SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 16, 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

881

CAF 16-02317

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

IN THE MATTER OF JANETTE G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TERRY S., RESPONDENT,
AND JULIE G., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

JESSICA L. VESPER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 29, 2016 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent Julie G. to preclude testimony.

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

Memorandum: In these consolidated appeals, respondent mother appeals from two orders that denied without prejudice the mother's respective motions seeking to preclude testimony from certain witnesses and to quash the subpoenas issued by petitioner for those witnesses to testify at a hearing in a proceeding pursuant to Family Court Act article 10. The appeals must be dismissed, inasmuch as any right of direct appeal from the orders terminated with the entry of the order of disposition, from which no appeal was taken (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Matter of Jerralynn R. Mc. [Scott Mc.]*, 114 AD3d 793, 794 [2d Dept 2014]; *Matter of Orzech v Nikiel*, 91 AD3d 1305, 1306 [4th Dept 2012]; *see generally Firestone v Firestone*, 44 AD2d 671, 672 [1st Dept 1974]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

882

CAF 16-02318

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

IN THE MATTER OF JANETTE G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TERRY S., RESPONDENT,
AND JULIE G., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

JESSICA L. VESPER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 29, 2016 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent Julie G. to quash subpoenas.

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

Same memorandum as in *Matter of Janette G.* ([appeal No. 1] — AD3d — [Nov. 16, 2018] [4th Dept 2018]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

895

KA 16-01323

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

DANIEL FLAGG, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY 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 (Anthony F. Aloi, J.), rendered August 13, 2015. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of promoting prison contraband in the first degree (Penal Law § 205.25 [2]) under the first count of the indictment to promoting prison contraband in the second degree (§ 205.20 [2]) and vacating the sentence imposed on that count, and as modified the judgment is affirmed and the matter is remitted to Onondaga County Court for sentencing on that conviction.

Opinion by CURRAN, J:

Defendant, an inmate at the Onondaga County Correctional Facility, was charged with promoting prison contraband in the first degree (Penal Law § 205.25 [2]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). The charges arose after correction officers recovered from defendant a disposable glove that contained four Tramadol pills. After a jury trial, defendant was convicted of both counts.

On appeal, defendant contends that the evidence is legally insufficient to establish that four Tramadol pills constitute "dangerous" contraband as required for his conviction of promoting prison contraband in the first degree, or, alternatively, that the verdict is against the weight of the evidence. As an initial matter, although defense counsel moved at the close of the People's case for a trial order of dismissal, and later renewed that motion at the close

of proof, his general objections were not sufficiently specific to alert County Court of the issue raised on this appeal concerning the "dangerous" nature of the contraband. Thus, defendant's legal sufficiency contention is not preserved for our review (*see People v Jackson*, 159 AD3d 1372, 1373 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018]; *People v Miller*, 96 AD3d 1451, 1452 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]). Nonetheless, we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

For the crime of promoting prison contraband in the first degree, the People were required to present competent evidence establishing that defendant was "confined in a detention facility" and "knowingly and unlawfully ma[de], obtain[ed] or possess[ed] any dangerous contraband" (Penal Law § 205.25 [2]). Penal Law § 205.00 (4) defines "[d]angerous contraband" as "contraband which is capable of such use as may endanger the safety or security of a detention facility or any person therein." The Court of Appeals in *People v Finley* (10 NY3d 647 [2008]) considered the unrelated prosecutions of two inmates for promoting and attempted promoting prison contraband in the first degree, both involving small amounts of marihuana. The Court pronounced the test for courts to apply:

> "[T]he test for determining whether an item is *dangerous* contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" (*id*. at 657).

The Court noted that "the distinction between contraband and dangerous contraband" does not turn upon "whether an item is legal or illegal outside of prison . . . [inasmuch as] [i]t is obvious that an item, such as a razor, may be perfectly legal outside prison and yet constitute dangerous contraband when introduced into that unpredictable environment" (*id.* at 658 n 8). In both of the cases reviewed by the Court in *Finley*, the People proffered evidence that the small amounts of marihuana were dangerous contraband because the marihuana could cause altered mental states leading to altercations and noncompliance; unrest could arise from the business or bartering trade for marihuana; and unrest over the marihuana could cause harm, i.e., assaults to correction officers (*see id*. at 650-652). None of that evidence, either singularly or collectively, was found by the Court to be legally sufficient evidence of dangerousness. As the Court observed, if such "possibly pernicious secondary effects were sufficient to establish the felony promoting contraband offense then every item of contraband could be classified as dangerous" (*id*. at 655).

In this case, the People presented testimony from a correction officer that the Tramadol posed a danger to both the inmates and the jail personnel because "inmates will fight over the drugs and the inmates get high and fight with the staff." Another correction

officer testified that Tramadol is a "serious safety risk" in that it may cause serious injury or death to other inmates, because "if someone is high on the unit you don't know what they're going to do . . . He could attack a corrections officer, attack another inmate. A lot of weird stuff happens." For those same reasons, the correction officer testified that it was a safety risk of injury or death or serious physical injury to staff. A Sheriff's detective assigned to investigate the matter testified for the People that Tramadol is classified as a "dangerous contraband" because:

> "if somebody is not prescribed medication it could be bad for their health. It could, ultimately, you know, result in death. The other reason is controlled substances have a higher value within the facilities so if traded or sold amongst the inmates it could result in any type of assault, fight, anything like that."

Like in *Finley*, the evidence presented here by the People can only be considered broad penological concerns and speculative and conclusory testimony. None of that evidence establishes a "substantial probability" that the Tramadol would bring about a "major threat" to the safety or security of the facility (*id.* at 657). Nor was there any way for the jury to reasonably determine from that evidence whether there was a "substantial probability" that ingesting the pills would likely "cause death or other serious injury" to a person (*id.*). What we find particularly lacking from the People's evidence in this case is any evidence regarding the dosage levels of Tramadol or any effect that the four pills would have on an individual, particularly on defendant. Accordingly, upon our review of the dangerousness element of promoting prison contraband in the first degree, we conclude that the People failed to introduce sufficient evidence to establish that the four Tramadol pills possessed by defendant were dangerous contraband (*see id.* at 659). In light of our determination, we conclude that, pursuant to CPL 470.15 (2) (a), the judgment should be modified by reducing defendant's conviction of promoting prison contraband in the first degree to promoting prison contraband in the second degree (Penal Law § 205.20 [2]; *see generally People v Cole*, 43 AD3d 1295, 1296 [4th Dept 2007]).

We recognize that, after *Finley* was decided, some courts have considered cases involving the possession of drugs other than marihuana and have concluded that the possessed drugs were dangerous contraband on what may be viewed as less "specific, competent proof" of a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats (*Finley*, 10 NY3d at 660 [Pigott, J., concurring in part and dissenting in part]). For example, testimony that the defendants were engaged in drug trafficking has been held to be sufficient to establish that there was dangerous contraband (*see e.g. People v Ariosa*, 100 AD3d 1264, 1265-1266 [3d Dept 2012], *lv denied* 21 NY3d 1013 [2013]; *People v Cooper*, 67 AD3d 1254, 1256-1257 [3d Dept 2009], *lv denied* 14 NY3d 799 [2010]). We disagree with those cases to the extent that they do not focus on the dangerousness of the *use* of the particular drug at issue, but

instead focus on broad concerns that could involve any sort of contraband, such as alcohol, cigarettes or other items that are not dangerous in themselves (*cf. People v Verley*, 121 AD3d 1300, 1301 [3d Dept 2014], *lv denied* 24 NY3d 1221 [2015] [heroin was dangerous contraband inasmuch as the People presented evidence the defendant who ingested the heroin was found on the floor of his cell, unresponsive with shallow breathing, constricted pupils and low oxygen saturation levels]). Drugs, unlike other contraband such as weapons, are not inherently dangerous and the dangerousness is not apparent from the nature of the item. Such general concerns about the drugs possessed that are not addressed to the specific use and effects of the particular drug are insufficient to meet the definition of dangerous contraband. Indeed, the determination of what types and quantities of drugs are "dangerous contraband" per se is one that should be left to the Legislature.

Defendant further contends that the verdict is against the weight of the evidence with respect to his criminal possession of a controlled substance in the seventh degree conviction because the People failed to establish that he knowingly possessed Tramadol, as opposed to Tylenol. We reject defendant's contention. While it would not have been unreasonable for the jury to have accepted defendant's testimony that he thought the pills were Tylenol, the jury was in the best position to weigh the competing evidence on that issue, including, among other things, that defendant went to great lengths to hide the contraband, he was in a cell next to someone who was prescribed Tramadol, and a "fishing line" was found in defendant's cell (*see generally People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]; *People v Schumaker*, 136 AD3d 1369, 1371 [4th Dept 2016], *lv denied* 27 NY3d 1075 [2016], *reconsideration denied* 28 NY3d 974 [2016]). Thus, viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, we reject defendant's contention that he received ineffective assistance of counsel. Defense counsel's failure to seek sanctions or preclusion of any reference to "fishing" because of the destruction of evidence, i.e., a video recording of the search of defendant's cell, did not render defense counsel's performance ineffective inasmuch as such a motion would have had little or no chance of success (*see People v Caban*, 5 NY3d 143, 152 [2005]). Moreover, defendant failed "to demonstrate the absence of strategic or other legitimate explanations for counsel's" alleged ineffectiveness in failing to make particular arguments or take particular actions such as requesting an adverse inference charge (*People v Rivera*, 71 NY2d 705, 709 [1988]). We conclude that the record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Defense counsel effectively cross-examined witnesses, brought to the jury's attention the missing video footage, made a coherent closing statement and was successful in obtaining a lesser

included charge on the verdict sheet.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

925

CA 18-00555

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

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY, NATIONWIDE PROPERTY AND CASUALTY, TITAN INDEMNITY COMPANY, VICTORIA FIRE AND CASUALTY COMPANY AND VICTORIA AUTOMOBILE INSURANCE COMPANY,
PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

JAMAICA WELLNESS MEDICAL, P.C.,
DEFENDANT-APPELLANT.

KOPELEVICH & FELDSHEROVA, P.C., BROOKLYN (MIKHAIL KOPELEVICH OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOLLANDER LEGAL GROUP, P.C., MELVILLE (ALLAN HOLLANDER OF COUNSEL), AND HARRIS J. ZAKARIN, P.C., FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 7, 2017. The judgment, insofar as appealed from, granted plaintiffs' motion for summary judgment and entered declarations in favor of plaintiffs.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, and the declarations are vacated.

Opinion by PERADOTTO, J.:

In this appeal, we must determine whether an insurer in a no-fault benefits case may be precluded from asserting a defense premised upon the failure of the insured or that person's assignee to appear at an examination under oath (EUO) where the insurer has not timely denied coverage. We hold that such a defense is subject to preclusion.

I.

Defendant is a medical professional corporation that was assigned claims for no-fault benefits by individuals who purportedly received treatment for injuries allegedly sustained in motor vehicle accidents.

Defendant submitted bills for the services it purportedly rendered, along with the assignment of benefit forms, to the insurance carrier plaintiffs (hereafter, Nationwide) seeking reimbursement pursuant to the no-fault law and regulations (*see* Insurance Law art 51; 11 NYCRR part 65). As part of an investigation of the validity of the claims, Nationwide sought additional information and requested that defendant submit to EUOs. Despite Nationwide's repeated requests, defendant failed to appear at any of the scheduled EUOs.

Thereafter, Nationwide commenced this declaratory judgment action alleging that, by failing to appear for properly scheduled and noticed EUOs, defendant "breached a material condition precedent to coverage" under the insurance policies and no-fault regulations. Nationwide moved for summary judgment declaring that, as a result of such breach, it was under no obligation to pay or reimburse any of the subject claims, and defendant cross-moved for, inter alia, summary judgment dismissing the complaint.

Supreme Court subsequently granted the motion, and denied the cross motion. The court declared, among other things, that defendant breached a condition precedent to coverage by failing to appear at the scheduled EUOs and determined that Nationwide therefore had the right to deny all claims retroactively to the date of loss, regardless of whether it had issued timely denials.

As limited by its brief on appeal, defendant contends that the court erred in granting the motion because, in pertinent part, an insurer is precluded from asserting a litigation defense premised upon nonappearance at an EUO in the absence of a timely denial of coverage and that Nationwide failed to meet its burden of establishing that it issued timely denials. We agree with defendant for the reasons that follow.

II.

"The Comprehensive Motor Vehicle Insurance Reparations Act, commonly referred to as the 'No-Fault Law' (*see* Insurance Law art 51) is aimed at ensuring 'prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists' " (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 504-505 [2015]). As relevant here, "[w]here an insurer fails to pay or deny a [no-fault] claim within the requisite 30 days under the statute and regulations following its receipt of the proof of claim, the insurer is subject to substantial consequences, namely, preclusion from asserting a defense against payment of the claim" (*id.* at 506 [internal quotation marks omitted]; *see Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d 556, 562-563 [2008]; *Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312, 317-318 [2007]; *Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274, 282 [1997], *rearg denied* 90 NY2d 937 [1997]). Although the preclusion remedy "may require an insurer to pay a no-fault claim it might not have had to honor if it had timely denied

the claim," the Court of Appeals has "emphasized that the great convenience of 'prompt uncontested, first-party insurance benefits' is 'part of the price paid to eliminate common-law contested lawsuits' " (*Viviane Etienne Med. Care, P.C.*, 25 NY3d at 506; *see Fair Price Med. Supply Corp.*, 10 NY3d at 565; *Presbyterian Hosp. in City of N.Y.*, 90 NY2d at 285).

The sole exception to the preclusion remedy "arises where an insurer raises lack of coverage as a defense" (*Viviane Etienne Med. Care, P.C.*, 25 NY3d at 506). "In such cases, an insurer who fails to issue a timely disclaimer is not prohibited from later raising th[at] defense because 'the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed' " (*Hospital for Joint Diseases*, 9 NY3d at 318). The Court of Appeals has characterized the no-coverage exception to the preclusion remedy as an "exceptional exemption" of "narrow[ ] . . . sweep" (*Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]; *see Fair Price Med. Supply Corp.*, 10 NY3d at 563-564; *Hospital for Joint Diseases*, 9 NY3d at 318). In determining whether a specific defense is subject to the preclusion remedy or falls under the no-coverage exception, a court must answer the following question: "Is the defense more like a 'normal' exception from coverage (e.g., a policy exclusion), or a lack of coverage in the first instance (i.e., a defense 'implicat[ing] a coverage matter')?" (*Fair Price Med. Supply Corp.*, 10 NY3d at 565).

III.

The specific defense at issue here, based on nonappearance at EUOs, originates from the mandatory personal injury protection endorsement included as part of all automobile insurance policies (*see* 11 NYCRR 65-1.1 [b] [1]), which provides that "[n]o action shall lie against the [insurer] unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage" (11 NYCRR 65-1.1 [d]). Those terms include providing written notice of the accident to the insurer, as well as written proof of claim for health service expenses (*see id.*). With respect to proof of claim, the endorsement states that, upon request by the insurer, the insured or that person's assignee must, among other things, submit to EUOs as may be reasonably required (*see id.*; *see also* 11 NYCRR 65-3.5 [e]).

We conclude that a defense premised upon nonappearance at an EUO is "more like a 'normal' exception from coverage (e.g., a policy exclusion)" than one involving "a lack of coverage in the first instance (i.e., a defense 'implicat[ing] a coverage matter')" (*Fair Price Med. Supply Corp.*, 10 NY3d at 565; *see also Hospital for Joint Diseases*, 9 NY3d at 319-320; *Presbyterian Hosp. in City of N.Y.*, 90 NY2d at 281-286; *see generally Central Gen. Hosp.*, 90 NY2d at 199). Unlike defenses where preclusion thereof would result in coverage where it never existed, such as those premised upon the lack of a contract with the person claiming coverage or for the vehicle involved in the accident, the termination of the contract prior to the

accident, or the cause of the purported injuries being something other than a vehicular accident (*see Hospital for Joint Diseases*, 9 NY3d at 319; *Central Gen. Hosp.*, 90 NY2d at 200; *Zappone v Home Ins. Co.*, 55 NY2d 131, 136-138 [1982]), the EUO nonappearance defense allows the insurer to avoid liability for the payment of no-fault benefits where the insured or assignee has breached a condition in an existing policy providing coverage (*see IDS Prop. Cas. Ins. Co. v Stracar Med. Servs., P.C.*, 116 AD3d 1005, 1007 [2d Dept 2014]). In other words, " 'coverage legitimately . . . exist[s]' " where there is a valid, unexpired policy under which a covered person seeks recovery following "an actual accident" involving a covered vehicle that results in the person sustaining "actual injuries" (*Fair Price Med. Supply Corp.*, 10 NY3d at 565). In that event, the insured or assignee must meet certain obligations to the insurer to receive payment, including submitting to reasonably requested EUOs, and the insurer must meet certain obligations to the insured or assignee, including making timely payment of benefits that are supported by the requisite proof (*see* Insurance Law § 5106 [a]; 11 NYCRR 65-1.1 [d]). Thus, coverage under the policy exists in the first instance, but the failure of the insured or assignee to comply with the provision requiring submission to reasonably requested EUOs allows the insurer to deny payment of a claim based on such a material breach of the policy and thus relieves the insurer of liability for the payment of policy proceeds (*see* 11 NYCRR 65-1.1 [d]; *Interboro Ins. Co. v Clennon*, 113 AD3d 596, 597 [2d Dept 2014]; *Westchester Med. Ctr. v Lincoln Gen. Ins. Co.*, 60 AD3d 1045, 1046-1047 [2d Dept 2009], *lv denied* 13 NY3d 714 [2009]).

