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

934

CA 16-01657

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

TRAVIS M. BRAUN, PLAINTIFF-RESPONDENT,

V ORDER

CHRISTOPHER J. CESAREO, MEDTRONIC, INC., AND MEDTRONIC USA, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

GREENBERG TRAURIG LLP, NEW YORK CITY (NOAH A. LEVINE OF COUNSEL), AND WOODS OVIATT GILMAN LLP, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), AND MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 23, 2015. The order, upon a nonjury trial adjudged, among other things, that defendant Christopher J. Cesareo was 50% liable for the accident.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

935

CA 16-01658

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

TRAVIS M. BRAUN, PLAINTIFF-RESPONDENT,

V ORDER

CHRISTOPHER J. CESAREO, MEDTRONIC, INC., AND MEDTRONIC USA, INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

GREENBERG TRAURIG LLP, NEW YORK CITY (NOAH A. LEVINE OF COUNSEL), AND WOODS OVIATT GILMAN LLP, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), AND MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered December 4, 2015. The amended order adjudged, among other things, that defendant Christopher J. Cesareo was 50% liable for the accident, and that defendant Medtronic, Inc. is vicariously liable for the conduct of defendant Christopher J. Cesareo.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

936

CA 17-00033

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

TRAVIS M. BRAUN, PLAINTIFF-RESPONDENT,

V ORDER

CHRISTOPHER J. CESAREO, MEDTRONIC, INC., AND MEDTRONIC USA, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

GREENBERG TRAURIG LLP, NEW YORK CITY (NOAH A. LEVINE OF COUNSEL), AND WOODS OVIATT GILMAN LLP, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), AND MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered June 8, 2016. The amended order, among other things, awarded plaintiff money damages for past pain and suffering, future pain and suffering, future medical expenses, and future lost wages.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

937

CA 18-00003

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

TRAVIS M. BRAUN, PLAINTIFF-RESPONDENT,

V ORDER

CHRISTOPHER J. CESAREO, MEDTRONIC, INC., AND MEDTRONIC USA, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 4.)

GREENBERG TRAURIG LLP, NEW YORK CITY (NOAH A. LEVINE OF COUNSEL), AND WOODS OVIATT GILMAN LLP, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), AND MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 20, 2017. The order, among other things, denied defendants' request for a collateral source offset.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

938

CA 18-00005

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

TRAVIS M. BRAUN, PLAINTIFF-RESPONDENT,

V ORDER

CHRISTOPHER J. CESAREO, MEDTRONIC, INC., AND MEDTRONIC USA, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 5.)

GREENBERG TRAURIG LLP, NEW YORK CITY (NOAH A. LEVINE OF COUNSEL), AND WOODS OVIATT GILMAN LLP, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), AND MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFF-RESPONDENT.

Appeal from a statement for judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 25, 2017. The statement for judgment, among other things, awarded plaintiff the sum of $21,451,518.69 as against defendants.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

939

CA 18-00377

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

TRAVIS M. BRAUN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. CESAREO, MEDTRONIC, INC., AND MEDTRONIC USA, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 6.)

GREENBERG TRAURIG LLP, NEW YORK CITY (NOAH A. LEVINE OF COUNSEL), AND WOODS OVIATT GILMAN LLP, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), AND MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 25, 2017. The judgment, among other things, awarded plaintiff the sum of $21,451,518.69 as against defendants.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, defendants' application for leave to file a late demand for a jury trial is granted, and a new trial is granted.

Memorandum: Defendants appeal from, inter alia, a judgment entered against them following a nonjury trial. We agree with defendants that Supreme Court erred in denying their oral application for leave to file a late demand for a jury trial, and we therefore reverse the judgment, grant the application and grant a new trial.

By note of issue filed on August 28, 2015 and served by mail, plaintiff elected a nonjury trial. Pursuant to CPLR 4102 (a), defendants could have demanded a trial by jury by filing such demand by September 17, 2015 (*see* CPLR 2103 [b] [2]). Defendants did not do so. On September 18, 2015, i.e., one day after the deadline for demanding a trial by jury, the parties appeared in court for the scheduled trial. After "extensive discussion off the record" in the court's chambers, the court determined that the parties waived their right to a trial by jury. Defendants' counsel placed on the record his objection and made an oral application for leave to file a late demand for a jury trial. After additional extensive arguments from counsel from both sides, the court adhered to its determination and denied the application. Defendants indicated that they could make a formal motion, but plaintiff objected, arguing that the court "has

already decided the issue." The court suggested that any such motion would be denied. An order was entered denying "[d]efendants' request to file a demand for trial by jury nunc pro tunc pursuant to CPLR Section 4102 (e)."

