests and had received training in investigating such cases. The officer testified that he was riding as a passenger in the patrol vehicle driven by his partner when he saw defendant about five feet away, walking on the sidewalk to the officer's right. The officer further testified that he exited the vehicle and conducted a search of defendant after he observed an L-shaped outline in the left front pocket of defendant's tight white jeans, which he recognized as a handgun. The handgun was lying flat against defendant's body, at his side. Although the encounter occurred at approximately 11:00 p.m., the area was well lit by a street light that was across the street from where defendant was walking.

We conclude that the officer's "testimony established that the police had reasonable suspicion to believe that . . . defendant had a gun and justified a search" (*People v McClendon*, 92 AD3d 959, 960 [2d

Dept 2012], *lv denied* 19 NY3d 865 [2012]; *see People v Prochilo*, 41 NY2d 759, 762 [1977]; *People v Williams*, 111 AD3d 448, 448 [1st Dept 2013], *lv denied* 22 NY3d 1204 [2014]). The court credited the testimony of the officer and, contrary to defendant's contention, "[t]here is no basis for disturbing the . . . court's credibility determinations, which are supported by the record" (*People v Martorell*, 49 AD3d 426, 427 [1st Dept 2008], *lv denied* 10 NY3d 866 [2008]; *see People v Johnson*, 138 AD3d 1454, 1454 [4th Dept 2016], *lv denied* 28 NY3d 931 [2016]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1010

KA 16-02146

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEON K. MCTYERE, 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 August 4, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is not valid, and he challenges the severity of the sentence. Contrary to the contentions of defendant, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and the valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1015

KA 16-01561

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. SERRANO, 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 Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered December 18, 2015. 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 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 contends that Supreme Court erred in admitting evidence concerning defendant's prior violations of the order of protection that he allegedly violated in the underlying crime. We reject that contention. "That testimony was relevant to establish defendant's motive and intent in committing the crime[] charged . . . and to establish that defendant's violation of the order of protection was neither innocent nor inadvertent" (*People v Pytlak*, 99 AD3d 1242, 1242-1243 [4th Dept 2012], *lv denied* 20 NY3d 988 [2012]; *see People v Zollo*, 47 AD3d 958, 958 [2d Dept 2008]). Inasmuch as the defense sought to establish that defendant's presence in the trees behind the complainant's residence had an innocent explanation, the evidence was relevant to refute that defense, and "the court properly determined that the probative value of that testimony outweighed its potential for prejudice" (*Pytlak*, 99 AD3d at 1243; *see People v Rogers*, 103 AD3d 1150, 1152-1153 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]; *Zollo*, 47 AD3d at 958).

Defendant failed to preserve for our review his contention that the court erred in failing to give limiting instructions with respect to the above *Molineux* evidence (*see People v Burrell*, 120 AD3d 911, 912 [4th Dept 2014]; *People v Williams*, 107 AD3d 1516, 1516 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]), and we decline to exercise our power to review that contention as a matter of discretion in the

interest of justice (*see* CPL 470.15 [6] [a]).

Although defendant contends that the court erred in permitting the People to introduce evidence of an encounter between defendant and the complainant's boyfriend outside of the complainant's residence earlier on the evening of defendant's arrest, we conclude that defendant waived that contention when he stipulated prior to trial that such evidence was admissible (*see e.g. People v Howie*, 149 AD3d 1497, 1498 [4th Dept 2017], *lv denied* 29 NY3d 1128 [2017]*; People v Hutchings*, 142 AD3d 1292, 1294 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]; *People v Santos-Sosa*, 233 AD2d 833, 833 [4th Dept 1996], *lv denied* 89 NY2d 988 [1997]). In any event, we conclude that the evidence was admissible inasmuch as it "completed the narrative of this particular criminal transaction" (*People v Alfaro*, 19 NY3d 1075, 1076 [2012]).

Finally, 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: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1020

CA 18-00268

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

ROBERT K. LESSER LIVING TRUST, DATED APRIL 21, 2005, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNITED SECULAR AMERICAN CENTER FOR THE DISABLED, INC., DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

KAZMI & REEVES LLP, NEW YORK CITY (JOHN W. REEVES OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (RICHARD J. EVANS, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered October 24, 2017. The order denied the motion of defendant United Secular American Center for the Disabled, Inc., to vacate a default judgment.