Nationwide nonetheless contends that the court properly relied upon First Department precedent holding that the failure to appear at a duly requested EUO constitutes "a breach of a *condition precedent to coverage* under the no-fault policy, and therefore fits squarely within the [no-coverage] exception to the preclusion [remedy]" (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011] [emphasis added]; *see Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]; *Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411, 411 [1st Dept 2015]; *Allstate Ins. Co. v Pierre*, 123 AD3d 618, 618 [1st Dept 2014]). We disagree. "Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract, [which is] a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself . . . In the latter situation, no contract arises 'unless and until the condition occurs' " (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). Contrary to the determination of the First Department, we conclude that the requirement that an insured or assignee submit to an EUO is not a condition precedent to the existence of coverage itself; rather, submission to a reasonably requested EUO represents an event that "must occur before [the insurer] is obliged to perform a promise made pursuant to an existing [policy]," i.e., rendering payment of benefits (*id.*; *see* 11 NYCRR 65-1.1 [d]). In sum, the failure to appear at a reasonably requested EUO constitutes a breach of an existing policy condition, which is distinguishable from lack of coverage in the first

instance (*see generally Fair Price Med. Supply Corp.*, 10 NY3d at 565; *Central Gen. Hosp.*, 90 NY2d at 199).

We further agree with defendant that, contrary to the court's determination and Nationwide's contention, our holding in *Interboro Ins. Co. v Tahir* (129 AD3d 1687 [4th Dept 2015]) is not controlling. The no-coverage exception to the preclusion remedy was not at issue and the insurer disclaimed coverage in that case; thus, it is factually distinguishable and legally unpersuasive inasmuch as the broad language regarding vitiation of the contract for failure to comply with a condition precedent was not central to the holding and did not account for the conceptual differences between types of conditions precedent (*see id.* at 1688).

IV.

We agree with defendant that, inasmuch as the defense based on nonappearance at an EUO is subject to the preclusion remedy, Nationwide was required to establish that it issued timely denials on that ground, and that Nationwide failed to meet its initial burden on the motion. The assertions in the affidavit of Nationwide's claims specialist that Nationwide issued timely denial forms to defendant for nonappearance at the EUOs are conclusory and unsupported by any such denial forms; therefore, Nationwide did not establish as a matter of law that it issued timely and proper denials. Inasmuch as Nationwide "failed to establish [its] prima facie entitlement to judgment as a matter of law on the issue of [its] timely and proper denial of coverage, summary judgment should have been denied regardless of the sufficiency of . . . defendant's opposition" (*Progressive Cas. Ins. Co. v Infinite Ortho Prods., Inc.*, 127 AD3d 1050, 1052 [2d Dept 2015]).

V.

Accordingly, we conclude that the judgment insofar as appealed from should be reversed, the motion should be denied, and the declarations should be vacated.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

932

CA 17-02049

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

VICTORIA PEARSON BREAU, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BLAIR N. BURDICK, ET AL., DEFENDANTS,
DALE R. BURDICK, RAYMOND L. FOSTER AND PAMELA FOSTER, DEFENDANTS-RESPONDENTS.

FANIZZI & BARR, P.C., NIAGARA FALLS (ANDREW D. FANIZZI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (JOSEPH H. EMMINGER, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT DALE R. BURDICK.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (NICHOLAS HRICZKO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RAYMOND L. FOSTER AND PAMELA FOSTER.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered August 29, 2017. The order, among other things, denied the motion of plaintiff to compel discovery and granted the cross motions of defendants Dale R. Burdick, Raymond L. Foster and Pamela Foster for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion of defendant Dale R. Burdick and reinstating the complaint against him, and granting plaintiff's motion, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action seeking to recover damages for injuries she sustained when her finger got caught in the unguarded chain of a hay conveyor then owned by defendant Dale R. Burdick while she was performing hay baling work on Burdick's farm. At the time of the accident, plaintiff was helping defendants Raymond L. Foster and Pamela Foster (collectively, Fosters), who had a verbal agreement with Burdick to perform such work on Burdick's farm in exchange for a percentage of the proceeds therefrom. Supreme Court, among other things, denied plaintiff's motion to compel the Fosters to permit inspection of the hay conveyor, and granted the respective cross motions of the Fosters and Burdick for summary judgment dismissing the complaint against them. We conclude that the court properly granted the Fosters' cross motion,

but we agree with plaintiff that the court erred in granting Burdick's cross motion. We therefore modify the order accordingly.

It is well established that, "[b]ecause a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). "New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition" (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]; *see Basso v Miller*, 40 NY2d 233, 241 [1976]). "The duty of a landowner to maintain [his or her] property in a safe condition extends to persons whose presence is reasonably foreseeable by the landowner" (*Brown v Rome Up & Running, Inc.*, 68 AD3d 1708, 1708 [4th Dept 2009] [internal quotation marks omitted]; *see Salim v Western Regional Off-Track Betting Corp., Batavia Downs*, 100 AD3d 1370, 1371 [4th Dept 2012]). "[A] landowner's duty to warn of a latent, dangerous condition on his [or her] property is a natural counterpart to his [or her] duty to maintain [the] property in a reasonably safe condition" (*Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]; *see Tagle*, 97 NY2d at 169). "It is well settled that both owners and occupiers owe a duty of reasonable care to maintain property in a safe condition and to give warning of unsafe conditions that are not open and obvious" (*Barry v Gorecki*, 38 AD3d 1213, 1215 [4th Dept 2007]).

Addressing first Burdick's cross motion, we note that it is undisputed that Burdick owned the farm where plaintiff's accident occurred and owned the allegedly dangerous hay conveyor that caused her injury. With Burdick's knowledge and permission, the Fosters used Burdick's hay conveyor to perform the haying work pursuant to their verbal agreement. Indeed, Burdick set up the hay conveyor for the Fosters' use prior to the accident. In addition, Burdick testified at his deposition that he had given Raymond Foster (Raymond) "complete power" over who assisted him and that, on the day of the accident, he was aware that Raymond was going to have people assist him in performing haying work on the farm. Burdick therefore failed to establish as a matter of law that plaintiff's presence on the farm to perform haying work with the Fosters was not reasonably foreseeable (*see generally Brown*, 68 AD3d at 1708-1709), and we note that Burdick does not contend otherwise.

Additionally, where, as here, "the defendant [property] owner provides . . . allegedly defective equipment, the legal standard [with respect to negligence] 'is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof' . . . , because in that situation the defendant property owner 'is possessed of the authority, as owner, to remedy the condition' of the defective equipment" (*Sochan v Mueller*, 162 AD3d 1621, 1625 [4th Dept 2018] [emphasis omitted], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 123 [2d Dept 2008]; *see Pommerenck v Nason*, 79 AD3d 1716, 1716 [4th Dept 2010]; *see also Sama v Sama*, 92 AD3d 862, 862 [2d Dept 2012]). In support of his cross motion, Burdick relied upon his deposition testimony, as well as the deposition testimony of Raymond and

plaintiff. Burdick's testimony established that he was aware that the hay conveyor had no safety guard over the chain. Although Burdick and Raymond suggested that the absence of a safety guard did not create a safety concern and that it was not unusual for a hay conveyor to lack such a safety guard, the evidence relied on by Burdick also indicates that some models of hay conveyors have a guard over the chain as a safety feature. In particular, Raymond testified that when plaintiff assisted him with haying work on prior occasions, they used a different model of hay conveyor that, unlike the one used at the time of the accident, had a safety guard on it. Moreover, during her testimony, plaintiff attributed the accident to the allegedly dangerous condition of the hay conveyor, i.e., the lack of a safety guard over the chain. Burdick submitted no other evidence—for example, an expert affidavit—to demonstrate that safety guards over the chain are unnecessary for the safe operation of hay conveyors (*see generally Kosicki v Spring Garden Assn., Inc.*, 42 AD3d 909, 910 [4th Dept 2007]). We thus conclude that Burdick failed to establish as a matter of law that the absence of a safety guard over the chain of the hay conveyor did not constitute a dangerous condition (*see Smith v Szpilewski*, 139 AD3d 1342, 1342 [4th Dept 2016]), or that he lacked actual or constructive notice of the allegedly dangerous condition (*see Sochan*, 162 AD3d at 1625; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2d Dept 2013]).

We agree with plaintiff that Burdick also failed to eliminate all triable issues of fact whether the unguarded chain on the hay conveyor constituted an open and obvious condition. We note that "whether a condition was readily observable impacts on plaintiff's comparative negligence and does not negate defendant's duty to keep the premises reasonably safe . . . An open and obvious condition merely negates the duty to warn" (*Pelow v Tri-Main Dev.*, 303 AD2d 940, 941 [4th Dept 2003]; *see Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d 599, 600 [1st Dept 2010]; *Rice v University of Rochester Med. Ctr.*, 55 AD3d 1325, 1327 [4th Dept 2008]). "It is well established that there is no duty to warn of an open and obvious dangerous condition because in such instances the condition is a warning in itself" (*Schneider v Corporate Place, LLC*, 149 AD3d 1503, 1504 [4th Dept 2017] [internal quotation marks omitted]). "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances . . . A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*id.* [internal quotation marks omitted]). "[T]he issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question," but "a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion" (*Tagle*, 97 NY2d at 169). Even assuming, arguendo, that the deposition testimony and photographic exhibits establish that the unguarded chain was partially visible to the side of the conveyor belt, we conclude that " '[s]ome visible hazards, because of their nature or location, are likely to be overlooked . . . , and the facts here simply do not warrant concluding as a matter of law that the [unguarded chain of the hay conveyor] was so obvious that it would necessarily be noticed by any careful observer,

so as to make any warning superfluous' " (*Schneider*, 149 AD3d at 1504).

In light of the foregoing, Burdick's potential liability is premised upon his ownership of the farm and the allegedly dangerous hay conveyor. Contrary to Burdick's contention, the record does not establish that he had entered into a lease agreement with the Fosters and, to the extent Burdick further contends that there was a bailment of the hay conveyer and that the nature thereof provides an alternative ground for affirmance, that contention is not properly before us inasmuch as it was not raised below (*see Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182 [4th Dept 2017]; *Ambrose v Brown*, 142 AD3d 1312, 1314 [4th Dept 2016]).

We further agree with plaintiff that Burdick failed to meet his initial burden of establishing as a matter of law that his alleged negligence was not a proximate cause of plaintiff's injuries (*see Malamas v Toys "R" Us-Delaware, Inc.*, 94 AD3d 1438, 1438-1439 [4th Dept 2012]). " 'As a general rule, issues of proximate cause[, including superceding cause,] are for the trier of fact' " (*Bucklaew v Walters*, 75 AD3d 1140, 1142 [4th Dept 2010]; *see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312 [1980], *rearg denied* 52 NY2d 784 [1980]) and, contrary to Burdick's contention, we conclude that he "failed to eliminate all triable issues of fact whether plaintiff's conduct in [loading hay bales onto the hay conveyor] was a superseding intervening cause of the accident, i.e., [Burdick] failed to meet [his] burden of establishing that the accident was not 'a normal or foreseeable consequence of the situation created by [his] [alleged] negligence' " (*Biro v Keen*, 153 AD3d 1571, 1572 [4th Dept 2017], quoting *Derdiarian*, 51 NY2d at 315)

Addressing next the Fosters' cross motion, we conclude that the court properly granted that cross motion. The Fosters met their initial burden by submitting evidence that they did not create the allegedly dangerous condition, and that they "did not own, occupy, or have a right to control or maintain the [farm upon which or the hay conveyor by which plaintiff was injured], thereby establishing as a matter of law that [they] owed 'no duty of care with respect to any unsafe condition existing there' " (*Gross v Hertz Local Edition Corp.*, 72 AD3d 1518, 1520 [4th Dept 2010]; *see Masterson v Knox*, 233 AD2d 549, 550 [3d Dept 1996]). The Fosters, at most, "had a license to [perform hay baling work on Burdick's farm with his hay conveyor], but the right to use the [farm and hay conveyor] does not establish control or give rise to a duty to warn" (*Masterson*, 233 AD2d at 550). "In the absence of any authority to maintain or control the [farm or the hay conveyor], or to correct any unsafe condition, [the Fosters] owed no duty of care with respect to any unsafe condition on [Burdick's] premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff further asserts that there is an issue of fact whether she had an employment relationship with the Fosters but, as the court

properly determined, that assertion is belied by the record. Plaintiff repeatedly testified at her deposition that she was never employed by the Fosters, she volunteered to help the Fosters because they were her friends, and she did not expect to, nor did she, receive compensation for her volunteer work (*see generally Goslin v La Mora*, 137 AD2d 941, 942-943 [3d Dept 1988]).

Inasmuch as we are reinstating the complaint against Burdick, and in light of the concession of the Fosters, who now own the hay conveyor, we further modify the order by granting plaintiff's motion to compel the Fosters to permit inspection of the hay conveyor, which is material and necessary in the prosecution of plaintiff's action against Burdick (*see* CPLR 3101 [a] [2], [4]; *see generally Lobello v New York Cent. Mut. Fire Ins. Co.*, 152 AD3d 1206, 1209 [4th Dept 2017]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

954

CA 17-00470

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF LUIS S., CONSECUTIVE NO. 21916, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered February 13, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that petitioner is subject to strict and intensive supervision and treatment.

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

Memorandum: Petitioner commenced this proceeding pursuant to Mental Hygiene Law article 10, seeking "an order discharging [him] and/or releasing [him] to the community under a regimen of strict and intensive supervision and treatment" (SIST). He appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a detained sex offender who suffers from a mental abnormality (*see* § 10.03 [i], [r]), and ordering his release to a regimen of SIST.

Initially, we conclude that petitioner is aggrieved by the order on appeal. It is well settled that a "party who has successfully obtained a[n] . . . order in his [or her] favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544 [1983]; *see Parker v Town of Alexandria*, 163 AD3d 55, 58 [4th Dept 2018]). "The major exception to this general rule, however, is that the successful party may appeal . . . from a judgment or order in his

[or her] favor if he [or she] is nevertheless prejudiced because it does not grant him [or her] complete relief. This exception would include those situations in which the successful party received an award less favorable than he [or she] sought . . . or a judgment which denied him [or her] some affirmative claim or substantial right" (*Parochial Bus*, 60 NY2d at 544-545).

Here, we conclude that petitioner is aggrieved by the order because, although Supreme Court granted one of the forms of the relief he requested in the alternative, i.e., release under a regimen of SIST, the primary relief he sought was release to the community without conditions, and the denial of that part of the petition involved a substantial right of petitioner (*see Matter of Stateway Plaza Shopping Ctr. v Assessor of City of Watertown*, 87 AD3d 1359, 1360 [4th Dept 2011]; *Scharlack v Richmond Mem. Hosp.*, 127 AD2d 580, 581 [2d Dept 1987]; *see generally* CPLR 5511; *Armata v Abbott Labs.*, 284 AD2d 911, 911 [4th Dept 2001]).

We reject petitioner's contention that the evidence is not legally sufficient to establish that he has a " '[m]ental abnormality' " (Mental Hygiene Law § 10.03 [i]), which is defined as a "congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (*id.*). Respondents' evidence at the hearing consisted of the report and testimony of a psychologist who evaluated petitioner and opined that he suffers from unspecified paraphilic disorder, alcohol abuse in remission in a controlled environment, and drug abuse in remission in a controlled environment, which predispose him to commit sex offenses, and that he has serious difficulty in controlling such conduct. Respondents' expert based her opinions on several factors, including her conclusion that petitioner posed a moderate to high risk of reoffending based on, inter alia, the Violence Risk Scale–Sex Offender Version, a test designed to evaluate an individual's risk of sexual violence (*see generally Matter of State of New York v Richard TT.*, 132 AD3d 72, 74, 77-78 [3d Dept 2015], *affd* 27 NY3d 718 [2016], *cert denied* — US —, 137 S Ct 836 [2017]). Respondents' expert also relied on the fact that petitioner has a history of sexually abusing prepubescent females and anally sodomizing them, even while he was in a consensual relationship with an age-appropriate sexual partner; he repeatedly offended in the past, including while he was undergoing sex offender treatment; he previously admitted that he had intense urges or cravings for such acts; and, although he later recanted it, he previously indicated that he engaged in such acts with prepubescent females in addition to those involved in his convictions.

Viewing the evidence in the light most favorable to respondents (*see Matter of State of New York v Floyd Y.*, 30 NY3d 963, 964 [2017]; *Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014], *rearg denied* 24 NY3d 933 [2014]), we conclude that it is legally sufficient to establish by clear and convincing evidence "the existence of a predicate 'condition, disease or disorder,' [and to] link that

'condition, disease or disorder' to a person's predisposition to commit conduct constituting a sex offense and to that person's 'serious difficulty in controlling such conduct' " (*Matter of State of New York v Dennis K.*, 27 NY3d 718, 726 [2016], *cert denied* — US —, 137 S Ct 579 [2016]; *see* Mental Hygiene Law § 10.07 [d]; *see generally Matter of Allan M. v State of New York*, 163 AD3d 1493, 1494-1495 [4th Dept 2018]).