Initially, we respectfully disagree with our dissenting colleague that the court's denial of defendants' application is not reviewable by us. Defendants appealed from the order denying their application but, upon plaintiff's motion, we dismissed that appeal inasmuch as the order was not appealable as of right because it did not decide a motion "made upon notice" (CPLR 5701 [a] [2]; *see Sholes v Meagher*, 100 NY2d 333, 335-336 [2003]; *Arroyo v City of New York*, 185 AD2d 829, 829 [2d Dept 1992]). Defendants now appeal, however, from the final judgment rendered in this action. An appeal from a final judgment "brings up for review . . . any non-final judgment or order which necessarily affects the final judgment" (CPLR 5501 [a] [1]). The parties do not dispute that the order denying defendants' application for leave to file a late demand for a jury trial necessarily affected the final judgment. Our dissenting colleague, however, construes the word "order" in CPLR 5501 (a) (1) to mean only orders that result from motions made upon notice. In other words, in his view, only orders that are appealable as of right are reviewable upon an appeal from the final judgment. We conclude that CPLR 5501 (a) (1) does not expressly or impliedly place such a limitation upon our review of orders that affect the judgment. Courts routinely review orders upon an appeal from a final judgment that would not have been appealable as of right, such as ex parte orders (*see e.g. Willoughby Rehabilitation & Health Care Ctr., LLC v Webster*, 134 AD3d 811, 812-813 [2d Dept 2015]; *Jovee Contr. Corp. v AIA Envtl. Corp.*, 283 AD2d 398, 399 [2d Dept 2001]; *Hartwich v Young*, 149 AD2d 762, 764 [3d Dept 1989], *lv denied* 75 NY2d 701 [1989]; *Matter of Dora P.*, 68 AD2d 719, 728 [1st Dept 1979]). Indeed, our dissenting colleague has not cited to any case where an order that was not appealable as of right was determined to be unreviewable upon an appeal from the final judgment.

With respect to the merits, the State Constitution provides for a right to a jury trial in civil cases (*see* NY Const, art I, § 2; *Baird v Mayor of City of N.Y.*, 74 NY 382, 385-386 [1878]; *Gallegos v Elite Model Mgt. Corp.*, 28 AD3d 50, 54 [1st Dept 2005]). Although that right may be waived through the failure to demand it in a timely fashion (*see* CPLR 4102 [a]), the court "may relieve a party from the effect" of such waiver "if no undue prejudice to the rights of another party would result" (CPLR 4102 [e]). While "[t]he decision . . . to relieve a party from failing to timely comply with CPLR 4102 (a) lies within the sound discretion of the trial court" (*Cicco v Durolek*, 147 AD3d 1486, 1487 [4th Dept 2017] [internal quotation marks omitted]; *see Calabro v Calabro*, 133 AD2d 604, 604 [2d Dept 1987]), we conclude that the court's denial of defendants' application was an abuse of discretion.

Defendants made their application for relief just one day after the deadline to make a timely demand for a jury trial (*see Rosenbaum v Schlossman*, 72 AD3d 623, 623 [1st Dept 2010]; *A.S.L. Enters. v Venus*

Labs., 264 AD2d 372, 373 [2d Dept 1999]; *Beck v 200 Wyndham Assoc.*, 61 AD2d 804, 804 [2d Dept 1978]). In opposition to the application, plaintiff established no prejudice from that negligible delay (*see Cicco*, 147 AD3d at 1487; *Debevoise & Plimpton LLP v Candlewood Timber Group LLC*, 102 AD3d 571, 573 [1st Dept 2013]; *Rosenbaum*, 72 AD3d at 623). Prejudice requires "some indication that the [party] has been hindered in the preparation of his [or her] case or has been prevented from taking some measure in support of his [or her] position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981], *rearg denied* 55 NY2d 801 [1981]). Although the trial was scheduled to begin the day after the deadline for demanding a jury trial, there was a jury panel present on that day, and granting defendants' application would not have delayed the trial. Indeed, plaintiff's attorneys had made post-note of issue references to a jury, thus showing that they were certainly prepared for a trial by jury and had not strategized only for a bench trial, as they argued. In denying the application, the court applied an improper legal standard by requiring defendants to explain why *they* would be prejudiced by a bench trial. Defendants had no obligation to explain their decision to avail themselves of a constitutional right.

All concur except CURRAN, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent because the "order" denying defendants' application for leave to file a late jury demand is not an "order" that can be reviewed on appeal under CPLR 5501 (a) (1). The so-called "order" is not brought up for review as an appealable paper under that provision because it is not a product of a motion made on notice (*see* CPLR 2211, 2212 [a]; 5512 [a]). Because the motion was not on notice, this Court has been deprived of a sufficient record, rendering the "order" unreviewable (*see* CPLR 5526).