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

Memorandum: Plaintiff commenced this action seeking to foreclose a mortgage secured by property that defendant United Secular American Center for the Disabled, Inc. (United) purchased from plaintiff. After United failed to appear in the action, a default judgment was entered. By a pro se order to show cause, United's president, Sharif Rahman, moved to vacate the default judgment based upon a lack of personal jurisdiction (*see* CPLR 5015 [a] [4]). We conclude that Supreme Court properly denied the motion without conducting a traverse hearing to determine whether United was properly served.

"Pursuant to CPLR 311 (a), personal service on a corporation may be accomplished by, inter alia, delivering the summons to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" (*Interboro Ins. Co. v Tahir*, 129 AD3d 1687, 1688 [4th Dept 2015] [internal quotation marks omitted]). Here, "[t]he process server's affidavit, which stated that the corporate defendant was personally served by delivering a copy of the summons and complaint to [Rahman] and provided a description of [him], constituted prima facie evidence of proper service pursuant to CPLR 311 (a) (1)" (*id.* [internal quotation marks omitted]; *see Cellino & Barnes, P.C. v*

Martin, Lister & Alvarez, PLLC, 117 AD3d 1459, 1460 [4th Dept 2014], *lv dismissed* 24 NY3d 928 [2014]), and United "failed to rebut the presumption of proper service by providing 'specific facts to rebut the statements in the process server's affidavit[]' " (*Wright v Denard*, 111 AD3d 1330, 1331 [4th Dept 2013]; *see Cellino & Barnes, P.C.*, 117 AD3d at 1460; *cf. Cach, LLC v Ryan*, 158 AD3d 1193, 1194-1195 [4th Dept 2018]). We thus conclude that Rahman's conclusory denials of service were "insufficient to support [United's] defense of lack of personal jurisdiction based on improper service of process or raise issues of fact requiring a traverse hearing" (*Sharbat v Law Offs. of Michael B. Wolk, P.C.*, 121 AD3d 426, 427 [1st Dept 2014]; *see Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]; *Irwin Mtge. Corp. v Devis*, 72 AD3d 743, 743 [2d Dept 2010]). United's other contentions with respect to the service upon Rahman are raised for the first time on appeal and thus are not properly before us (*see Orellano v Samples Tire Equip. & Supply Corp.*, 110 AD2d 757, 758 [2d Dept 1985]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Although United further contends that service of process on the Secretary of State did not confer personal jurisdiction over United (*see* Business Corporation Law § 306; *Gourvitch v 92nd & 3rd Rest Corp.*, 146 AD3d 431, 431 [1st Dept 2017]; *see also Matter of Hamilton Equity Group, LLC v Southern Wellcare Med., P.C.*, 158 AD3d 1214, 1215 [4th Dept 2018]), we note that, before the motion court, United failed to address, let alone establish any defect in, plaintiff's service of process through the Secretary of State. We thus conclude that United's current challenges to such service, raised for the first time on appeal, are not properly before us (*see Fwu Chyuang Chow v Kenteh Enters. Corp.*, 169 AD2d 572, 573 [1st Dept 1991]; *see generally Ciesinski*, 202 AD2d at 985).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1024

CA 18-00331

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

ELLANA EBERHARDT, PLAINTIFF-RESPONDENT,

V ORDER

JOHN NAPPA, ET AL., DEFENDANTS,
AND ANTHONY NAPPA, DEFENDANT-APPELLANT.

BURGIO, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DIETRICH LAW FIRM P.C., AMHERST, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered January 8, 2018. The order denied the motion of defendant Anthony Nappa to dismiss the complaint against him and granted the cross motion of plaintiff to extend the time for service of the summons and complaint on said defendant.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1026

CA 18-00092

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

TODD J. YOUNG AND MICHELLE YOUNG,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GIGI E. GRIZANTI, DEFENDANT-APPELLANT.