We also reject petitioner's contention that basing the determination that he has a mental abnormality on a diagnosis of unspecified paraphilic disorder does not comport with the requirements of due process. That diagnosis is contained in the current edition of the Diagnostic and Statistical Manual – Fifth Edition (DSM-5). Although there is limited case law concerning that diagnosis, the Court of Appeals has repeatedly held that basing such a determination on the very similar former diagnosis of paraphilia not otherwise specified (paraphilia NOS) meets the requirements of due process (*see Dennis K.*, 27 NY3d at 733-734; *Matter of State of New York v Shannon S.*, 20 NY3d 99, 106-107 [2012], *cert denied* 568 US 1216 [2013]), and the diagnosis of unspecified paraphilic disorder has similar diagnostic requirements as the former diagnosis of paraphilia NOS. The former diagnosis was set forth in earlier versions of the DSM, including the DSM-3, the DSM-4, and the DSM-4-TR. When the current version, the DSM-5, was published in 2013, the authors replaced the former diagnosis of paraphilia NOS with, inter alia, unspecified paraphilic disorder (*see generally Matter of State of New York v Harris*, 48 Misc 3d 950, 951-956 [Sup Ct, Bronx County 2015]). Consequently, we conclude that the rationales in *Dennis K.* (27 NY3d at 733-734), and *Shannon S.* (20 NY3d at 106-107), apply to the diagnosis of unspecified paraphilic disorder as well. Petitioner's contention that unspecified paraphilic disorder lacks sufficiently definite characteristics to meet the definition of a mental disorder, and thus that the determination that he has a mental abnormality based upon that diagnosis fails to comport with due process, is without merit. Unspecified paraphilic disorder is a recognized form of paraphilic disorder, and " '[t]he essential features of a [p]araphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months' " (*Matter of State of New York v Donald DD.*, 24 NY3d 174, 179 n 1 [2014]; *see Dennis K.*, 27 NY3d at 727 n 2; *United States v Carta*, 592 F3d 34, 40-42 [1st Cir 2010]). Thus, although the Court of Appeals has recognized that "[c]ertain diagnoses may, of course, be premised on such scant or untested evidence and 'be so devoid of content, or so near-universal in [their] rejection by mental health professionals,' as to be violative of constitutional due process" (*Shannon S.*, 20 NY3d at 106-107), the acceptance of the diagnosis of unspecified paraphilic disorder by mental health professionals, coupled with the specific features that a mental health professional must find in order to issue that diagnosis, allow it to be used as the basis for a finding of mental abnormality within the meaning of the Mental Hygiene Law without violating the requirements of due process.

In addition, "to the extent that [petitioner] challenges the validity of [unspecified paraphilic disorder] as a predicate 'condition, disease or disorder,' we need not reach that argument because he did not mount a *Frye* challenge to the diagnosis" (*Dennis K.*, 27 NY3d at 734; *see generally Donald DD.*, 24 NY3d at 187; *Matter of State of New York v David S.*, 136 AD3d 445, 446 [1st Dept 2016]; *Matter of York v Zullich*, 89 AD3d 1447, 1448 [4th Dept 2011]; *cf. Matter of State of New York v Hilton C.*, 158 AD3d 707, 709-710 [2d Dept 2018]).

Finally, we reject petitioner's further contention that the determination that he suffers from a mental abnormality is contrary to the weight of the evidence (*see generally Matter of State of New York v Stein*, 85 AD3d 1646, 1647 [4th Dept 2011], *affd* 20 NY3d 99 [2012], *cert denied* 568 US 1216 [2013]; *Matter of State of New York v Edward T.*, 161 AD3d 1589, 1589 [4th Dept 2018]). Although petitioner presented expert testimony that would support a contrary finding, that merely raised a credibility issue for the court to resolve, and its determination is entitled to great deference given its "opportunity to evaluate [first-hand] the weight and credibility of [the] conflicting expert testimony" (*Matter of State of New York v Chrisman*, 75 AD3d 1057, 1058 [4th Dept 2010]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1006

CA 18-00301

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

DENNIS A. DUMOND AND MICHELE L. DUMOND,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

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

GOZIGIAN, WASHBURN & CLINTON, COOPERSTOWN (E.W. GARO GOZIGIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHELE E. DETRAGLIA, UTICA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered December 7, 2017. The order, inter alia, granted plaintiffs money damages upon stipulation.

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

Memorandum: New York Central Mutual Fire Insurance Company (defendant) issued an insurance policy for plaintiffs' property in the Town of Walton, Delaware County. A structure on the property was thereafter destroyed by fire, and defendant denied plaintiffs' claim for coverage. Plaintiffs then commenced this action for monetary damages and a declaration that the insurance policy covered the loss. Supreme Court subsequently denied defendant's cross motion for summary judgment dismissing the complaint, granted in part plaintiffs' motion for summary judgment, and issued a declaration in plaintiffs' favor on the issue of coverage subject to a future determination regarding, inter alia, the amount of damages. Defendant appealed from that order, but we granted plaintiffs' motion to dismiss the appeal for failure to perfect (*Dumond v New York Cent. Mut. Fire Ins. Co.*, 2016 NY Slip Op 89758[U] [4th Dept 2016]).

The parties thereafter stipulated to the amount of damages. The stipulation, which by its own terms did not finally resolve the action, also provided that "defendant may appeal each and every part of the . . . case proceedings heretofore, including but not limited to the issue of whether there is coverage in this case and whether the [c]ourt properly denied defendant's [cross] motion for summary judgment." This stipulation was so ordered by the court, and defendant then filed the current notice of appeal purporting to appeal

"from each and every part of said **Stipulation and Order** as well as from the whole thereof and the prior proceedings and rulings therein."

We now dismiss the instant appeal for the following three reasons. First, defendant is not aggrieved by the "Stipulation and Order" on appeal because, as its title reflects, it constitutes an order entered on consent. As such, defendant "may not appeal from it" (*Adams v Genie Indus., Inc.*, 14 NY3d 535, 541 [2010], citing *Dudley v Perkins*, 235 NY 448, 457 [1923]; *see* CPLR 5511; *Smith v Hooker Chem. & Plastics Corp.*, 69 NY2d 1029, 1029 [1987]). The fact that defendant is aggrieved by the prior summary judgment order is of no moment because the "Stipulation and Order" is not a final order or judgment, and it thus does not bring up for review that prior order (*see Crystal v Manes*, 130 AD2d 979, 979 [4th Dept 1987]).

Second, the appeal must be dismissed because the paper from which defendant purports to appeal is not an appealable order under CPLR 5701 (a) (2), which authorizes an appeal as of right from certain specified orders "where the motion it decided was made upon notice." That provision is inapplicable here because the "Stipulation and Order" on appeal did not decide a motion, much less a motion made on notice (*see Sholes v Meagher*, 100 NY2d 333, 335-336 [2003]; *Mohler v Nardone*, 53 AD3d 600, 600 [2d Dept 2008]).

Third, it is well established that "[a]n appeal that has been dismissed for failure to prosecute bars, on the merits, a subsequent appeal as to all questions that could have been raised on the earlier appeal had it been perfected" (*Grogan v Gamber Corp.*, 78 AD3d 571, 571 [1st Dept 2010]; *see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 753-757 [1999]; *Bray v Cox*, 38 NY2d 350, 352-355 [1976]). Defendant's substantive contentions on the instant appeal could have been raised on the prior appeal, had it been perfected. Thus, dismissal of the instant appeal is also warranted on that ground (*see Rubeo*, 93 NY2d at 757; *Bray*, 38 NY2d at 355; *Madison Realty Capital, L.P. v Broken Angel, LLC*, 107 AD3d 766, 767 [2d Dept 2013], *lv denied* 21 NY3d 866 [2013], *lv dismissed* 21 NY3d 1069 [2013]; *Grogan*, 78 AD3d at 571; *Alfieri v Empire Beef Co., Inc.*, 41 AD3d 1313, 1313 [4th Dept 2007]; *Frey v Parsons*, 291 AD2d 837, 837 [4th Dept 2002]).

In sum, defendant is attempting to use a non-appealable paper, i.e., the "Stipulation and Order," as a vehicle to revive its previously dismissed appeal from the summary judgment order. This is improper, because litigants have no authority to "stipulate to enlarge our appellate jurisdiction" (*Commissioner of Social Servs. of City of N.Y. v Harris*, 26 AD3d 283, 286 [1st Dept 2006]; *see Matter of Shaw*, 96 NY2d 7, 13 [2001], citing *Robinson v Oceanic Steam Nav. Co.*, 112 NY 315, 324 [1889]). Finally, given the parties' failure to inform us of the prior dismissed appeal in their appellate briefs, we must remind counsel that "attorneys for litigants in [an appellate] court have an obligation to keep the court informed of all . . . matters pertinent to the disposition of a pending appeal and cannot, by agreement between them, . . . predetermine the scope of [its] review" (*Amherst & Clarence Ins. Co. v Cazenovia Tavern*, 59 NY2d 983, 984 [1983], *rearg*

denied 60 NY2d 644 [1983]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1012

KA 16-01507

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN L. TYLER, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered April 25, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

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 County Court erred in denying that part of his omnibus motion seeking to suppress a handgun and his oral statements to the police.

We reject defendant's contention that the testimony of one of the police officers at the suppression hearing was incredible as a matter of law. It is well settled that "great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous" (*People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]; *see People v Harris*, 147 AD3d 1354, 1355 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]). Inasmuch as the testimony of the relevant police officer does not appear to be "patently tailored to nullify constitutional objections . . . [or] impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self contradictory" (*People v Garafolo*, 44 AD2d 86, 88 [2d Dept 1974]), we find no basis in the record to disturb the suppression court's determination to credit the officer's testimony (*see People v Hale*, 130 AD3d 1540, 1541 [4th Dept 2015], *lv denied* 26 NY3d 1088 [2015], *reconsideration denied* 27 NY3d 998 [2016]).

We reject defendant's further contentions that the police lacked an objective, credible reason to justify their initial request for information and that they lacked a founded suspicion of criminality to justify a common-law inquiry. The testimony at the suppression hearing establishes that, shortly before 9:00 p.m. on a freezing-cold night in January, a Buffalo police officer observed defendant walking in a high-crime area where there had been a recent increase in shootings and where there was no other pedestrian or vehicular traffic. The officer was in the passenger seat of a marked patrol vehicle driven by his partner, and the officers were following two other marked police vehicles. As the second police vehicle passed defendant, the officer saw him look back at the police vehicle, gesture toward his waistband, and lift up something in the area of his right hip. When the third police vehicle came into defendant's view, defendant looked stunned: his eyes widened, he slowed his pace, and he appeared unsure of what to do. Although it was dark outside, the street was well lit, and the officer could see a bulge at defendant's right hip. The officer rolled down his window and asked defendant where he was headed. Defendant gave a seemingly implausible response, given the temperature and the distance to his claimed destination, and the officer asked defendant to step over to the patrol vehicle, intending to engage him in further conversation. The officers did not activate their overhead lights or siren and remained inside their patrol vehicle. As defendant walked toward the patrol vehicle, however, the officer observed that the bulge in his waistband was consistent with a handgun. As defendant bent toward the officer's open window, the officer told defendant to wait and asked what was in his waistband. Defendant restated where he was going, and the officer again asked what was in his waistband. Defendant swore, pulled out a handgun, and fled. The officer thereafter exited the patrol vehicle and pursued defendant.

We conclude that "the action taken [by the police] was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998]; *see generally People v Hollman*, 79 NY2d 181, 184-185 [1992]; *People v De Bour*, 40 NY2d 210, 222-223 [1976]). "[I]n light of the late hour, the cold weather, the absence of other pedestrian or automobile traffic, . . . the presence of [defendant] in a high[-]crime area" (*People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]), and the officer's observations of defendant, the officer had an objective, credible reason to ask defendant where he was going (*see generally People v Garcia*, 20 NY3d 317, 322 [2012]; *De Bour*, 40 NY2d at 223). Furthermore, defendant's implausible answer to the officer's question and the officer's observations of defendant provided a founded suspicion of criminality (*see generally De Bour*, 40 NY2d at 215; *People v Cantor*, 36 NY2d 106, 113-114 [1975]). Finally, defendant's subsequent display of a handgun and his flight justified the officer's pursuit of him (*see People v Daniels*, 147 AD3d 1392, 1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *see generally People v Martinez*, 59 AD3d 1071, 1072 [4th Dept

2009], *lv denied* 12 NY3d 856 [2009]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1021

CA 18-00382

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

FREDERICK B. PAGELS, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

THADDEUS J. MULLEN, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 14, 2017. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Opinion by CURRAN, J:

This appeal arises out of a collision between defendant's vehicle and plaintiff's bicycle at the intersection of Ontario and Evelyn Streets in the City of Buffalo. Defendant, having just left a pizzeria situated at the corner of the intersection, approached the intersection intending to turn right from Evelyn Street onto Ontario Street. Defendant testified at his deposition that he stopped at the stop sign on the corner of Evelyn Street and then inched forward to peer around a vehicle parked to his left on Ontario Street. Plaintiff, who was riding his bicycle on the sidewalk parallel to Ontario Street toward Evelyn Street, collided with the side of defendant's vehicle. Plaintiff testified at his deposition that he did not know whether defendant stopped at the stop sign, but that defendant's vehicle was moving at the time of the accident. Defendant testified at his deposition that he was stopped at the time of the accident. There was no stop sign or traffic signal for vehicles traveling on Ontario Street. Defendant also testified that he did not see plaintiff until after the accident occurred, and plaintiff testified that he did not see defendant's vehicle until he was six feet from it and in the intersection, at which point plaintiff was unable to stop. Rather, plaintiff applied his brakes and attempted to go around the vehicle to his left but collided with defendant's moving vehicle somewhere between that vehicle's front wheel well and the rear

quarter panel. After the accident, defendant found plaintiff on the ground, half on the street and half on the sidewalk.

Plaintiff commenced this negligence action seeking damages for injuries that he sustained in the collision and alleging that defendant was negligent in permitting his vehicle to come into contact with plaintiff. After the parties' depositions, defendant moved for summary judgment dismissing the complaint on the ground that he had "no negligence relating to the accident." Defendant also contended, inter alia, that plaintiff's violation of various sections of the Vehicle and Traffic Law constituted negligence per se. Specifically, defendant contended that plaintiff violated Vehicle and Traffic Law §§ 1120 and 1234 (a) by failing to ride his bicycle on the right-hand side of the roadway, and that plaintiff violated section 1140 by failing to yield the right-of-way to defendant, who had already entered the intersection at the time of the accident. Plaintiff opposed the motion, contending, inter alia, that the provisions of the Vehicle and Traffic Law § 1234 (a) are inapplicable because plaintiff was riding his bicycle on a sidewalk and not a roadway, as contemplated by that section. Plaintiff further contended that issues of fact exist regarding whether defendant violated Vehicle and Traffic Law §§ 1142 and 1172 by failing to stop at the stop sign and failing to yield the right-of-way to plaintiff, and whether defendant failed to "see what [was] there to be seen." Supreme Court granted defendant's motion and dismissed the complaint. We reverse.

Defendant, as the movant for summary judgment, had the burden of establishing as a matter of law that he was not negligent or that, even if he was negligent, his negligence was not a proximate cause of the accident (*see Darnley v Randazzo*, 159 AD3d 1578, 1578-1579 [4th Dept 2018]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To meet that burden, defendant was required to establish that he fulfilled his "common-law duty to see that which he should have seen [as a driver] through the proper use of his senses" (*Luttrell v Vega*, 162 AD3d 1637, 1638 [4th Dept 2018] [internal quotation marks omitted]; *see Sauter v Calabretta*, 90 AD3d 1702, 1703 [4th Dept 2011]), "and to exercise reasonable care under the circumstances to avoid an accident" (*Deering v Deering*, 134 AD3d 1497, 1499 [4th Dept 2015] [internal quotation marks omitted]; *see Cupp v McGaffick*, 104 AD3d 1283, 1284 [4th Dept 2013]), including that he met the obligation "to keep a reasonably vigilant lookout for bicyclists" (*Chilinski v Maloney*, 158 AD3d 1174, 1175 [4th Dept 2018] [internal quotation marks omitted]; *see Palma v Sherman*, 55 AD3d 891, 891 [2d Dept 2008]). Defendant also had the burden of establishing as a matter of law that there was nothing he could do to avoid the accident (*see Jackson v City of Buffalo*, 144 AD3d 1555, 1556 [4th Dept 2016]).

The dissent incorrectly relies on article 26 of the Vehicle and Traffic Law to conclude that defendant had the right-of-way relative to plaintiff and plaintiff failed to yield to defendant, inasmuch as article 26 concerns which vehicle has the right-of-way in specific situations (*see e.g.* § 1143), and a "[b]icycle" (§ 102) is not a "[v]ehicle" (§ 159) within the ambit of article 26. To the extent

that the dissent implicitly concludes that plaintiff was "upon a roadway" and subject to the duties of a vehicle driver (§ 1231), and that plaintiff bicyclist failed to yield the right-of-way to defendant vehicle operator, we reject that conclusion because it inappropriately resolves the conflicting evidence regarding whether plaintiff was already in the unmarked crosswalk in the intersection (*see* § 1151 [a]; *see also Joannis v Cahill*, 71 AD3d 1437, 1439 [4th Dept 2010]). Furthermore, even if we accepted the dissent's conclusion that defendant vehicle operator had the right-of-way, defendant still had a "duty to exercise reasonable care in proceeding through [an] intersection" (*Limardi v McLeod*, 100 AD3d 1375, 1376 [4th Dept 2012]), and "cannot blindly and wantonly enter an intersection" (*Deering*, 134 AD3d at 1499 [internal quotation marks omitted]; *see Dorr v Farnham*, 57 AD3d 1404, 1405-1406 [4th Dept 2008]; *Halbina v Brege*, 41 AD3d 1218, 1219 [4th Dept 2007]).

Notably, "summary judgment is seldom appropriate in negligence actions . . . Indeed, even when 'the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances. This can rarely be decided as a matter of law' " (*Smith v Key Bank of W. N.Y.*, 206 AD2d 848, 849 [4th Dept 1994], quoting *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). " 'To grant summary judgment it must clearly appear that no material and triable issue of fact is presented . . . [, and t]his drastic remedy should not be granted where there is any doubt as to the existence of such issues' " (*Halbina*, 41 AD3d at 1219, quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). Moreover, "[p]roximate cause is almost invariably a factual issue" (*Monell v City of New York*, 84 AD2d 717, 718 [1st Dept 1981]).

We conclude that defendant failed to meet his burden of establishing his entitlement to summary judgment as a matter of law on the issue of his own negligence or, even assuming, arguendo, that he was negligent, on whether his negligence was a proximate cause of the accident because: (1) his own papers contain his deposition testimony that he never saw plaintiff's bicycle before the impact; and (2) he failed to submit any other evidence establishing that there was nothing he could have done to avoid the accident. Inasmuch as defendant never saw plaintiff before the collision, he is unable to provide a non-speculative assertion that there was nothing he could do to avoid the accident. Thus, under the circumstances of this case, in the absence of eyewitnesses, expert testimony or such other evidence demonstrating defendant's inability to avoid the accident, defendant cannot meet his burden with respect to either his negligence or proximate cause. There is no need to address defendant's contentions that only plaintiff was negligent or that plaintiff's negligence was the sole proximate cause of the accident because those issues are merely the converse of defendant's burden on the motion of establishing that he was not negligent or that his negligence was not a proximate cause of the accident.

We reject the dissent's view that defendant's failure to see plaintiff, or even glance to his right where plaintiff would have been

seen, does not raise triable questions of material fact with respect to defendant's negligence. Moreover, in a negligence case, "a split decision, such as this one, in which appellate judges disagree about what disputed facts may be inferred from undisputed facts, should be extremely rare" (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 321 [2009, Pigott, J., dissenting]). We submit that this is not such a rare case inasmuch as our determination rests squarely on this Court's precedent of finding triable questions of fact regarding a party's fulfillment of the duty to see what should have been seen (*see Luttrell*, 162 AD3d at 1637-1638; *Chilinski*, 158 AD3d at 1175; *Russo v Pearson*, 148 AD3d 1762, 1763 [4th Dept 2017]; *Sauter*, 90 AD3d at 1704; *Hyatt v Messana*, 67 AD3d 1400, 1402 [4th Dept 2009]; *Spicola v Piracci*, 2 AD3d 1368, 1369 [4th Dept 2003]; *see also* PJI 2:77, 2:77.1).

Further, given that defendant failed to meet his initial burden, we need not review the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Accordingly, we conclude that the order should be reversed, the motion should be denied and the complaint should be reinstated.

LINDLEY and WINSLOW, JJ., concur with CURRAN, J.;

PERADOTTO, J.P., dissents and votes to affirm in the following opinion in which CARNI, J., concurs: We respectfully dissent because well-settled principles of law, as applied to the facts here, resolve this case in favor of defendant.

The evidence submitted by defendant in support of his motion for summary judgment established that, in accordance with the Vehicle and Traffic Law, defendant approached the stop sign on Evelyn Street and stopped before entering the crosswalk running parallel to Ontario Street (*see* § 1172 [a]; *see also* § 110 [a]). After having stopped, defendant appropriately proceeded to move slowly beyond the stop sign into the crosswalk in order to peer around a vehicle parked to his left on Ontario Street and thereby observe approaching vehicles to which he was required to yield before making a right turn onto that street (*see* §§ 1142 [a]; 1172 [a]). Defendant established that he had the right-of-way relative to plaintiff inasmuch as defendant was properly positioned partially across the crosswalk while fulfilling his obligation to observe traffic conditions to the left and yield to approaching vehicles on Ontario Street (*see* § 1142 [a]; *see generally Olsen v Baker*, 112 AD2d 510, 511 [3d Dept 1985], *lv denied* 66 NY2d 604 [1985]), and that plaintiff, by entering upon the roadway from the sidewalk and attempting to cross Evelyn Street in the crosswalk when defendant's vehicle was, according to plaintiff's deposition testimony, "*already* in the intersection . . . trying to enter the flow of traffic" on Ontario Street (emphasis added), failed to yield the right-of-way to defendant (*see* § 1143; *Green v Mower*, 302 AD2d 1005, 1006 [4th Dept 2003], *affd* 100 NY2d 529 [2003]; *Johnson v Murphy*, 121 AD3d 1589, 1590 [4th Dept 2014]; *Wolbe v Fishman*, 29 AD3d 785, 785-786 [2d Dept 2006]; *see also* § 1231; *see generally Joannis v Cahill*, 71 AD3d 1437, 1438 [4th Dept 2010]). Given such evidence, the majority's assertion that there is conflicting evidence precluding the conclusion

that plaintiff failed to fulfill his duty to yield the right-of-way to defendant is belied by the record (*see Green*, 302 AD2d at 1006; *see also* §§ 1143, 1231).

Contrary to the majority's holding, "[w]hile a driver is required to see that which through proper use of [his] . . . senses [he] should have seen . . . , a driver who has the right-of-way is entitled to anticipate that [a bicyclist] will obey the traffic law requiring him . . . to yield . . . [A] driver with the right-of-way who has only seconds [or no time] to react to a [bicycle] which has failed to yield is not . . . negligent for failing to avoid the collision" (*George v Cerat*, 118 AD3d 1475, 1476 [4th Dept 2014] [internal quotation marks omitted]). Inasmuch as defendant abided by the applicable provisions of the Vehicle and Traffic Law and had the right-of-way relative to plaintiff, he was entitled to anticipate that plaintiff would obey the traffic law requiring him to yield, and defendant was not negligent for failing to avoid the collision when plaintiff entered the roadway, neglected to yield, and rode his bicycle into the side of defendant's already-present vehicle (*see id.*; *Rosenberg v Kotsek*, 41 AD3d 573, 574 [2d Dept 2007]; *see generally Aiello v City of New York*, 32 AD3d 361, 362 [1st Dept 2006]). Defendant's deposition testimony that he did not see plaintiff's bicycle before the collision does not raise an issue of fact under these circumstances, and is entirely consistent with the evidence and to be expected given that defendant was already in a forward position partially across the crosswalk with the right-of-way relative to plaintiff when plaintiff rode his bicycle into the *side* of defendant's vehicle somewhere between the front wheel well and the rear quarter panel. Based on the foregoing, we conclude that the order should be affirmed because defendant met his initial burden of establishing as a matter of law that he was not negligent and, inasmuch as plaintiff did not submit any conflicting evidence in opposition to the motion, he failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1080

KA 16-02182

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIGUEL MARTINEZ, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, 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 (Walter W. Hafner, Jr., A.J.), rendered August 2, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06). Initially, we agree with defendant that his purported waiver of the right to appeal is invalid inasmuch as "[t]he minimal inquiry made by County Court was insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Caufield*, 126 AD3d 1542, 1542 [4th Dept 2015] [internal quotation marks omitted]).

Defendant contends that the court erred in failing to assign him new counsel at sentencing. We reject that contention. "The record belies the contention of defendant that he requested new assigned counsel [at sentencing], and thus it cannot be said that the court erred in failing to conduct an inquiry to determine whether good cause was shown to substitute counsel" (*People v Singletary*, 63 AD3d 1654, 1655 [4th Dept 2009], *lv denied* 13 NY3d 839 [2009]; *see People v Matthews*, 142 AD3d 1354, 1355 [4th Dept 2016], *lv denied* 28 NY3d 1125 [2016]; *cf. People v Dodson*, 30 NY3d 1041, 1042 [2017]). In any event, even assuming, arguendo, that defendant's complaints concerning defense counsel "suggest[ed] a serious possibility of good cause for the substitution [of counsel] and thereby established a need for further inquiry" (*People v Jones*, 149 AD3d 1576, 1578 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017] [internal quotation marks omitted]), we conclude that "the court afforded defendant the opportunity to express

his objections concerning defense counsel, and the court thereafter reasonably concluded that defendant's objections were without merit" (*People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]; *see People v Porto*, 16 NY3d 93, 101-102 [2010]; *Singletary*, 63 AD3d at 1654).

Contrary to defendant's related contention, we conclude that "[defense] counsel's statement[s], in response to . . . inquir[ies] from the court, that the sentence promise had been set forth clearly at the time of the plea[and that defendant had previously been informed of his maximum sentencing exposure], [were] not 'adversarial' toward defendant . . . , [inasmuch as defense] counsel was simply reiterating what was already a matter of record, which was the court's own recollection as well" (*People v Benitez*, 290 AD2d 363, 365 [1st Dept 2002], *lv denied* 98 NY2d 673 [2002]; *see People v Alvarez*, 143 AD3d 543, 544 [1st Dept 2016], *lv denied* 28 NY3d 1142 [2017]; *People v Burgos*, 298 AD2d 190, 190 [1st Dept 2002], *lv denied* 99 NY2d 580 [2003]).

To the extent that the complaints made by defendant at sentencing could be construed as a motion to withdraw his plea, we note that the court implicitly rejected any such motion when it determined that defendant's complaints were belied by the record (*see People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]) and that the court made its determination before defense counsel made a separate comment regarding the voluntariness of the plea that was adverse to defendant (*cf. People v Mitchell*, 21 NY3d 964, 966-967 [2013]), and we thus conclude that the record demonstrates that the court's rejection of any purported motion to withdraw the plea was not influenced by defense counsel's statements at sentencing (*see People v Holmes*, 145 AD3d 641, 642 [1st Dept 2016], *lv denied* 29 NY3d 949 [2017]; *People v Carter-Doucette*, 124 AD3d 1323, 1324 [4th Dept 2015], *lv denied* 25 NY3d 988 [2015]; *People v Thaxton*, 309 AD2d 1255, 1256 [4th Dept 2003], *lv denied* 1 NY3d 581 [2003]; *Burgos*, 298 AD2d at 190).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). Finally, inasmuch as the uniform sentence and commitment form incorrectly reflects that defendant was sentenced as a second felony offender, it must be amended to reflect that he was actually sentenced as a second felony drug offender previously convicted of a violent felony offense (*see People v Oberdorf*, 136 AD3d 1291, 1292-1293 [4th Dept 2016], *lv denied* 27 NY3d 1073 [2016]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1083

CAF 17-00862

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

IN THE MATTER OF DANIEL K., JOSEPH K.,
WALTER K., JR., AND WYATT K.
---------- MEMORANDUM AND ORDER
ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MILDRED K., RESPONDENT,
AND ROGER K., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered March 31, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Roger K. had neglected Daniel K. and derivatively neglected the other three children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, found that he neglected Daniel K. and derivatively neglected the other three children, and placed them in the custody of petitioner. The father contends that Family Court erred in its finding of derivative neglect. That contention, however, "is not reviewable on appeal because it was premised on [his] admission of neglect and thereby made in an order entered on consent of the parties" (*Matter of Jenessa L.M. [Shawn C.P.]*, 160 AD3d 1434, 1435 [4th Dept 2018]). Furthermore, we note that, to the extent the father contends that he did not consent to the finding of derivative neglect, his contention is not properly before us inasmuch as he raises it for the first time on appeal (*cf. Matter of Paige K. [Jay J.B.]*, 81 AD3d 1284, 1284 [4th Dept 2011]). To the extent that the father contends that any purported consent to the finding of derivative neglect was not knowing, voluntary, and intelligent, we note that he did not move to vacate his admission to having derivatively neglected the subject children, and thus that

contention is also not properly before us (*see Matter of Kh'Niayah D. [Niani J.]*, 155 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]; *Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497 [4th Dept 2015], *lv dismissed in part and denied in part* 26 NY3d 941 [2015]; *Matter of Julia R.*, 52 AD3d 1310, 1311 [4th Dept 2008], *lv denied* 11 NY3d 709 [2008]).

The father's contention that the Attorney for the Children (AFC) was ineffective is not preserved for our review because the father failed to make a motion seeking the AFC's removal (*see Matter of Mason v Mason*, 103 AD3d 1207, 1208 [4th Dept 2013]). Moreover, the father's contention that the AFC was ineffective because she substituted her judgment for that of the children is "based on matters outside the record and is not properly before us" (*Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1147 [4th Dept 2016]; *see Matter of Gridley v Syrko*, 50 AD3d 1560, 1561 [4th Dept 2008]; *Matter of Harry P. v Cindy W.*, 48 AD3d 1100, 1100 [4th Dept 2008]). According to the Rules of the Chief Judge, an AFC "must zealously advocate the child's position" and, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]). There is, however, minimal evidence in the record here regarding the AFC's interactions with the subject children, and no evidence with respect to whether the AFC ignored their wishes.

We reject the father's further contention that the court erred in determining that it was in the best interests of Joseph K. and Wyatt K. to continue their placement in petitioner's custody. We conclude that the court's determination to that effect " 'reflect[s] a resolution consistent with the best interests of the children after consideration of all relevant facts and circumstances, and [is] supported by a sound and substantial basis in the record' " (*Martha S.*, 126 AD3d at 1497). We have considered the father's remaining contentions and conclude that they are without merit.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1095

KA 15-01597

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL SANTIAGO, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE 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 (Michael L. Dwyer, J.), rendered January 20, 2011. 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 [4]), defendant contends that the waiver of the right to appeal is invalid. We reject that contention and conclude that defendant validly waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]). Although the valid waiver of the right to appeal forecloses our review of defendant's contentions that the sentence is unduly harsh and severe and constitutes cruel and unusual punishment (*see People v Marshall*, 144 AD3d 1544, 1545 [4th Dept 2016]), it "does not encompass [defendant's] contention that the plea was not knowingly, intelligently or voluntarily entered" (*People v Williams*, 91 AD3d 1299, 1299 [4th Dept 2012]). We thus address the merits of that contention.

Defendant contends that the plea was not knowingly, intelligently or voluntarily entered because of "his confusion concerning the ramifications of his guilty plea." That contention is preserved for our review by defendant's pro se oral motion to withdraw the plea (*see* CPL 220.60 [3]; *People v Gravino*, 62 AD3d 1259, 1259 [4th Dept 2009], *affd* 14 NY3d 546 [2010]), which was directed to the same issue that is raised on appeal (*cf. People v Gibson*, 140 AD3d 1786, 1787 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]; *People v Johnson*, 128 AD3d 1539, 1539 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]). We conclude, however, that the contention lacks merit. At the time of the plea,

the court "expressly reviewed the terms of the plea agreement, including the agreed-upon sentence, [and] confirmed that defendant agreed to such terms" (*People v Miles*, 138 AD3d 1350, 1350 [3d Dept 2016], *lv denied* 28 NY3d 934 [2016]). Thus, "the record . . . belies defendant's contention that the plea was not voluntary or intelligent because there was confusion regarding the appropriate sentence, inasmuch as 'the record reflects that defendant was aware of the sentence to be imposed' " (*People v Brown*, 162 AD3d 1568, 1569 [4th Dept 2018], *lv denied* 32 NY3d 935 [2018]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1096

KA 16-00316

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN KING, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 15, 2015. The judgment convicted defendant, upon a jury verdict, of conspiracy in the second degree, criminal possession of a controlled substance in the third degree (three counts), criminal sale of a controlled substance in the third degree (two counts) and criminal sale of a controlled substance 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 conspiracy in the second degree (Penal Law § 105.15), three counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]), two counts of criminal sale of a controlled substance in the third degree (§ 220.39 [1]), and one count of criminal sale of a controlled substance in the first degree (§ 220.43 [1]). 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]).

Defendant's contention that Supreme Court should have precluded certain voice identification evidence on the ground that it was not

included in the People's CPL 710.30 notice is unpreserved for our review inasmuch as defendant did not object to the admission of that evidence on that ground during trial, as defense counsel correctly conceded in his posttrial CPL 330.30 motion (*see People v Marvin*, 162 AD3d 1744, 1744 [4th Dept 2018]; *People v Davis*, 118 AD3d 1264, 1266 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]). In any event, prior to trial, defense counsel advised the court that, "rather than having a pretrial hearing, a mini trial ahead of trial, we can deal with this issue as it comes up." During trial, the court allowed defense counsel to challenge the voice identification evidence, outside the presence of the jury. In so doing, defendant " 'waived preclusion on the ground of lack of notice because [he] was given a full opportunity to be heard' " with respect to the admissibility of that evidence (*Davis*, 118 AD3d at 1266; *see generally Marvin*, 162 AD3d at 1744-1745). We similarly reject defendant's related contention that the voice identification evidence was the result of unduly suggestive police procedures. The voice identifications of the police officers, one of whom had met defendant face to face during a prior, unrelated investigation, and the other two who had listened to defendant's voice and become familiar with that voice from either monitoring and/or listening to certain intercepted telephone calls, were confirmatory (*see People v Brito*, 11 AD3d 933, 934 [4th Dept 2004], *appeal dismissed* 5 NY3d 825 [2005]; *People v Morenito*, 281 AD2d 928, 929 [4th Dept 2001]; *People v Deleon*, 273 AD2d 27, 28 [1st Dept 2000], *lv denied* 95 NY2d 933 [2000]). Furthermore, it is well established that " '[a] witness may properly testify to his or her opinion of the identification of a speaker's voice, regardless of whether the witness became familiar with that voice before or after the identifying conversation occurred' " (*People v Gray*, 57 AD3d 1473, 1475 [4th Dept 2008], *lv denied* 12 NY3d 854 [2009]; *see People v Hoffler*, 41 AD3d 891, 893 [3d Dept 2007], *lv denied* 9 NY3d 962 [2007]). Under these circumstances, we conclude that the court "properly left to the jury the role of weighing the probative value of the police officer[s'] opinion testimony" regarding the identification of the speaker's voice (*Hoffler*, 41 AD3d at 893).