BAXTER, SMITH & SHAPIRO, P.C., WEST SENECA (JOSHUA A. BLOOM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered August 23, 2017. The order denied defendant's motion for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Todd J. Young (plaintiff), a postal carrier with the United States Postal Service, allegedly sustained when he was delivering mail to defendant's residence and defendant's dog "attacked and bit" him, which caused him to trip and fall on bags of mulch on defendant's driveway. Supreme Court denied defendant's motion for summary judgment dismissing the complaint. We affirm.

We conclude that defendant failed to meet her initial burden of establishing that she neither knew nor should have known that the dog had any vicious propensities (*see generally Doerr v Goldsmith*, 25 NY3d 1114, 1116 [2015]). While defendant submitted her own affidavit, in which she averred she had no knowledge of the dog previously biting anyone, or jumping aggressively or acting in a dangerous manner towards anyone, she also submitted plaintiff's deposition testimony that, because of the dog's vicious behavior, postal carriers nicknamed the dog "Cujo" and a Dog/Animal Warning Card was issued to postal carriers who delivered mail to defendant's residence. Defendant also submitted the deposition testimony of another postal carrier who, along with plaintiff, testified that when they delivered mail to defendant's residence, the dog slammed into the door and/or barked or growled and otherwise acted in a vicious manner. Plaintiff and the other postal carrier also testified that the dog was kept restrained in defendant's home, with the wooden front door shut. Thus, by

submitting testimony describing the dog's repeated vicious behavior, defendant's own submissions raised a triable issue of fact whether she knew or should have known about the dog's vicious propensities (*see Arrington v Cohen*, 150 AD3d 1695, 1696 [4th Dept 2017]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1032

KA 16-02096

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY J. REYNOLDS, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Michael F. Pietruszka, A.J.), rendered September 26, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. The record establishes that the waiver was knowingly, intelligently, and voluntarily entered (*see People v Wright*, 158 AD3d 1068, 1069 [4th Dept 2018], *lv denied* 31 NY3d 1019 [2018]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1033

CAF 17-01881

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

IN THE MATTER OF NICOLAS KAMMEYER,
PETITIONER-RESPONDENT,

V ORDER

JAMI R. MANGES-MERRIMAN, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

RUTHANNE G. SANCHEZ, WATERTOWN, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered October 18, 2017 in a proceeding pursuant to Family Court Act article 6. The order settled a record on appeal.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1036

CAF 16-02139

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

IN THE MATTER OF THOMAS E. HOWARD, JR.,
PETITIONER-RESPONDENT,

V ORDER

AMANDA L. HOWARD, RESPONDENT-APPELLANT.

PAUL A. NORTON, CLINTON, FOR RESPONDENT-APPELLANT.

DIANE MARTIN-GRANDE, ROME, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered October 17, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, placed conditions on respondent's parenting time with one of the subject children.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1037

CAF 17-00510

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

IN THE MATTER OF AIDEN T.

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

MEMORANDUM AND ORDER

MELISSA S. AND KEVIN T., RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

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

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

STUART J. LAROSE, SYRACUSE, ATTORNEY FOR THE CHILD.

JOHN S. CRISAFULLI, SYRACUSE, FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered February 23, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject child.

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

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

"A suspended judgment 'is a brief grace period designed to prepare the parent to be reunited with the child' " (*Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017], quoting *Matter of Michael B.*, 80 NY2d 299, 311 [1992]). If Family Court " 'determines by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights' " (*Matter of Joseph M., Jr. [Joseph M., Sr.]*, 150 AD3d 1647, 1648 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]; *see Matter of Emily A. [Gina A.]*, 129 AD3d 1473, 1474 [4th Dept 2015]).