Defendant further contends that the court erred in denying his request to provide the jury with a multiple conspiracies charge (*see People v Leisner*, 73 NY2d 140, 150 [1989]). We reject that contention. Although a multiple conspiracies charge must be given "when the facts are such that a jury might reasonably find either a single conspiracy or multiple conspiracies" (*id.*), it is well established that "[p]roof of a defendant's knowledge of the identities and specific acts of all his coconspirators is not necessary where the circumstantial evidence establishes the defendant's knowledge that he is part of a criminal venture which extends beyond his individual participation" (*People v Ackies*, 79 AD3d 1050, 1056 [2d Dept 2010]). Here, the evidence established that defendant sold large quantities of cocaine to a coconspirator, defendant knew that this coconspirator was supplying other coconspirators, and defendant was aware of other coconspirators who were distributing large quantities of narcotics. Consequently, the court did not err in denying defendant's request to provide the jury with a multiple conspiracies charge inasmuch as

" '[t]here was no reasonable view of the evidence that there was any conspiracy [other] than the single conspiracy charged in the indictment' " (*People v Williams*, 150 AD3d 1315, 1320 [3d Dept 2017], *lv denied* 30 NY3d 984 [2017]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1097

KA 16-00802

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUAN LINDSEY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered March 22, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). At sentencing, defendant sought youthful offender status. Because defendant was convicted of an armed felony (*see* CPL 1.20 [41] [a]; *People v Quinones*, 140 AD3d 1693, 1693-1694 [4th Dept 2016], *lv denied* 28 NY3d 935 [2016]), he was ineligible for youthful offender status unless, insofar as relevant here, the court "determine[d] that there are mitigating circumstances bearing directly upon the manner in which the crime was committed" (*People v Middlebrooks*, 25 NY3d 516, 519 [2015]; *see* CPL 720.10 [2] [a] [ii]; [3] [i]). County Court initially determined that defendant was ineligible for youthful offender status because there were no such mitigating circumstances in this case. The court further determined, in the alternative, that defendant should not be granted youthful offender status even had he been eligible.

Initially, we agree with defendant that the court erred in determining that he was ineligible for youthful offender status. Although it is well established that a defendant's lack of criminal record is not a qualifying mitigating circumstance (*see People v Garcia*, 84 NY2d 336, 342 [1994]; *People v Victor J.*, 283 AD2d 205, 206 [1st Dept 2001], *lv denied* 96 NY2d 942 [2001]), it is equally well established that "lack of injury to others and nondisplay of a weapon

[constitute] qualifying mitigating circumstances" (*Garcia*, 84 NY2d at 342; *see People v Marquis A.*, 145 AD3d 61, 68-69 [3d Dept 2016]). Here, it is undisputed that defendant did not use or display the gun at issue, nor did its possession result in injury to others. Thus, there are "mitigating circumstances bearing directly upon the manner in which the crime was committed" (*Middlebrooks*, 25 NY3d at 519; *see* CPL 720.10 [3] [i]), and it follows that defendant is eligible for youthful offender status (*see Marquis A.*, 145 AD3d at 68-69).

Notwithstanding defendant's eligibility for youthful offender status, however, we agree with the court that, considering the "broad range of factors pertinent to any youthful offender determination" (*Middlebrooks*, 25 NY3d at 527; *see People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]), defendant should not be afforded youthful offender status under the circumstances of this case. We therefore affirm the judgment on the alternative ground articulated by the court at sentencing (*see generally People v Nicholson*, 26 NY3d 813, 825-826 [2016]; *People v Concepcion*, 17 NY3d 192, 197-198 [2011]).

Defendant's remaining contention is unpreserved for our review (*see People v Russell*, 133 AD3d 1199, 1200 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]), and we decline to review it as a matter of discretion in the interest of justice (*see generally* CPL 470.15 [3] [c]). Finally, we note that the uniform sentence and commitment sheet incorrectly indicates that defendant was "re-sentenced as a probation violator," and it must therefore be amended by striking that notation.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1099

KA 16-01504

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MOHAMED KABA, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 18, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]). We reject defendant's contention that the evidence is legally insufficient to disprove his justification defense (*see People v Carter*, 145 AD3d 1567, 1567 [4th Dept 2016]). The People established that defendant cut the victim with a box cutter during a fight between defendant, the victim, and their respective friends. Although defendant testified that he saw an unknown person, whom he could not describe, holding a "huge blade" or "large knife" and swinging it around, no other witnesses saw anyone with a knife. In addition, defendant testified that the victim did not have a knife and that defendant was not in fear of his life when the victim was on the ground and defendant was slashing him. The People therefore "demonstrate[d] beyond a reasonable doubt that the defendant did not believe deadly force was necessary or that a reasonable person in the same situation would not have perceived that deadly force was necessary" (*People v Umali*, 10 NY3d 417, 425 [2008], *rearg denied* 11 NY3d 744 [2008], *cert denied* 556 US 1110 [2009]). We further conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), including the charge on the defense of justification, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). " '[T]he jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence

the weight it should be accorded' " (*People v Kalinowski*, 118 AD3d 1434, 1436 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

We reject defendant's contention that his right to remain silent was violated and that Supreme Court should have suppressed his statement to the police on that ground. After defendant was arrested and given his *Miranda* warnings, he invoked his right to remain silent. Defendant was then booked and transported to an area to be held for arraignment. While the transporting officers and defendant were waiting in the lobby, a passing police officer said to the transporting officers, "so you guys got your stabbing suspect?" Defendant responded, "it was not a stabbing, it was a slashing." We conclude that the remark by the officer was not the functional equivalent of interrogation inasmuch as it was not "reasonably likely to elicit a response" (*People v Ferro*, 63 NY2d 316, 319 [1984], *cert denied* 472 US 1007 [1985]; *see Rhode Island v Innis*, 446 US 291, 301-302 [1980]; *People v Roberts*, 121 AD3d 1530, 1531 [4th Dept 2014], *lv denied* 24 NY3d 1122 [2015]). In any event, we conclude that any error in refusing to suppress defendant's statement is harmless beyond a reasonable doubt (*see People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). In light of the video evidence depicting the incident at issue, there is no question that defendant was the perpetrator of the assault.

Finally, the sentence is not unduly harsh or severe.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1110

CA 18-00681

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

DITECH FINANCIAL, LLC, FORMERLY KNOWN AS GREEN TREE SERVICING, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY W. CORBETT, SHEILA B. CORBETT, ALSO KNOWN AS SHEILA CORBETT, DEFENDANTS-APPELLANTS, AND CAPITAL ONE BANK (USA), N.A., ET AL., DEFENDANTS.

HUMPLEBY LAW OFFICE, P.C., SYRACUSE (CRAIG C. HUMPLEBY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STIM & WARMUTH, P.C., FARMINGVILLE (GLENN P. WARMUTH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered September 21, 2017. The order, among other things, granted plaintiff's motion for summary judgment against defendants Timothy W. Corbett and Sheila B. Corbett.

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

Memorandum: Plaintiff commenced this mortgage foreclosure action in January 2016, alleging that Timothy W. Corbett and Sheila B. Corbett (defendants) defaulted by failing to pay their monthly mortgage installments. Plaintiff thereafter moved for, inter alia, summary judgment striking defendants' answer. In opposition to plaintiff's motion, defendants contended, inter alia, that the foreclosure action is time-barred because the debt was accelerated in 2010 by plaintiff's predecessor in interest (*see* CPLR 213 [4]). Supreme Court granted the motion. We affirm.

"Where, as here, a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the six-year statute of limitations begins to run on the date that each installment becomes due" (*Wilmington Sav. Fund Socy., FSB v Gustafson*, 160 AD3d 1409, 1410 [4th Dept 2018]; *see* CPLR 213 [4]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2010]; *United States of Am. v Quaintance*, 244 AD2d 915, 915-916 [4th Dept 1997], *lv dismissed* 91 NY2d 957 [1998]). If the mortgage holder accelerates the debt by a demand or by commencement of a foreclosure action, the statute of limitations begins to run on the entire debt (*see Business Loan Ctr.,*

Inc. v Wagner, 31 AD3d 1122, 1123 [4th Dept 2006]; *see also Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]).

We reject defendants' contention that a January 2010 letter to defendants from plaintiff's predecessor in interest accelerated the debt and thus that the statute of limitations began to run on the entire debt at that time. The 2010 letter, which, among other things, advised defendants of their default and of the lender's intention to accelerate the debt in the future if certain preconditions were not met, "falls far short of providing clear and unequivocal notice to defendants that the entire mortgage debt was being accelerated" (*Goldman Sachs Mtge. Co. v Mares*, 135 AD3d 1121, 1122 [3d Dept 2016]; *see FBP 250, LLC v Wells Fargo Bank, N.A.*, 164 AD3d 1307, 1309 [2d Dept 2018]; *see generally Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983 [2d Dept 2012]). Inasmuch as a letter discussing acceleration as a possible future event does not constitute an exercise of the mortgage's optional acceleration clause (*see 21st Mtge. Corp. v Adames*, 153 AD3d 474, 475 [2d Dept 2017]; *Goldman Sachs Mtge. Co.*, 135 AD3d at 1122-1123; *see generally Wells Fargo Bank, N.A.*, 94 AD3d at 982-983), we conclude that the court properly granted plaintiff's motion.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1111

CA 18-00786

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

JAMES E. FAYSON, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

RENT-A-CENTER EAST, INC., R.G. GERSCHWENDER,
DEFENDANTS-RESPONDENTS,
MELANIE E. WEIGEL AND FANTASIA K. JACOBS,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, ALBANY (CHRISTIAN J. SOLLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 21, 2017. The order, among other things, denied the motion of defendants Melanie E. Weigel and Fantasia K. Jacobs for summary judgment and denied the cross motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained in a motor vehicle accident that occurred while she was a passenger in a vehicle owned by defendant Melanie E. Weigel and operated by defendant Fantasia K. Jacobs (Weigel defendants). That vehicle collided with a vehicle owned by defendant Rent-A-Center, East, Inc. and operated by defendant R.G. Gerschwender (RAC defendants). Plaintiff appeals and the Weigel defendants cross-appeal from an order that, inter alia, denied the Weigel defendants' motion for summary judgment dismissing the complaint and cross claims against them and denied plaintiff's cross motion for partial summary judgment on the issue of negligence against all defendants. We affirm.

The accident occurred at the intersection of Broadway and Mills Street in the City of Buffalo when Gerschwender exited a parking lot and intended to proceed straight across Broadway onto Mills. Broadway had two lanes in each direction, and a curbside parking lane on both

sides. There was no traffic control device at the intersection. In support of the motion and cross motion, the Weigel defendants and plaintiff relied on the deposition testimony of Jacobs and plaintiff, both of whom testified that Jacobs was traveling on Broadway in the left lane when Gerschwender suddenly came out of the parking lot to their left and struck their vehicle. The Weigel defendants therefore contend that their motion should have been granted inasmuch as Jacobs had the right-of-way, and Gerschwender was negligent in failing to yield to the Weigel vehicle and, for the same reason, plaintiff contends that his cross motion should have been granted with respect to the RAC defendants' negligence. The Weigel defendants and plaintiff also submitted, however, the deposition testimony of Gerschwender and his passenger, both of whom testified that the collision occurred in the right lane, and that there were no vehicles approaching when they exited the parking lot. The theory of the RAC defendants is that Jacobs had been parked on Broadway in the parking lane and pulled out into the right lane when Gerschwender was already in the intersection, and therefore Jacobs failed to yield the right-of-way to Gerschwender (*see Davis v Turner*, 132 AD3d 603, 603 [1st Dept 2015]). On this record, particularly the differing versions of which lane Jacobs was in at the time of the accident, we conclude that there is a triable issue on which party had the right-of-way, thus precluding summary judgment to the Weigel defendants and plaintiff (*see Buffa v Carr*, 148 AD3d 606, 606 [1st Dept 2017]; *Barnes v United Parcel Serv.*, 104 AD3d 562, 562 [1st Dept 2013]). We reject the contention of the Weigel defendants that the RAC defendants are relying only on speculation with respect to the cause of the accident (*cf. Pivetz v Brusco*, 145 AD3d 806, 808 [2d Dept 2016]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1120

TP 18-00969

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

IN THE MATTER OF MERRIN DISTEFANO, PETITIONER,

V MEMORANDUM AND ORDER

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

MERRIN DISTEFANO, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB 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, Orleans County [Michael M. Mohun, A.J.], entered May 22, 2018) to review determinations of respondent. The determinations found after tier II and tier III hearings that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a series of five determinations, after tier II and tier III hearings, that she violated several inmate rules arising from several incidents. The record establishes that this proceeding was untimely inasmuch as it was commenced more than four months after each of the final administrative determinations in this matter (*see* CPLR 217 [1]; *Matter of Jackson v Fischer*, 78 AD3d 1335, 1335 [3d Dept 2010], *lv denied* 16 NY3d 705 [2011]). Furthermore, even assuming, arguendo, that this proceeding was timely commenced with respect to the fifth determination, we reject petitioner's contention that the determination is not supported by substantial evidence. The misbehavior report, together with the testimony of the correction officer who witnessed the incident, "constitutes substantial evidence supporting the determination that petitioner violated [the applicable] inmate rule[s]" (*Matter of Oliver v Fischer*, 82 AD3d 1648, 1648 [4th Dept 2011]; *see Matter of Jones v Annucci*, 141 AD3d 1108, 1108-1109 [4th Dept 2016]). Petitioner's denial of the reported misbehavior merely raised an issue of credibility for the Hearing Officer (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]).

We have considered petitioner's remaining contentions and

conclude that they do not require a different result.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1124

KA 16-01948

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN COBB, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (David W. Foley, A.J.), entered September 19, 2016. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contentions, we conclude that County Court properly applied the analysis prescribed by *People v Gillotti* (23 NY3d 841, 861 [2014]) and, in so doing, properly determined that defendant failed to establish by a preponderance of the evidence " 'the existence of the mitigating circumstances' that would justify a downward departure" (*People v Leach*, 158 AD3d 1240, 1241 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018], quoting *Gillotti*, 23 NY3d at 864; *see People v Bernecky*, 161 AD3d 1540, 1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1126

KA 15-01593

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD L. DEWITT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, 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 (William F. Kocher, J.), entered July 1, 2015. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree and driving while intoxicated.

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 aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]) and misdemeanor driving while intoxicated (§§ 1192 [3]; 1193 [1] [b] [i]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of reckless endangerment in the first degree (Penal Law § 120.25). The pleas were taken during one proceeding. Contrary to defendant's contention in both appeals, he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Rodriguez*, 156 AD3d 1433, 1433 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]). That waiver encompasses defendant's challenges in both appeals to the factual sufficiency of the plea allocution (*see Rodriguez*, 156 AD3d at 1434), and the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737 [1998]). Contrary to defendant's further contention in both appeals, he voluntarily, knowingly, and intelligently waived participation in the shock incarceration program (*see generally* Correction Law § 865; *Lopez*, 6 NY3d at 256).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1127

KA 15-01594

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD L. DEWITT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, 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 (William F. Kocher, J.), entered July 1, 2015. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree.

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

Same memorandum as in *People v Dewitt* ([appeal No. 1] — AD3d — [Nov. 16, 2018] [4th Dept 2018]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1130

KAH 18-00378

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ARIEL GARCIA, PETITIONER-APPELLANT,

V OPINION AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND JAMES THOMPSON, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY,
RESPONDENTS-RESPONDENTS.

ROBERT S. DEAN, CENTER FOR APPELLATE LITIGATION, NEW YORK CITY (JAN HOTH OF COUNSEL), FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered December 27, 2017 in a habeas corpus proceeding. The judgment denied the petition.

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

Opinion by TROUTMAN, J.:

When an incarcerated person, who was previously convicted of a sex offense, is conditionally released or released on parole, the Board of Parole (Board) must under certain circumstances require, as a mandatory condition of such release, that he or she refrain from entering school grounds (*see* Executive Law § 259-c [14]). The issue before us is whether the school grounds mandatory condition must be applied to all level three sex offenders, or only to those serving a sentence for an offense enumerated in Executive Law § 259-c (14). We hold that this condition must be applied to all level three sex offenders. We therefore conclude that the judgment should be affirmed.

I

Petitioner was convicted in 1994 of rape in the third degree (Penal Law § 130.25 [2]), a crime for which he was eventually adjudicated as a level three sex offender. Years later, petitioner was again incarcerated, and is currently serving a prison term of 3½

to 7 years for a conviction of robbery in the third degree (§ 160.05). Although petitioner had a conditional release date of December 20, 2016, he remains incarcerated. Petitioner's conditional release was denied because the proposed address in the Bronx that he supplied to the Board did not comply with the school grounds mandatory condition.