The suspended judgment was entered on consent of the parties

after the mother admitted that she had not addressed her substance abuse issues and the father admitted that he had not demonstrated an understanding of how the mother's substance abuse issues impact her ability to parent safely and appropriately. The terms of the suspended judgment, inter alia, required the mother to refrain from using illegal drugs or engaging in criminal activity and required both respondents to demonstrate that the circumstances that resulted in the child's placement have been ameliorated such that the child may be safely returned to their care. At the hearing on the petition to revoke the suspended judgment and terminate respondents' parental rights, however, the mother admitted that she relapsed and used cocaine during the period of the suspended judgment. That relapse in part caused her to violate her parole, which resulted in a 12-month period of incarceration. Additionally, consistent with his prior inability to understand the impact of the mother's substance abuse problems on her ability to parent safely and appropriately, the father testified: "She's a very good mother. Although she has her addiction problem, she keeps that so out of being a parent you wouldn't even know . . . I didn't even know she had a problem for over a year after I first started dating her." There was also testimony that the child had lived with the foster mother since he was placed in her home as a newborn, that he had bonded with her and desired to continue living with her, and that she was a "powerful and significant positive parenting force" for him. Thus, contrary to respondents' contention, we conclude that there is a sound and substantial basis in the record to support the court's determination that respondents violated numerous terms of the suspended judgment and that it is in the child's best interests to terminate their parental rights (*see Matter of Michael S. [Timothy S.]*, 159 AD3d 1378, 1379 [4th Dept 2018]; *Matter of Kh'niayah D. [Niani J.]*, 155 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]).

We reject respondents' further contention that the father was denied effective assistance of counsel. Respondents failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015] [internal quotation marks omitted]).

Finally, the court's " 'prior order finding permanent neglect and suspending judgment was entered on consent of [respondents] and thus is beyond appellate review' " (*Matter of Xavier O.V. [Sabino V.]*, 117 AD3d 1567, 1567 [4th Dept 2014], *lv denied* 24 NY3d 903 [2014]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1038

CAF 17-00623

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

IN THE MATTER OF AIDEN T.

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

ORDER

MELISSA S. AND KEVIN T., RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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

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

STUART J. LAROSE, SYRACUSE, ATTORNEY FOR THE CHILD.

JOHN S. CRISAFULLI, SYRACUSE, FOR INTERVENOR-RESPONDENT.

Appeal from a corrected order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered March 9, 2017 in a proceeding pursuant to Social Services Law § 384-b. The corrected order, among other things, terminated respondents' parental rights with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1039

CAF 17-01128

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

IN THE MATTER OF NICHOLAS J. KAMMEYER,
PETITIONER-RESPONDENT,

V ORDER

JAMI R. MANGES-MERRIMAN, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

RUTHANNE G. SANCHEZ, WATERTOWN, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered May 22, 2017 in a proceeding pursuant to Family Court Act article 6. The order settled a record on appeal.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1042

CA 18-00086

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

BEVERLY BRADLEY, AS GUARDIAN OF THE PERSON AND PROPERTY OF RHOEMEL LAMPKIN, AND BEVERLY BRADLEY, INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V ORDER

RAMESH KONAKANCHI, D.O., DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered October 17, 2017. The order denied the motion of defendant for summary judgment dismissing plaintiff's complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 8 and 9, 2018,

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1043

CA 17-02083

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

SUSAN RIDGEWAY, PLAINTIFF-RESPONDENT,

V ORDER

SALEH A. FETOUH, M.D., AND SALEH A. FETOUH, P.C., DOING BUSINESS AS BREAST SCREENING CENTER OF WESTERN NEW YORK, DEFENDANTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOGANWILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered August 28, 2017. The order, insofar as appealed from, granted the motion of plaintiff for leave to renew her opposition to a prior motion and, upon renewal, denied the motion of defendants for summary judgment.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1044

CA 18-00122

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

JENNIFER TOMASCHOW, INDIVIDUALLY AND AS ADMINISTRATRIX OF ESTATE OF SUSAN M. PLAKE, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

ST. JAMES MERCY HEALTH SYSTEM, ET AL., DEFENDANTS, PINNACLE FAMILY PRACTICE, PLLC, AND RHONDA PETERSON, M.D., DEFENDANTS-APPELLANTS.