Petitioner commenced this proceeding pursuant to CPLR article 70, seeking a writ of habeas corpus on the ground that his incarceration beyond his conditional release date is illegal. He contended, inter alia, that he is not subject to the school grounds mandatory condition because he is serving a sentence for robbery in the third degree, a crime not enumerated in Executive Law § 259-c (14). In their return, respondents contended, inter alia, that the plain language of that statute requires the school grounds mandatory condition to be applied to all level three sex offenders, not only those serving a sentence for an enumerated offense. Supreme Court denied the petition.

II

We note at the outset that, if we were to accept petitioner's interpretation of Executive Law § 259-c (14), he would be entitled to immediate release (*see generally People ex rel. Cassar v Margiotta*, 150 AD3d 1254, 1255 [2d Dept 2017]). "A person who is serving . . . [a] sentence of imprisonment shall, if he or she so requests, be conditionally released from the institution in which he or she is confined when the total good behavior time allowed to him or her, pursuant to the provisions of the correction law, is equal to the unserved portion of his or her term" (Penal Law § 70.40 [1] [b]). There is no dispute that petitioner's good behavior time exceeds the unserved portion of his term of incarceration, and therefore he is entitled to conditional release upon his request.

III

Initially, we reject respondents' contention that we should defer to the Board's interpretation of the relevant statute. Judicial deference to an administrative agency tasked with enforcing a statute may be appropriate where the interpretation of the statute involves "specialized 'knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom' " (*Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005]), or " 'where the question is one of specific application of a broad statutory term' " (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006]; *see Matter of Nearpass v Seneca County Indus. Dev. Agency*, 152 AD3d 1192, 1193 [4th Dept 2017]). In contrast, where, as here, "the question is one of pure statutory interpretation 'dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight' " (*KSLM-Columbus Apts., Inc.*, 5 NY3d at 312; *see Matter of Monroe County Pub. Sch. Dists. v Zyra*, 51 AD3d 125, 133 [4th Dept 2008]). The issue presented here "is one of statutory construction and not of deference to [the Board's] determination"

(*KSLM-Columbus Apts., Inc.*, 5 NY3d at 312).

IV

Nevertheless, the Board's interpretation is correct. "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]; *see Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018]). "The 'literal language of a statute' is generally controlling unless 'the plain intent and purpose of a statute would otherwise be defeated' . . . Where 'the language is ambiguous or where literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the [statute's] enactment,' courts may '[r]esort to legislative history' " (*Anonymous*, 32 NY3d at 37).

Here, the parties dispute the interpretation of Executive Law § 259-c (14), which provides, in relevant part:

> "[W]here a person serving a sentence for an offense defined in article one hundred thirty, one hundred thirty-five or two hundred sixty-three of the penal law or section 255.25, 255.26 or 255.27 of the penal law[1] and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds . . ."

Petitioner contends that "such person" unambiguously refers to a person serving a sentence for one of the enumerated offenses and that the plain language of the statute therefore provides that the school grounds mandatory condition must be imposed on only those level three sex offenders currently incarcerated for an enumerated offense. Respondents assert that the statute is ambiguous, and that the legislative history, along with the consensus interpretation of numerous agencies and organizations, supports the proposition that the school grounds mandatory condition applies to all level three sex offenders regardless of the crime for which they are currently incarcerated. We agree with respondents.

At first glance, we acknowledge that the phrase "such person"

---

[1] These are sex offenses (Penal Law article 130), kidnapping, coercion, etc. (article 135), sexual performance by a child (article 263), and incest (§§ 255.25, 255.26, 255.27).

appears to have the meaning that petitioner urges. Respondents assert, however, that it is not the only rational interpretation. Although the word "such" often serves a particularizing role, it "can also be used simply to refer back to something previously mentioned but not 'particularized' . . . Where both a 'particularizing' and a 'non-particularizing' interpretation of 'such' are possible, it need not be the case that the particularizing interpretation prevails" (*North Broward Hosp. Dist. v Shalala*, 172 F3d 90, 95 [DC Cir 1999], *cert denied* 528 US 1022 [1999]; *see University Med. Ctr. of S. Nev. v Thompson*, 380 F3d 1197, 1201 [9th Cir 2004]; *see generally Federal Trade Commn. v Tuttle*, 244 F2d 605, 611 [2d Cir 1957], *cert denied* 354 US 925 [1957]).

The statutory language allows for "such person" to be understood in varying degrees of particularity. Aside from the construction urged by petitioner, "such person" may be read to refer simply to "a person," a construction that would read the word "such" out of the statute. Alternatively, it may be read to refer to a person serving a sentence for an enumerated offense against a minor, a construction that would render superfluous the later reference to level three sex offenders. It may also, however, be read to refer to "a person serving a sentence." Under that last construction, "where a person serving a sentence . . . is released on parole," the Board must, "as a mandatory condition of such release," prohibit "such sentenced offender" from entering "school grounds" if "such sentenced offender" is (1) being released from incarceration for an enumerated offense against a person under 18 years of age; or (2) "a level three sex offender" (Executive Law § 259-c [14]). That is not the only possible construction, but it is another rational construction that supports the Board's interpretation. We therefore conclude that Executive Law § 259-c (14) is ambiguous (*see generally Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 662-667 [1998]).

V

We thus turn to the legislative history, which we conclude strongly supports respondents' interpretation of the statute. When Executive Law § 259-c (14) was first enacted, the school grounds mandatory condition applied only to persons serving a sentence for an enumerated offense against a minor (*see People v Diack*, 24 NY3d 674, 681 [2015]). In 2005, the legislature amended the statute to add the reference to level three sex offenders (*see id.*). The sponsors' memorandum defined the purpose of that amendment: "To prohibit sex offenders placed on conditional release or parole from entering upon school grounds or other facilities where the individual has been designated as a level three sex offender" (Sponsor's Mem, Bill Jacket, L 2005, ch 544). As justification, the sponsors offered: "There is a need to prohibit those sex offenders who are determined to pose the most risk to children from entering upon school grounds or other areas where children are cared for" (*id.*).

The assembly bill jacket contains a letter from counsel for the Department of Education explaining that the amendment would "require, as a condition of parole or conditional release, that any individual

designated as a level three sex offender is prohibited from entering school grounds" (Letter from St Educ Dept, July 11, 2005, Bill Jacket, L 2005, ch 544). Counsel for the Unified Court System conveyed his understanding that the amendment would "bar level three sex offenders who have been placed on conditional release or parole from entering upon school grounds" (Letter from Unified Ct Sys, July 6, 2005, Bill Jacket, L 2005, ch 544). In opposition to the bill, the legislative director of the New York Civil Liberties Union wrote: "Current law prohibits from school grounds certain past offenders whose victims were under the age of eighteen. The proposed law would apply this restriction to *all persons* designated 'Level Three' sex offenders" (Letter from NY Civ Liberties Union, Aug 18, 2005, Bill Jacket, L 2005, ch 544 [emphasis added]).

Based on our review of the legislative history relating to the enactment of the relevant amendment to Executive Law § 259-c (14), we conclude that there existed a consensus among governmental and nongovernmental organizations that, for good or ill, the amended language was intended to extend the school grounds mandatory condition to all persons conditionally released or released to parole who have been designated level three sex offenders.

VI

For the foregoing reasons, petitioner, a designated level three sex offender, has failed to establish that he is entitled to immediate release, and therefore we conclude that the court properly denied his petition (*see generally Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d 1334, 1335 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]). Accordingly, the judgment should be affirmed.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1135

CA 18-00677

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

LAFAWN FLOOD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, CITY OF SYRACUSE POLICE DEPARTMENT AND JEREMY L. BALDWIN, DEFENDANTS-APPELLANTS.

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

IZZO LAW OFFICE, PLLC, SYRACUSE (JANET M. IZZO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered December 21, 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 reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained in a motor vehicle accident. On the morning in question, plaintiff was driving her vehicle an undetermined distance behind a patrol vehicle operated by defendant Jeremy L. Baldwin, a police officer employed by defendant City of Syracuse Police Department. Baldwin attempted to execute a U-turn in order to pursue a suspect in a domestic incident. Before he attempted the U-turn, he checked his driver's side and rearview mirrors, turned his head, and saw no vehicles behind him. Baldwin made an abrupt left and his vehicle collided with plaintiff's vehicle. Only thereafter, according to plaintiff's testimony, did Baldwin activate his overhead lights.

We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. "[T]he reckless disregard standard of care . . . applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" (*Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]; *see Dodds v Town of Hamburg*, 117 AD3d 1428, 1429 [4th Dept 2014]). When the accident occurred, Baldwin was operating an

"authorized emergency vehicle" (§ 1104 [a]), and he "was engaged in an emergency operation by virtue of the fact that he was attempting a U-turn in order to 'pursu[e] an actual or suspected violator of the law' " (*Dodds*, 117 AD3d at 1429, quoting § 114-b). Thus, Baldwin's conduct was exempted from the rules of the road by section 1104 (b) (4) and is governed by the reckless disregard standard of care in section 1104 (e) (*see Dodds*, 117 AD3d at 1429).

A " 'momentary judgment lapse' does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach" (*Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]; *see Dodds*, 117 AD3d at 1429). In support of their motion, defendants submitted evidence of the precautions Baldwin took before he attempted the U-turn and established as a matter of law that Baldwin's conduct did not rise to the level of reckless disregard for the safety of others, i.e., "he did not act with 'conscious indifference' to the consequences of his actions" (*Green v State of New York*, 71 AD3d 1310, 1312 [3d Dept 2010]; *see Dodds*, 117 AD3d at 1430; *cf. Perkins v City of Buffalo*, 151 AD3d 1941, 1942 [4th Dept 2017]). Plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1140

CA 18-00787

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

RAY E. CLARK, III, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF LYONSDALE, TOWN OF LYONSDALE HIGHWAY DEPARTMENT AND EDWARD A. FARR, DEFENDANTS-APPELLANTS.

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SHANLEY LAW OFFICES, MEXICO (P. MICHAEL SHANLEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Lewis County (Charles C. Merrell, J.), entered November 30, 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 reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle that he was driving was allegedly struck by the wing blade of a snowplow operated by defendant Edward A. Farr, who was employed by defendant Town of Lyonsdale (Town). Supreme Court denied defendants' motion for summary judgment dismissing the complaint. Defendants appeal, and we reverse.

Vehicle and Traffic Law § 1103 (b) "exempts all vehicles 'actually engaged in work on a highway'—including [snowplows]—from the rules of the road" (*Riley v County of Broome*, 95 NY2d 455, 461 [2000]). Here, defendants established as a matter of law that the snowplow was "actually engaged in work on a highway" at the time of the incident (§ 1103 [b]; *see Harris v Hanssen*, 161 AD3d 1531, 1532-1533 [4th Dept 2018]; *cf. Arrahim v City of Buffalo*, 151 AD3d 1773, 1773 [4th Dept 2017]; *Hofmann v Town of Ashford*, 60 AD3d 1498, 1499 [4th Dept 2009]), and plaintiff's evidence that the plow blade was up at the time of the accident did not raise a triable issue of fact with respect thereto inasmuch as plaintiff did not dispute that Farr was "working his run or beat at the time of the accident" (*Harris*, 161 AD3d at 1533 [internal quotation marks omitted]).

Thus, Farr was exempt from the rules of the road unless he acted

with “reckless disregard for the safety of others” (Vehicle and Traffic Law § 1103 [b]; *see Ferrand v Town of N. Harmony*, 147 AD3d 1517, 1517 [4th Dept 2017]). “That standard requires evidence that a person has acted ‘in conscious disregard of a known or obvious risk that [was] so great as to make it highly probable that harm [would] follow’ ” (*Ferrand*, 147 AD3d at 1518). Here, defendants also established as a matter of law that Farr’s conduct “did not rise to the level of recklessness required for the imposition of liability” (*Ferreri v Town of Penfield*, 34 AD3d 1243, 1243 [4th Dept 2006]; *see Primeau v Town of Amherst*, 17 AD3d 1003, 1003-1004 [4th Dept 2005], *affd* 5 NY3d 844 [2005]). In support of their motion, defendants submitted evidence that the lane markings on the road were covered in snow and the testimony of plaintiff that he had “no idea” whether any part of the snowplow was actually in his lane of travel. Furthermore, defendants’ expert testified that it was plaintiff’s vehicle that crossed the center line into Farr’s lane, causing the accident.

In opposition, plaintiff failed to raise a triable issue of fact with respect to the issue of reckless disregard (*see Catanzaro v Town of Lewiston*, 73 AD3d 1449, 1449 [4th Dept 2010]; *Ferreri*, 34 AD3d at 1243-1244). At most, plaintiff established that Farr did not see plaintiff’s vehicle and that a portion of the snowplow crossed the center line of the road, which does not amount to recklessness. Moreover, plaintiff failed to submit competent evidence that Farr’s operation of the snowplow without either a “wing man” or certification to operate the snowplow without a wing man was reckless. Finally, while plaintiff and Farr provided different versions of the accident, those differences alone do not create a question of fact on the issue of reckless disregard here (*see Catanzaro*, 73 AD3d at 1449).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1141

CA 18-00352

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

NATIONSTAR MORTGAGE LLC, FORMERLY KNOWN AS
CENTEX HOME EQUITY, PLAINTIFF-RESPONDENT,

V ORDER

STEPHEN M. FERSACI, CELESTE A. FERSACI,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (LUCY A. BRADO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FRIEDMAN VARTOLO LLP, NEW YORK CITY (ORAN SCHWAGER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered January 18, 2017. The judgment, among other things, awarded plaintiff a default judgment and ordered the immediate sale of the subject property.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Ozolins* [appeal No. 2], 65 AD2d 958, 958 [4th Dept 1978]; *see also Marine Midland Bank v Landsdowne Mgt. Assoc.*, 193 AD2d 1091, 1092 [4th Dept 1993], *lv denied* 82 NY2d 656 [1993]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1142

CA 18-00353

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

NATIONSTAR MORTGAGE LLC, FORMERLY KNOWN AS
CENTEX HOME EQUITY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN M. FERSACI, CELESTE A. FERSACI,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (LUCY A. BRADO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FRIEDMAN VARTOLO LLP, NEW YORK CITY (ORAN SCHWAGER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 24, 2017. The order, among other things, denied the motion of defendant Stephen M. Fersaci to vacate the default judgment.

It is hereby ORDERED that said appeal insofar as taken by defendant Celeste A. Fersaci is unanimously dismissed and the order is affirmed without costs.

Memorandum: Defendants Stephen M. Fersaci and Celeste A. Fersaci appeal from an order denying a motion to vacate a default judgment (*see* CPLR 5015 [a] [1]). Initially, we note that only Stephen Fersaci (defendant) moved to vacate the default judgment. Inasmuch as Celeste Fersaci did not move to vacate the default judgment, she is not an aggrieved party, and thus the appeal to the extent that it was taken by her must be dismissed (*see Edgar S. v Roman*, 115 AD3d 931, 932 [2d Dept 2014]). Defendant contends that Supreme Court erred in denying the motion because he offered a reasonable excuse for the default. We reject that contention. "A party seeking to vacate an order or judgment on the ground of excusable default must offer a reasonable excuse for its default and a meritorious defense to the action" (*Wells Fargo Bank, N.A. v Dysinger*, 149 AD3d 1551, 1552 [4th Dept 2017]). Defendant failed to offer a meritorious defense, and thus we need not consider whether he offered a reasonable excuse (*cf. id.*). Defendant's remaining contentions are raised for the first time on appeal and thus are not properly before us (*see Ciesinski v Town of*

Aurora, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1145

KA 16-01985

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER J. DEHOYOS, ALSO KNOWN AS "POPPY,"
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered August 24, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). Contrary to defendant's contention, we conclude that the record establishes that his waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Ramos*, 7 NY3d 737, 738 [2006]). Moreover, "[a]ny nonwaivable issues purportedly encompassed by the waiver are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable" (*People v Weatherbee*, 147 AD3d 1526, 1526 [4th Dept 2017], *lv denied* 29 NY3d 1038 [2017] [internal quotation marks omitted]; *see People v Mead*, 133 AD3d 1257, 1258 [4th Dept 2015]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]). Even assuming, arguendo, that defendant's appeal waiver does not encompass his contention that the component of his sentence requiring him to pay restitution must be vacated because County Court did not require an affidavit pursuant to Penal Law § 60.27 (9), we conclude that defendant's contention is not preserved for our review (*see People v Connors*, 91 AD3d 1340, 1341-1342 [4th Dept 2012], *lv denied* 18 NY3d 956 [2012]). We decline to exercise our power to reach that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant's further contention that the restitution component of his sentence must be vacated because restitution was directed to an entity that is not a law enforcement agency as contemplated in Penal Law § 60.27 (9) is a challenge to the legality of the sentence and thus survives his waiver of the right to appeal and does not require preservation (*see People v Boatman*, 110 AD3d 1463, 1464 [4th Dept 2013], *lv denied* 22 NY3d 1039 [2013]). Contrary to defendant's contention, we conclude that the court properly directed him to pay restitution to the Orleans County Major Felony Crime Task Force for the unrecovered funds it expended in buying drugs from him (*see* § 60.27 [9]; *People v Tracey*, 221 AD2d 738, 738 [3d Dept 1995], *lv denied* 88 NY2d 943 [1996]; *see generally People v Diallo*, 88 AD3d 1152, 1153-1154 [3d Dept 2011], *lv denied* 18 NY3d 993 [2012]*; People v McCorkle*, 298 AD2d 848, 848 [4th Dept 2002], *lv denied* 99 NY2d 561 [2002]).