HIRSCH & TUBIOLO, P.C., ROCHESTER (NICHOLAS J. REEDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

POWERS & SANTOLA, LLP, ROCHESTER (KELLY C. WOLFORD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered July 12, 2017. The order denied the motion of defendants Pinnacle Family Practice, PLLC, and Rhonda Peterson, M.D., for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 28, 2018,

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1047

CA 17-01778

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

CAROLE COTTEN, DOING BUSINESS AS DYNAMICS
UNLIMITED, PLAINTIFF-RESPONDENT,

V ORDER

STANTON H. LESSER, AS SUCCESSOR TRUSTEE OF
THE ROBERT K. LESSER LIVING TRUST DATED
APRIL 21, 2005, PALMER-BRYANT REALTY, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.
(ACTION NO. 1.)

GRAF BUILDING, LLC, PLAINTIFF-RESPONDENT,

V

STANTON H. LESSER AND SUE ORTON, AS CO-PERSONAL
REPRESENTATIVES OF THE ESTATE OF ROBERT K.
LESSER, DECEASED, STANTON H. LESSER, AS SUCCESSOR
TRUSTEE OF THE ROBERT K. LESSER LIVING TRUST
DATED APRIL 21, 2005, ROBERT K. LESSER LIVING
TRUST DATED APRIL 21, 2005, AND PALMER-BRYANT
REALTY, INC., DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)

MEDICOR ASSOCIATES, INC., PLAINTIFF-RESPONDENT,

V

STANTON H. LESSER AND SUE ORTON, AS CO-PERSONAL
REPRESENTATIVES OF THE ESTATE OF ROBERT K.
LESSER, DECEASED, STANTON H. LESSER, AS SUCCESSOR
TRUSTEE OF THE ROBERT K. LESSER LIVING TRUST
DATED APRIL 21, 2005, PALMER-BRYANT REALTY, INC.,
JOHN J. BANKOSH, DAVID BRYANT,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(ACTION NO. 3.)

G.H. GRAF REALTY CORPORATION, GRAF BUILDING, LLC,
AND COUNTY OF CHAUTAUQUA, PLAINTIFFS-RESPONDENTS,

V

STANTON H. LESSER AND SUE ORTON, AS CO-PERSONAL
REPRESENTATIVES OF THE ESTATE OF ROBERT K.

LESSER, DECEASED, STANTON H. LESSER, AS SUCCESSOR TRUSTEE OF THE ROBERT K. LESSER LIVING TRUST DATED APRIL 21, 2005, PALMER-BRYANT REALTY, INC., DAVID BRYANT, JOHN J. BANKOSH, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(ACTION NO. 4.)

CAROLE COTTEN, DOING BUSINESS AS DYNAMICS UNLIMITED, PLAINTIFF-RESPONDENT,

V

STANTON H. LESSER AND SUE ORTON, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF ROBERT K. LESSER, DECEASED, JOHN J. BANKOSH, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(ACTION NO. 5.)

GOLDBERG SEGALLA LLP, BUFFALO (TROY S. FLASCHER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BURGETT & ROBBINS, LLP, JAMESTOWN (LYDIA ALLEN CAYLOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT CAROLE COTTEN, DOING BUSINESS AS DYNAMICS UNLIMITED.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (HOWARD E. BERGER OF COUNSEL, FOR PLAINTIFF-RESPONDENT GRAF BUILDING, LLC.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT MEDICOR ASSOCIATES, INC.

LAW OFFICES OF JOHN WALLACE, BUFFALO (JAMES J. NAVAGH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS G.H. GRAF REALTY CORPORATION, GRAF BUILDING, LLC, AND COUNTY OF CHAUTAUQUA.

Appeals from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered February 27, 2017. The order, among other things, denied that part of the motion of defendants-appellants seeking summary judgment dismissing the complaints against them.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1048

CA 18-00459

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

FREDERICK P. BRADLEY, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT REXCOAT AND JENNIFER REXCOAT,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF JOHN TROP, BUFFALO (THOMAS DURKIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

VANDETTE PENBERTHY LLP, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered May 12, 2017. The order granted the motion of plaintiff for an extension of time to serve a "summons and notice."

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Obot v Medaille Coll.*, 82 AD3d 1629, 1630 [4th Dept 2011], *lv denied* 17 NY3d 756 [2011]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1049

TP 18-00478

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

IN THE MATTER OF MICHAEL YARBOROUGH, PETITIONER,

V MEMORANDUM AND ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT.