Finally, we note that the certificate of conviction should be amended because it incorrectly reflects that defendant was sentenced as a second felony offender when he was actually sentenced as a second felony drug offender (*see People v Holmes*, 147 AD3d 1367, 1367-1368 [4th Dept 2017], *lv denied* 29 NY3d 998 [2017]; *People v Smallwood*, 145 AD3d 1447, 1447 [4th Dept 2016]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1172

KA 16-01761

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESHAWN HARRIS, DEFENDANT-APPELLANT.

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

DESHAWN HARRIS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 31, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]). Defendant contends that Supreme Court erred in denying his challenge for cause of a prospective juror. Although defendant exhausted his peremptory challenges and therefore "[a]n erroneous ruling by the court denying a challenge for cause [would] constitute reversible error" (CPL 270.20 [2]; *see generally People v Thompson*, 21 NY3d 555, 560 [2013]), we nevertheless reject that contention (*see generally People v Johnson*, 94 NY2d 600, 616 [2000]). The prospective juror stated that he had recognized the name of a police detective involved in the case. Following questioning by the court regarding whether that would affect his ability to be fair and unbiased, the prospective juror replied, "I doubt it." The prospective juror also answered that he "believed so" when he was questioned by the court regarding whether he could separate the instant shooting from two shootings that he had witnessed years ago. When further questioned by defense counsel if he would "lean one way or another in this type of case," the prospective juror answered, "No." We conclude that the prospective juror's "statements here, taken in context and as a whole, were unequivocal" with respect to his ability to be fair and impartial (*People v Chambers*, 97 NY2d 417, 419 [2002]; *see People v Smith*, 126 AD3d 1528, 1530 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]).

Contrary to defendant's further contention, the court did not abuse its discretion in permitting the prosecutor to ask questions of a witness on redirect examination regarding the witness's disability that the prosecutor did not address on direct examination with that witness and that were not raised during cross-examination (*see People v Dennis*, 55 AD3d 385, 386 [1st Dept 2008], *lv denied* 12 NY3d 783 [2009]). The questions were brief, and were used to support the People's theory that defendant must have been the shooter inasmuch as the witness had a disability, making it unlikely that the witness was the shooter. Moreover, defense counsel had an opportunity to re-cross-examine the witness with respect to that topic, but he did not avail himself of that opportunity.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We reject defendant's contention that the sentence is unduly harsh and severe.

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that they are either unpreserved for our review or without merit.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1174

KA 17-00642

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY BROWN, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 16, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]) and attempted robbery in the first degree (§§ 110.00, 160.15 [4]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see People v Taggart*, 124 AD3d 1362, 1362 [4th Dept 2015]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

We note that the crimes of conviction listed on the uniform sentence and commitment form do not correspond with the counts of the indictment under which those crimes were charged. The uniform sentence and commitment form incorrectly reflects that count three of the indictment charged defendant with robbery in the first degree and count six of the indictment charged him with attempted robbery in the first degree, but count three of the indictment charged him with attempted robbery in the first degree and count six of the indictment charged him with robbery in the first degree. The uniform sentence and commitment form must therefore be amended to correct those clerical errors (*see People v Glowacki*, 159 AD3d 1585, 1586 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]; *People v Cruz*, 144 AD3d 1494,

1495 [4th Dept 2016]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1176

CA 18-00176

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

JACOB STILLMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MOBILE MOUNTAIN, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL REDDY OF COUNSEL), FOR DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered May 8, 2017. The judgment apportioned damages 80% to defendant Mobile Mountain, Inc.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he fell from an artificial rock climbing wall at a local festival. Mobile Mountain, Inc. (defendant) appeals from a judgment that, upon a jury verdict, apportioned defendant 80% of the damages to be awarded to plaintiff at a subsequent damages trial. Inasmuch as defendant requested only a premises liability charge (*see* PJI 2:90), defendant failed to preserve for our review its contention that Supreme Court erred in failing to instruct the jury on the issue of actual or constructive notice in connection with plaintiff's theory of negligent inspection (*see Fitzpatrick & Weller, Inc. v Miller*, 21 AD3d 1374, 1375 [4th Dept 2005]). In any event, that contention is without merit (*see generally Pantoja v Lindsay Park Hous. Corp.*, 277 AD2d 365, 366 [2d Dept 2000]; *Naples v City of New York*, 34 AD2d 577, 578 [2d Dept 1970]).

The court properly denied defendant's request to instruct the jury on the doctrine of assumption of the risk. Contrary to defendant's contention, the failure to inspect or the negligent inspection of the artificial rock climbing wall's safety equipment that was used by plaintiff unreasonably enhanced the risks that plaintiff assumed in climbing that festival amusement (*see generally Custodi v Town of Amherst*, 20 NY3d 83, 87-88 [2012]; *Stillman v Mobil Mtn., Inc.*, 162 AD3d 1510, 1511 [4th Dept 2018]). Finally, we reject defendant's contention that the court erred in denying its motion for

a directed verdict inasmuch as there was a rational process by which the jury could have based a finding in favor of plaintiff upon the evidence presented (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *Williamson v Hodson*, 147 AD3d 1488, 1488-1489 [4th Dept 2017], *lv denied* 29 NY3d 913 [2017]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1190

KA 16-02157

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR C. LINK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered August 29, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree (Penal Law § 220.34 [1]). Contrary to defendant's contention, the record establishes that he validly waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]; *People v Burdick*, 159 AD3d 1444, 1444 [4th Dept 2018], *lv denied* 31 NY3d 1115 [2018]; *People v Farrara*, 145 AD3d 1527, 1527 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]). Although the better practice is to inform the defendant during the plea colloquy that appellate counsel will be appointed if he or she is indigent (*see People v Brown*, 122 AD3d 133, 144 [2d Dept 2014], *lv denied* 24 NY3d 1042 [2014]), County Court's failure "to go into that level of detail did not render the waiver invalid" (*People v Pope*, 129 AD3d 1389, 1391 [3d Dept 2015] [Devine, J., concurring]; *see generally Lopez*, 6 NY3d at 257; *Brown*, 122 AD3d at 145). Defendant's valid waiver of his right to appeal forecloses his challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1191

KA 16-01788

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAVELLE R. SOTERO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered September 1, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the fourth degree (Penal Law §§ 110.00, 220.09 [1]). We agree with defendant that his waiver of the right to appeal is not valid inasmuch as the record fails to establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Bradshaw*, 18 NY3d 257, 264 [2011]). We conclude that defendant's sentence is not unduly harsh or severe.

Defendant failed to preserve his remaining contention for our review, 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 [3] [c]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1193

KA 15-02111

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SPARTACUS BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 14, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's contention is primarily based on alleged variances among the witnesses' testimony and between the testimony and the physical evidence. Any inconsistencies in the witnesses' testimony, however, "merely presented issues of credibility for the jury to resolve" (*People v Ielfield*, 132 AD3d 1298, 1300 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]), and we conclude that, "notwithstanding minor inconsistencies in the testimony of the People's witnesses, 'there is no basis for disturbing the jury's determinations concerning credibility' " (*People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]; *see People v McCallie*, 37 AD3d 1129, 1130 [4th Dept 2007], *lv denied* 8 NY3d 987 [2007]).

By failing to object on the grounds raised on appeal, defendant failed to preserve for our review his contention that County Court's consciousness-of-guilt instruction to the jury impermissibly shifted the burden of proof (*see* CPL 470.05 [2]; *People v Robinson*, 88 NY2d 1001, 1001-1002 [1996]; *People v Koberstein*, 262 AD2d 1032, 1033 [4th Dept 1999], *lv denied* 94 NY2d 798 [1999]). 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]).

The sentence is not unduly harsh or severe.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1194

CAF 17-01893

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

IN THE MATTER OF MICHAEL BROWN,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

ARIEL ORR, RESPONDENT-PETITIONER-APPELLANT.

BENEDICT LAW OFFICE, BATH (MARY HOPE M. BENEDICT OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

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

VIVIAN CLARA STRACHE, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered October 24, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the modification petition of respondent-petitioner and granted petitioner-respondent sole legal and physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition of respondent-petitioner is reinstated, and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: Pursuant to a consent order, petitioner-respondent father and respondent-petitioner mother had joint legal custody and shared physical custody of the subject child. After entry of the consent order, each parent filed a modification petition seeking sole custody. Family Court held a hearing and, thereafter, dismissed the mother's petition and, in essence, granted the father's petition. On appeal, the mother contends, and the father and the Attorney for the Child concede, that the court failed to make factual findings to support the award of custody. We agree. It is "well established that the court is obligated 'to set forth those facts essential to its decision' " (*Matter of Rocco v Rocco*, 78 AD3d 1670, 1671 [4th Dept 2010]; *see* CPLR 4213 [b]; Family Ct Act § 165 [a]). Here, the court utterly failed to follow that well-established rule inasmuch as it made no findings to support its determination. "Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court–the court best able to measure the credibility of the witnesses" (*Matter of Jose L. I.*, 46 NY2d 1024, 1026 [1979]). We therefore reverse the order, reinstate

the mother's petition, and remit the matter to Family Court to make a determination on the petitions, including specific findings as to a change in circumstances and the best interests of the child, following an additional hearing if necessary (*see Matter of Avdic v Avdic*, 125 AD3d 1534, 1536 [4th Dept 2015]). Pending the court's determination upon remittal, the custody and visitation provisions in the order appealed from shall remain in effect.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1206

CA 18-00887

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

DUSTIN MICHAEL MAROLF, AS ADMINISTRATOR OF THE ESTATE OF DEBBIE ANN CRUMP, DECEASED, PLAINTIFF,

V MEMORANDUM AND ORDER

RAPID RESPONSE MONITORING SERVICES INCORPORATED, THE LIGHTSTONE GROUP, LLC, CURTIS APARTMENTS ASSOCIATES, LP, CURTIS APARTMENTS ASSOCIATES, CITY RENEWAL MANAGEMENT CORP., DEFENDANTS-RESPONDENTS, AND FIRE DETECTION SYSTEMS, INC., DEFENDANT-APPELLANT.

RAPID RESPONSE MONITORING SERVICES INCORPORATED, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

FIRE DETECTION SYSTEMS, INC., THIRD-PARTY DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY DEFENDANT-APPELLANT.

KIRSCHENBAUM & KIRSCHENBAUM, P.C., GARDEN CITY (CAROLINE WALLITT OF COUNSEL), FOR DEFENDANT-RESPONDENT RAPID RESPONSE MONITORING SERVICES INCORPORATED AND THIRD-PARTY PLAINTIFF-RESPONDENT.

BARCLAY DAMON LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS THE LIGHTSTONE GROUP, LLC, CURTIS APARTMENTS ASSOCIATES, LP, CURTIS APARTMENTS ASSOCIATES, AND CITY RENEWAL MANAGEMENT CORP.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered August 22, 2017. The order, among other things, granted the motion of defendant-third-party plaintiff for summary judgment against defendant-third-party defendant.

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

Memorandum: Plaintiff's decedent, Debbie Ann Crump, resided at the Curtis Apartments in the City of Watertown in an apartment equipped with an emergency alarm system. In September 2015, Crump activated the alarm system in an attempt to summon help for a bleeding

condition, but no one responded and she ultimately died. Plaintiff, as administrator of Crump's estate, brought this negligence and wrongful death action against, among others, defendant-third-party defendant Fire Detection Systems, Inc. (FDS), the company that installed the alarm system, and defendant-third-party plaintiff Rapid Response Monitoring Services Incorporated (Rapid Response), a subcontractor of FDS responsible for monitoring the alarm system. Rapid Response commenced a third-party action against FDS.

FDS appeals from an order that, inter alia, granted Rapid Response's motion for summary judgment against FDS on its cross claim and on the first cause of action in the third-party complaint, both seeking contractual indemnification. We affirm.

FDS contends that Supreme Court erred in granting the motion because questions of fact exist whether Rapid Response was grossly negligent and thus barred by public policy from enforcing the indemnification provision in its contract with FDS. We reject that contention. An indemnification provision "simply shift[s] the source of compensation without restricting the injured party's ability to recover," whereas an exculpatory clause seeks to "deprive a contracting party of the right to recover for damages suffered as a result of the [other contracting] party's tortious act" (*Austro v Niagara Mohawk Power Corp.*, 66 NY2d 674, 676 [1985]). Unlike exculpatory clauses, indemnification provisions are invalid on public policy grounds "only to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury" (*id*.). Thus, even assuming, arguendo, that Rapid Response was grossly negligent, we conclude that public policy would not bar enforcement of the indemnification provision at issue here.

We have considered FDS's remaining contention and conclude that it is without merit.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1209

TP 18-00072

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

IN THE MATTER OF RONALD K. HORTMAN, MONTCLARE REALTY, LTD. AND JOANNE PANEK HORTMAN, PETITIONERS,

V MEMORANDUM AND ORDER

DIVISION OF LICENSING SERVICES, RESPONDENT.

JOANNE PANEK HORTMAN, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS 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 [John F. O'Donnell, J.], entered January 12, 2018) to review a determination of respondent. The determination revoked the license of petitioner JoAnne Panek Hortman as an individual real estate broker.

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

Memorandum: JoAnne Panek Hortman (petitioner) commenced this CPLR article 78 proceeding seeking to annul a determination of respondent, a division of the New York State Department of State (Department) which, after a hearing, revoked petitioner's license as an individual real estate broker. Contrary to petitioner's contention, we conclude that the Department's determination that petitioner breached her fiduciary duties and demonstrated untrustworthiness and incompetency (*see* Real Property Law § 441-c [1] [a]) is supported by substantial evidence in the record (*see Matter of Re/Max All-Pro Realty v New York State Dept. of State, Div. of Licensing Servs.*, 292 AD2d 831, 832 [4th Dept 2002], *lv denied* 98 NY2d 606 [2002]). We further conclude that the penalty of revocation of petitioner's license is not so disproportionate to the offense as to be shocking to one's sense of fairness (*see Matter of Goldberg v Cortez-Vasquez*, 94 AD3d 531, 532 [1st Dept 2012]; *Re/Max All-Pro Realty*, 292 AD2d at 832). We reject petitioner's contention that the Department's failure to abide by the time limits of 19 NYCRR 400.13 (a) requires annulment of the determination. The time limitation is directory only, not mandatory (*see Matter of G&S Mgt., Inc. v Fiala*, 94 AD3d 1577, 1578 [4th Dept 2012]; *Matter of Giambrone v Grannis*, 88 AD3d 1272, 1273 [4th Dept 2011]; *see generally Matter of Dickinson v*

Daines, 15 NY3d 571, 574-576 [2010]), and petitioner failed to show that she suffered substantial prejudice from the delay (*see Dickinson*, 15 NY3d at 577; *Giambrone*, 88 AD3d at 1273). We have considered petitioner's remaining contention and conclude that it is without merit.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1212

KA 15-01778

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RINALDO R. PEARSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 31, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and misdemeanor driving while intoxicated (DWI) (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [b] [i]). Defendant contends, and the People concede, that Supreme Court failed to apprehend the extent of its sentencing discretion on the DWI count. We agree. Defendant's contention is not foreclosed by his waiver of the right to appeal and does not require preservation (*see People v Davis*, 115 AD3d 1239, 1239 [4th Dept 2014]). During the plea colloquy, the court informed defendant that the fine for the DWI was between $1,000 and $5,000, when in fact the fine was between $500 and $1,000, and it was discretionary, not mandatory, if the court imposed a period of imprisonment (*see* § 1193 [1] [b] [i]; *People v Bills*, 103 AD3d 1149, 1149-1150 [4th Dept 2013]; *People v Swan*, 277 AD2d 1033, 1034 [4th Dept 2000], *lv denied* 96 NY2d 788 [2001]). Additionally, the record does not establish that the court was aware of the possible periods of probation and the duration for the condition of the ignition interlock device (*see* Penal Law § 65.00 [3] [d]; Vehicle and Traffic Law § 1193 [1] [b] [ii]; *cf. People v Beyrau*, 115 AD3d 1240, 1240 [4th Dept 2014]). We therefore modify the judgment by vacating the sentence imposed on count two of the indictment, and we remit the

matter to Supreme Court for resentencing on that count (*see Bills*, 103 AD3d at 1150).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1215

KA 15-01397

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DUNG V. VO, 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 (Francis A. Affronti, J.), rendered May 22, 2014. The judgment convicted defendant, upon a jury verdict, of sexual abuse 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: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]). Defendant contends, and the People correctly concede, that Supreme Court improperly precluded him from presenting evidence tending to establish that the complainant had a reason to fabricate the allegations against defendant (*see generally People v Hudy*, 73 NY2d 40, 56 [1988], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]; *People v McFarley*, 31 AD3d 1166, 1166-1167 [4th Dept 2006]), and that a new trial must therefore be granted (*see McFarley*, 31 AD3d at 1166).