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

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see Matter of Adams v Annucci*, 158 AD3d 1091, 1091 [4th Dept 2018]; *see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]).

Petitioner further contends that the Hearing Officer improperly denied his request to call a certain inmate as a witness at the hearing because the Hearing Officer failed to ascertain the reason for the inmate's refusal to testify. We reject that contention. The record establishes that the inmate had initially agreed to testify as a witness for petitioner but ultimately refused to do so, despite the Hearing Officer's personal efforts to secure his testimony and to ascertain the reason for the refusal. "[W]hen the [H]earing [O]fficer conducts a personal interview but is unable to elicit a genuine reason from the refusing witness, the charged inmate's right to call witnesses will have been adequately protected" (*Matter of Hill v Selsky*, 19 AD3d 64, 67 [3d Dept 2005]; *see Matter of Blades v Annucci*,

153 AD3d 1502, 1503-1504 [3d Dept 2017]). In any event, we note that the inmate's testimony would have been properly excluded by the Hearing Officer as redundant to the testimony of another inmate who testified at petitioner's hearing (*see Matter of Inesti v Rizzo*, 155 AD3d 1581, 1582 [4th Dept 2017]).

Finally, petitioner contends that the Hearing Officer erred in failing to assess the credibility and reliability of the informants who provided confidential testimony. Petitioner failed to raise that contention in his administrative appeal and thus failed to exhaust his administrative remedies with respect to it, and this Court lacks the discretionary authority to consider that contention (*see Matter of Polanco v Annucci*, 136 AD3d 1325, 1325 [4th Dept 2016]).

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1061

CA 17-01751

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

MICHELY J. PEREZ, PLAINTIFF-RESPONDENT,

V ORDER

CHARLES BARLING, DEFENDANT-APPELLANT,
AND TERRY L. COLE, DEFENDANT.

DENIS A. KITCHEN, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

MARTIN J. ZUFFRANIERI, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Thomas P. Franczyk, A.J.), entered June 20, 2017. The judgment awarded plaintiff money damages upon a nonjury verdict.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1064

CA 18-00041

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

AGNIESZKA CHEN, PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM CHEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WILLIAM CHEN, BRONX, DEFENDANT-APPELLANT PRO SE.

FERON POLEON, LLP, AMHERST (KATIE M. POLEON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Sharon S. Townsend, J.), entered August 10, 2017. The order, among other things, directed defendant to execute documents needed to transfer funds from certain Individual Retirement Accounts to plaintiff.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1065

CA 18-00098

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

AGNIESZKA CHEN, PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM CHEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WILLIAM CHEN, BRONX, DEFENDANT-APPELLANT PRO SE.

FERON POLEON, LLP, AMHERST (KATIE M. POLEON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Sharon S. Townsend, J.), entered November 17, 2017. The order, among other things, directed that funds in defendant's retirement accounts be sequestered and appointed a receiver with full authority to transfer the funds in the sequestered accounts to plaintiff.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

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

1066

CA 18-00099

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

AGNIESZKA CHEN, PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM CHEN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

WILLIAM CHEN, BRONX, DEFENDANT-APPELLANT PRO SE.

FERON POLEON, LLP, AMHERST (KATIE M. POLEON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Sharon S. Townsend, J.), entered December 19, 2017. The order and judgment, among other things, granted a money judgment to plaintiff's attorney against defendant.

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

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (959/10) KA 09-01166. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TROY L. KENNEDY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (221/11) KA 09-01583. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ORLANDO O. OCASIO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (336/17) KA 15-00922. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MAURICE R. HOWIE, ALSO KNOWN AS “QUELL”, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND NEMOYER, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (733/17) KA 15-00604. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMONE LEWIS, ALSO KNOWN AS “MONE”, ALSO KNOWN AS “D”, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed

Sept. 28, 2018.)

MOTION NO. (814/17) KA 13-00159. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY D. SAMUEL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (1513/17) CA 17-00786. -- IN THE MATTER OF HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE OF HSBC BANK USA, NATIONAL ASSOCIATION, PETITIONER-RESPONDENT, V SOUTHERN WELLCARE MEDICAL, P.C., RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (1530/17) CA 17-01222. -- DONNA JONES, PLAINTIFF-APPELLANT, V SMOKE TREE FARM, A NEW YORK PARTNERSHIP, ROBERT F. SMITH, INDIVIDUALLY AND AS A PARTNER OF SMOKE TREE FARM AND/OR DOING BUSINESS AS SMOKE TREE FARM, BENEDETTE SMITH, INDIVIDUALLY AND AS A PARTNER OF SMOKE TREE FARM AND/OR DOING BUSINESS AS SMOKE TREE FARM, DIANE VAN PATTEN, INDIVIDUALLY AND AS A PARTNER OF SMOKE TREE FARM AND/OR DOING BUSINESS AS SMOKE TREE FARM, AND DON VAN PATTEN, INDIVIDUALLY AND AS PARTNER OF SMOKE TREE FARM AND/OR DOING BUSINESS AS SMOKE TREE FARM, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT:

SMITH, J.P., DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (221/18) KA 12-02145. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEFFREY J. TERBORG, DEFENDANT-APPELLANT. -- Motion for reargument and other relief denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (234/18) CA 17-01558. -- NORTHLAND EAST, LLC, NORTHLAND WEST, LLC, DUTTON, LLC, AND MICHAEL W. SWEENEY, PLAINTIFFS-APPELLANTS, V J.R. MILITELLO REALTY, INC., AND NORDEL II, LLC, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (260/18) CA 17-00423. -- CARRIANN RAY, PLAINTIFF-RESPONDENT, V VICTORIA J.G. STOCKTON, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, DEJOSEPH, AND CURRAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (329/18) CA 17-01645. -- ABBOTT BROS. II STEAK OUT, INC., PLAINTIFF-RESPONDENT, V ALEXANDROS TSOULIS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (521/18) CA 17-02093. -- ANDREW G. VANDEE, JERRY PHALEN, JAMES LYNCH, ROGER SLATER, RICHARD THOMAS, ELIJAH CLOSSON, WILLIAM PRINDLE AND SHAWN KIRK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS-RESPONDENTS, V SUIT-KOTE CORPORATION, DEFENDANT-RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (534/18) KA 16-00005. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DARNELL CREDELL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (539/18) CA 17-01703. -- IN THE MATTER OF PILOT TRAVEL CENTERS, LLC, PETITIONER-APPELLANT, V TOWN BOARD OF TOWN OF BATH, TOWN OF BATH PLANNING BOARD, MICHAEL LUFFRED, IN HIS OFFICIAL CAPACITY AS CODE ENFORCEMENT OFFICER OF TOWN OF BATH, LOVE'S TRAVEL STOPS & COUNTRY STORES, INC., RESPONDENTS-RESPONDENTS, ET AL., RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (599/18) KA 14-02214. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V ISIAH WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (604/18) KA 15-02121. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ISIAH WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 3.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (630/18) CA 17-01005. -- W. JAMES CAMPERLINO, PLAINTIFF-RESPONDENT, V DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (631/18) CA 17-01006. -- W. JAMES CAMPERLINO, PLAINTIFF-RESPONDENT, V DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (632/18) CA 17-01007. -- W. JAMES CAMPERLINO,

PLAINTIFF-RESPONDENT, V DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES, DEFENDANTS-APPELLANTS. (APPEAL NO. 3.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (633/18) CA 17-01008. -- W. JAMES CAMPERLINO, PLAINTIFF-RESPONDENT-APPELLANT, V DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 4.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (634/18) CA 17-01837. -- W. JAMES CAMPERLINO, PLAINTIFF-APPELLANT, V DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES, DEFENDANTS-RESPONDENTS. (APPEAL NO. 5.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (635/18) CA 17-01934. -- MARY WYZYKOWSKI, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 125390.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 28,

2018.)