It is well settled that " '[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations' " (*People v Horton*, 145 AD3d 1575, 1575-1576 [4th Dept 2016], quoting *Chambers v Mississippi*, 410 US 284, 294 [1973]). "It is also well settled that in presenting the defense, counsel for the defendant 'may establish, during both cross[-]examination and on [defendant's] direct case, the [complainant's] . . . motive to lie . . . This is not a collateral inquiry, but is directly probative on the issue of credibility' " (*id.* at 1576). Here, as in *People v Ocampo* (28 AD3d 684, 686 [2d Dept 2006]), "the excluded evidence was not speculative . . . or cumulative . . . , as it went directly to the credibility of the complainant[, and] the defense counsel offered a good faith basis for the excluded

line of questioning [and evidence].” “Because it cannot be said that there is no reasonable possibility that the error contributed to the verdict, the error cannot be deemed harmless beyond a reasonable doubt and reversal therefore is required” (*McFarley*, 31 AD3d at 1167; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant also correctly contends that the court erred in permitting the People to present prompt outcry testimony that exceeded the proper scope of such testimony. Although “evidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place” (*People v McDaniel*, 81 NY2d 10, 16 [1993]), such evidence is limited to “only the fact of a complaint, not its accompanying details,” including the identity of the assailant (*id.* at 17; *see People v Rice*, 75 NY2d 929, 932 [1990]). We thus conclude that the court erred in permitting two of the three prompt outcry witnesses to testify concerning the identity of the alleged assailant (*see generally McDaniel*, 81 NY2d at 17; *Rice*, 75 NY2d at 932).

We thus conclude that either error, alone, would justify reversal and that the cumulative effect of the errors denied defendant a fair trial (*see generally People v Shanis*, 36 NY2d 697, 699 [1975]).

Based on our determination, the remainder of defendant’s contentions are academic.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1217

KA 16-01547

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR M. IRIZARRY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 31, 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: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Rodriguez*, 156 AD3d 1433, 1433 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]). The waiver "was not rendered invalid based on [Supreme C]ourt's failure to require defendant to articulate the waiver in his own words" (*People v Scott*, 144 AD3d 1597, 1597 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017] [internal quotation marks omitted]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737 [1998]).

To the extent that defendant's contention that he received ineffective assistance of counsel survives his plea and valid waiver of the right to appeal (*see generally People v Livermore*, 161 AD3d 1569, 1570 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]), we conclude that it lacks merit. Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]). Defendant contends that his first counsel was ineffective in filing a motion to suppress that was summarily denied because it did not make sufficient factual allegations (*see generally* CPL 710.60 [1]; *People v Long*, 8 NY3d 1014, 1015 [2007]). Defendant, however, "has not shown that defense counsel

was able to make a more detailed suppression motion, or that such a motion[,] 'if made, would have been successful,' and thus he has not 'establish[ed] that defense counsel was ineffective in failing to make such a motion' " (*People v Larkins*, 153 AD3d 1584, 1586 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]). Defendant contends that his second counsel was ineffective when he stated at sentencing that a prior conviction affected only the minimum sentence that defendant could receive as a second felony offender. Although defendant contends that his second felony offender status had other future implications that defense counsel failed to explain, it is apparent that defense counsel was simply discussing the ramifications of the prior conviction on the sentence in this case, and defendant has not established that counsel was ineffective in doing so (*see generally People v Brunner*, 244 AD2d 831, 831-832 [3d Dept 1997]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1223

TP 18-00673

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

IN THE MATTER OF AMERICAN AUTO STOCK, INC.,
DOING BUSINESS AS MARINA MITSUBISHI, PETITIONER,

V MEMORANDUM AND ORDER

THERESA L. EGAN, IN HER OFFICIAL CAPACITY AS
EXECUTIVE DEPUTY COMMISSIONER OF NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES, RESPONDENT.

CHRISTOPHER J. ENOS, ROCHESTER, FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS 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, Monroe County [Debra A. Martin, A.J.], entered April 10, 2018) to review a determination of respondent. The determination, among other things, suspended petitioner's dealer registration for two concurrent periods of 14 days and imposed civil penalties.

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

Memorandum: Petitioner, an automobile dealership, commenced this CPLR article 78 proceeding seeking to review a determination of respondent that ordered it to pay civil penalties and suspended its dealer registration for a period of 14 days. After conducting a hearing, an Administrative Law Judge sustained 8 of the 10 charges alleged by the State of New York Department of Motor Vehicles against petitioner. The charges stemmed from petitioner's failure to keep appropriate records pursuant to the regulations for issuing license plates and temporary registrations to purchasers of vehicles (*see* 15 NYCRR part 78). In this proceeding, petitioner challenges the determination with respect to just three of the charges. We conclude that the determination with respect to those three charges is supported by substantial evidence (*see generally Matter of Licari v New York State Dept. of Motor Vehs.*, 153 AD3d 1598, 1598 [4th Dept 2017]). There was substantial evidence at the hearing that petitioner omitted information from MV-50 forms (*see* 15 NYCRR 78.11), failed to maintain a daily record of the temporary registrations that it issued (*see* 15 NYCRR 78.23 [g] [1]), and lent license plates to another dealership (*see* 15 NYCRR 78.23 [h] [5]). Contrary to petitioner's

further contention, the suspension of its dealer registration for 14 days is not shocking to one's sense of fairness (*see Matter of Huntington Chrysler-Plymouth v Commissioner of Motor Vehs. of State of N.Y.*, 156 AD2d 560, 561 [2d Dept 1989]; *see generally Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). While we agree with petitioner that it did not engage in fraudulent practices (*cf. Matter of Westbury Superstores, Ltd. v State of N.Y. Dept. of Motor Vehs.*, 144 AD3d 695, 696 [2d Dept 2016]), petitioner has a history of prior violations of the regulations, thus warranting the suspension (*see Licari*, 153 AD3d at 1599). We have considered petitioner's remaining contention and conclude that it lacks merit.

All concur except LINDLEY, J., who dissents in part and votes to modify in accordance with the following memorandum: I respectfully dissent. I agree with the majority that the determination of the Department of Motor Vehicles (DMV) that petitioner violated various regulations set forth in 15 NYCRR part 78 is supported by substantial evidence. In my view, however, the penalty imposed for two of the violations — a 14-day suspension of petitioner's dealer registration — is "so disproportionate to the offense[s] as to be shocking to one's sense of fairness" (*Matter of Acer v State Dept. of Motor Vehs.*, 175 AD2d 618, 618 [4th Dept 1991]). Granted, petitioner has demonstrated a pattern of sloppy record-keeping and has been repeatedly fined in the past for committing the same type of violations. Nevertheless, petitioner did not defraud or cheat any customers, and a suspension of petitioner's dealer registration may well result in Mitsubishi Motor Sales of America, Inc. terminating its franchise agreement with petitioner. Of course, a termination of the franchise agreement will have an adverse impact not just on petitioner, but also on all of its employees, most of whom did nothing wrong.

I note that the two violations for which the suspension was issued involved petitioner's failure to keep proper records of dealer-issued registrations and transfer of registration number plates to another dealer, which shared a common owner with petitioner. Because the DMV no longer permits petitioner to issue license plates to its customers, there is no danger that petitioner will commit further violations of a similar nature. Under the circumstances, I conclude that the fines imposed, totaling $8,000, along with the DMV's termination of petitioner's authority to issue license plates, are a sufficient penalty for petitioner's misconduct, which, again, did not harm any of its customers. I would therefore grant the petition in part and reduce the penalty accordingly.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1226

CA 17-01584

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

IN THE MATTER OF KHARYE JARVIS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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 August 2, 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.

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination denying him parole release. Petitioner has since been released to parole supervision, thus rendering the appeal moot (*see Matter of Velez v Evans*, 101 AD3d 1642, 1642 [4th Dept 2012]), and the exception to the mootness doctrine does not apply herein (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1234

KA 17-00903

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY WALKER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), dated April 10, 2017. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in assessing 15 points under risk factor 11, which permits the assessment of points for a defendant's history of drug or alcohol abuse. We conclude that clear and convincing evidence supports the assessment of those points (*see People v Mundo*, 98 AD3d 1292, 1293 [4th Dept 2012], *lv denied* 20 NY3d 855 [2013]; *see generally* § 168-n [3]), and we therefore reject defendant's contention.

The People introduced evidence that, during an interview with the probation officer who prepared the presentence investigation report for the underlying conviction, defendant admitted that he abused marihuana beginning at age 13 and that he had repeatedly engaged in treatment for that abuse over a five-year period, to no avail. Defendant also stated on several occasions that the only time he was drug free was when he was incarcerated. Testing upon defendant's entry into the state prison system verified his need for treatment, and he was assigned to the Alcohol and Substance Abuse Treatment program. Although defendant is correct that an assessment of points under risk factor 11 is not proper where a defendant's "more recent history is one of prolonged abstinence" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006]; *see People v Wilbert*, 35 AD3d 1220, 1221 [4th Dept 2006]; *People v Abdullah*, 31 AD3d 515, 516 [2d Dept 2006]), in this case defendant

admitted that his only period of abstinence occurred while he was incarcerated. It is well settled that "[t]he fact that defendant may have abstained from the use of alcohol and drugs while incarcerated is not necessarily predictive of his behavior when [he is] no longer under such supervision" (*People v Lowery*, 93 AD3d 1269, 1270 [4th Dept 2012], *lv denied* 19 NY3d 807 [2012] [internal quotation marks omitted]; *see People v Kunz*, 150 AD3d 1696, 1697 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *People v Jackson*, 134 AD3d 1580, 1580-1581 [4th Dept 2015]). In addition, "defendant was required to attend drug and alcohol treatment while incarcerated, thus further supporting the court's assessment of points for a history of drug or alcohol abuse" (*Mundo*, 98 AD3d at 1293; *see People v Newman*, 148 AD3d 1600, 1601 [4th Dept 2017], *lv denied* 29 NY3d 914 [2017]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1235

KA 17-01155

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANTE CAPEL, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, A.J.), entered April 21, 2017. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order designating him a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that Supreme Court abused its discretion in denying his request for a downward departure from the presumptive risk level (*see People v Reber*, 145 AD3d 1627, 1627 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *People v Adams*, 52 AD3d 1237, 1237 [4th Dept 2008], *lv denied* 11 NY3d 705 [2008]). Defendant was required to register as a sex offender in New York because he committed a classifying offense in another state (*see* § 168-a [2] [d] [ii]), and the court properly declined to grant a downward departure based on factors "adequately taken into account by the guidelines" (*People v Finocchiaro*, 140 AD3d 1676, 1676 [4th Dept 2016], *lv denied* 28 NY3d 906 [2016] [internal quotation marks omitted]). Defendant further contends that he should have received a downward departure because the victim's lack of consent in the underlying offense was based only on her age and the ages of the victim and defendant, 12 and 16 respectively, were relatively close. Defendant's contention lacks merit. The court properly considered all of the circumstances and determined that, notwithstanding defendant's contentions, the presumptive level two risk classification did not "result[] in an overassessment of defendant's risk to public safety" (*People v George*, 141 AD3d 1177, 1178 [4th Dept 2016]; *cf. People v Carter*, 138 AD3d 706, 707-708 [2d

Dept 2016]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1237

KA 16-02081

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. HARLACH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered October 13, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1251

TP 18-00885

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

IN THE MATTER OF JOSEPH A. SARCINELLI, DOING BUSINESS AS AMERICAN AUTO WORLD, INC., PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES AND NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEAL BOARD, RESPONDENTS.

MCGRATH LAW FIRM, PLLC, KENMORE (PETER MCGRATH OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Tracey A. Bannister, J.], entered May 8, 2018) to review a determination of respondents. The determination, among other things, revoked petitioner's dealership registration.

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 to annul a determination that revoked his automobile dealer registration and imposed a civil penalty. We conclude that the determination is supported by substantial evidence and we therefore confirm it (*see Matter of T's Auto Care, Inc. v New York State Dept. of Motor Vehs. Appeals Bd.*, 15 AD3d 881, 881 [4th Dept 2005]; *see also Matter of Frank J. Marianacci, Inc. v Reardon*, 156 AD3d 1422, 1423 [4th Dept 2017]; *see generally* CPLR 7803 [4]; *Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]). Eleven of the 14 charges against petitioner arose from the sale of two repossessed vehicles by petitioner's father. Petitioner does not dispute that those sales were improper and resulted in violations of the Vehicle and Traffic Law and applicable regulations. Moreover, contrary to petitioner's contention, the hearing testimony and the documents entered in evidence constituted substantial evidence supporting the conclusion that petitioner's father was acting as petitioner's agent when engaging in those transactions. Additionally, we conclude that the determination with respect to the remaining three

charges, alleging violations of 15 NYCRR 78.15 (a) and 15 NYCRR 78.25 (b), is supported by substantial evidence.

Finally, petitioner failed to preserve for our review his further contention that he was deprived of a fair hearing "inasmuch as he did not raise an objection on that ground before the Administrative Law Judge" (*Matter of Gorman v New York State Dept. of Motor Vehs.*, 34 AD3d 1361, 1361 [4th Dept 2006]; *see Matter of Khan Auto Serv., Inc. v New York State Dept. of Motor Vehs.*, 123 AD3d 1258, 1260 [3d Dept 2014]; *see also Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1254

CA 17-01135

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

ANTONELLA VILLELLA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RAFFAELE R. VILLELLA, DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 2, 2016. The order, among other things, determined that defendant owes plaintiff maintenance arrears, child support arrears and outstanding education and uninsured medical expenses.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Niagara County, for a new hearing.

Memorandum: Defendant father appeals from an order determining, inter alia, that he owes maintenance arrears, child support arrears, and outstanding education and uninsured medical expenses to plaintiff pursuant to a prior order of support. We agree with the father that he was denied his right to counsel at the hearing to determine whether he was in willful violation of the support order (*see* Family Ct Act § 262 [a] [vi]; Judiciary Law § 35 [8]). Supreme Court "failed to inform the father of his right to have counsel assigned if he could not afford to retain an attorney" (*Matter of Soldato v Caringi*, 137 AD3d 1749, 1749 [4th Dept 2016]), and failed to grant the father an adjournment at the outset of the second day of the hearing when he requested the assistance of counsel (*see Matter of Hassig v Hassig*, 34 AD3d 1089, 1090 [3d Dept 2006]). To the extent that the father thereafter chose to proceed pro se, the court also failed to "engage the father in the requisite searching inquiry concerning his decision to proceed pro se and thereby ensure that the father was knowingly, intelligently and voluntarily waiving his right to counsel" (*Soldato*, 137 AD3d at 1749; *see Matter of Girard v Neville*, 137 AD3d 1589, 1590 [4th Dept 2016]; *Matter of Pugh v Pugh*, 125 AD3d 663, 664 [2d Dept 2015]). We therefore reverse the order and remit the matter to Supreme Court for a new hearing. We decline to award the father appellate fees and costs.

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1257

KA 13-00723

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHARLES J. GREENBERG, AMHERST, 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 February 7, 2013. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the fifth 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 a jury verdict, of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31). In appeal No. 2, defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of rape in the third degree (§ 130.25 [2]) and imposing a sentence of incarceration upon defendant's admission that he violated the terms and conditions of his probation. We affirm in both appeals.

In appeal No. 1, defendant contends that the evidence is legally insufficient to support the conviction because the People failed to submit sufficient evidence of a transfer of a controlled substance between defendant and the buyer. We reject that contention (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Defendant's further contention that the evidence is legally insufficient to establish that he had the necessary means to complete the drug sale is unpreserved for our review because he did not raise that contention until his CPL 330.30 motion (*see People v Simmons*, 111 AD3d 975, 977 [3d Dept 2013], *lv denied* 22 NY3d 1203 [2014]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]; *People v Mills*, 28 AD3d 1156, 1157 [4th Dept 2006], *lv denied* 7 NY3d 903 [2006]), 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]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see*

Danielson, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We note that the certificate of conviction in appeal No. 1 incorrectly reflects that defendant was acquitted of promoting prison contraband in the first degree (Penal Law § 205.25 [1]), and it must therefore be amended to reflect that a mistrial without prejudice was granted on that count (*see People v Gause*, 46 AD3d 1332, 1333 [4th Dept 2007], *lv dismissed* 10 NY3d 811 [2008]).

In appeal No. 2, defendant correctly concedes that he failed to preserve for our review his challenge to the voluntariness of his admission to the violation of probation because he "did not move on that ground either to withdraw his admission . . . or to vacate the judgment revoking his sentence of probation" (*People v Spangenberg*, 118 AD3d 1444, 1444 [4th Dept 2014], *lv denied* 24 NY3d 965 [2014]; *see People v Carncross*, 48 AD3d 1187, 1187 [4th Dept 2008], *lv dismissed* 10 NY3d 932 [2008], *lv denied* 11 NY3d 830 [2008]). Moreover, the narrow exception to the preservation rule does not apply because defendant did not say anything during the admission colloquy that "cast[ ] significant doubt upon [his] guilt or otherwise call[ed] into question the voluntariness of the [admission]" (*People v Lopez*, 71 NY2d 662, 666 [1988]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see People v Carlisle*, 120 AD3d 1607, 1608 [4th Dept 2014], *lv denied* 24 NY3d 1082 [4th Dept 2014]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court

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

1258

KA 13-00724

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, AMHERST, 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.), entered February 7, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Same memorandum as in *People v Williams* ([appeal No. 1] — AD3d — [Nov. 16, 2018] [4th Dept 2018]).

Entered: November 16, 2018

Mark W. Bennett
Clerk of the Court