MOTION NOS. (638-639/18) KA 15-01174. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALEXANDER KATES, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 16-02022. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALEXANDER KATES, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (654/18) TP 17-02198. -- IN THE MATTER OF BRETT D. BERSANI, PETITIONER, V NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (657/18) CA 17-00858. -- STEVEN MCGREGOR, PLAINTIFF-RESPONDENT, V PERMCLIP PRODUCTS CORP., DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (673/18) CA 17-02187. -- WILLIAM LANDAHL AND KIMBERLY LANDAHL, PLAINTIFFS-RESPONDENTS, V DANIEL B. STEIN AND TRUDY STEIN, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER,

AND CURRAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (691/18) CA 17-01682. -- IN THE MATTER OF PATRICIA ANN GOODYEAR, PETITIONER-RESPONDENT, V NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT-RESPONDENT, AND JEANENE JUNE DEMARC, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (696/18) CAF 17-01771. -- IN THE MATTER OF JEANENE JUNE DEMARC, PETITIONER-APPELLANT, V PATRICIA ANN GOODYEAR, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (709/18) KA 16-01081. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RASHAWN C. AUSTIN, DEFENDANT-APPELLANT. -- Motion for reargument be and the same hereby is granted and, upon reargument, the memorandum and order entered June 8, 2018 (162 AD3d 1574) is amended by adding the following sentence as the last sentence of the memorandum: "We have reviewed the remaining contentions raised by defendant on appeal and conclude that none warrant reversal or modification of the judgment." PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (732/18) KA 15-01997. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY LANKFORD, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (747/18) CA 18-00146. -- DELPHI HOSPITALIST SERVICES LLC, PLAINTIFF-APPELLANT, V EDWARD L. PATRICK, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (769/18) CA 17-02233. -- ASIA BALL, AS PARENT AND NATURAL GUARDIAN OF INFANT A.K, PLAINTIFF-RESPONDENT, V ORLANDO CAESAR, DEFENDANT, KELLI SMITH AND KELLI'S LITTLE ONE-Z CHILDCARE, INC., DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (801/18) KA 12-01622. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH GELLING, DEFENDANT-APPELLANT. -- Motion for reargument be and the same hereby is granted in part and, upon reargument, the memorandum and order entered July 25, 2018 (163 AD3d 1489) is amended by deleting the phrase "second-story" from the second sentence of the ninth

paragraph of the memorandum. PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (806/18) CA 17-01956. -- CAYUGA NATION, BY AND THROUGH ITS LAWFUL GOVERNING BODY, CAYUGA NATION COUNCIL, PLAINTIFF-RESPONDENT, V SAMUEL CAMPBELL, CHESTER ISAAC, JUSTIN BENNETT, KARL HILL, SAMUEL GEORGE, DANIEL HILL, TYLER SENECA, MARTIN LAY, WILLIAM JACOBS, WARREN JOHN, WANDA JOHN, BRENDA BENNETT, PAMELA ISAAC, ET AL., DEFENDANTS-APPELLANTS, AND COUNTY OF SENECA, INTERVENOR. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

MOTION NO. (832/18) TP 17-01928. -- IN THE MATTER OF J.C. SMITH, INC., PETITIONER, V NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, ALSO KNOWN AS EMPIRE STATE DEVELOPMENT, HOWARD ZEMSKY, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT AND CEO OF EMPIRE STATE DEVELOPMENT, DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT OF NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, AND LOURDES ZAPATA, DIRECTOR, DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT OF NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 28, 2018.)

KA 17-01041. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHAVELO BORDEN, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from a Judgment of Wyoming County Court, Michael M. Mohun, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: WHALEN, P.J., CENTRA, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

KA 17-00325. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRIAN J. DEALE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from a Judgment of Wyoming County Court, Michael M. Mohun, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: WHALEN, P.J., CENTRA, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 28, 2018.)

KA 15-01251. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARC A. DRAKE, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Supreme Court, Monroe County, to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Sept. 28, 2018.)

KA 14-00583. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH E. MARTINEZ, ALSO KNOWN AS JOHN DOE, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Supreme Court, Monroe County, to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Sept. 28, 2018.)

KA 16-01033. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAYMOND L. MORGAN, ALSO KNOWN AS JOHN DOE, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Genesee County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Sept. 28, 2018.)

KA 16-01811. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JARVIS J. PORTER, ALSO KNOWN AS JOHN DOE, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Sept. 28, 2018.)