I note by way of background that, after the filing of the note of issue and until the eve of trial, the parties and Supreme Court implied that they expected to proceed to a jury trial. On September 18, 2015, defendants appeared for the scheduled trial, following a one-day adjournment they had requested, and informed the court that they had learned just that morning that plaintiff had not requested a jury trial in the note of issue. They acknowledged that the deadline in CPLR 4102 (a) for filing a demand for a trial by jury had expired one day earlier, but requested that the court excuse the failure to make a timely demand. Defendants argued that the failure to file a demand was inadvertent and that plaintiff would not be prejudiced by a late filing inasmuch as defendants missed the deadline by only "16 hours." Plaintiff opposed the application, arguing that defendants were required to demonstrate "excusable conduct for the waiver" and that the excuse of simply failing to notice plaintiff's request for a bench trial in the note of issue was "inadequate." The court denied the application after determining that plaintiff would be prejudiced by the filing of a late demand for a jury trial.

Following the trial's liability phase, defendants submitted an "order" to the court memorializing the denial of their application for leave to file a late demand for a jury trial. Plaintiff objected to

entry of that order on the ground that "[a] party must make a motion to the court before an order may be issued." The court, however, executed the "order," which stated that defendants "moved . . . for an Order pursuant to CPLR § 4102 (e)" and that the "application" was heard in "open court on September 18, 2015." Because defendants made an oral application, the "order" did not determine a "motion made upon supporting papers" and thus did not "recite the papers used on the motion" (CPLR 2219 [a]).

After procuring the "order," defendants filed a notice of appeal. Plaintiff moved to dismiss the appeal, "arguing that defendants have no appeal as of right because the order did not decide a motion made on notice, and permission to appeal was not timely sought." This Court granted the motion and dismissed the appeal (*see* CPLR 5701 [a] [2]; *Sholes v Meagher*, 100 NY2d 333, 335-336 [2003]; *Arroyo v City of New York*, 185 AD2d 829, 829 [2d Dept 1992]). Defendants never moved before Supreme Court to vacate the "order," the denial of which they could have appealed as of right (*see* CPLR 5701 [a] [3]).

Defendants now appeal from the final judgment entered against them following a nonjury trial, assuming in their initial brief that the "order" is reviewable on appeal. In his respondent's brief, plaintiff made procedural arguments challenging the propriety of defendants' oral application, noting that, inter alia, they did not comply with CPLR article 22. Defendants directly addressed plaintiff's arguments in their reply brief.

It is my view that, by affording appellate review to defendants on such a scant record on appeal—i.e., the 37-page transcript of the September 18, 2015 oral argument addressing this issue—the majority has improperly disregarded the requirements of CPLR articles 22 and 55 (*see* CPLR 2214, 2219, 2220, 5501 [a] [1]; 5526). Because defendants made no pretense of trying to comply with those requirements, which are intended to ensure fairness to both sides, I would hold that the "order" is unreviewable, despite defendants' appeal from a final judgment. I dissent because we do not have the authority to overwrite those statutes.

CPLR 5501 (a) (1) states that "[a]n appeal from a final judgment brings up for review . . . any non-final judgment or order which necessarily affects the final judgment." To define what constitutes an "order" for purposes of appellate reviewability, and to ascertain whether the appeal from the final judgment brings an order up for review, the other relevant provisions of the CPLR must be considered. I submit that what constitutes a reviewable "order" for purposes of CPLR 5501 (a) (1) should be consistent with the other definitions of "order" found in CPLR articles 22 and 57.

CPLR 5701 (a) (2) provides in relevant part that an appeal may be taken as of right from an order "where the motion it decided was made upon notice." In *Sholes v Meagher*, the Court of Appeals explained that, "[w]ith limited exceptions, an appeal may be taken to the Appellate Division as of right from an order deciding a motion made upon notice when—among other possibilities—the order affects a

substantial right . . . There is, however, no right of appeal from an ex parte order, including an order entered sua sponte" (100 NY2d at 335). The reason for this rule is that, "[w]hile the procedure in this particular case may well have produced a record sufficient for appellate review, there is no guarantee that the same would be true in the next case. Moreover, the amount of notice will vary from case to case, and its sufficiency may often be open to debate. Adherence to the procedure specified by CPLR 5701 (a) uniformly provides for certainty, while at the same time affording the parties a right of review by the Appellate Division" (*id.* at 336).

The Court in *Sholes* essentially defined an order appealable as of right as being the product of a motion made on notice—a definition that should also control when interpreting what constitutes a reviewable "order" under CPLR 5501 (a) (1). The same principles that applied in *Sholes* should apply here because, even if I were to agree with the majority that "in this particular case" the transcript "produced a record sufficient for appellate review," there is "no guarantee that the same would be true in the next case" (100 NY2d at 336). Perhaps in another case this Court will require motion papers or, at the opposite extreme, it may not require transcripts of the relevant argument in the record at all. One can imagine a variety of hypothetical permutations permitted by the majority's elastic approach, such as permitting appeals from stipulated orders not based on any motion papers, where the parties essentially argue their positions for the first time in their appellate briefs. Thus, the question I raise is how much of a motion record will suffice and how do lawyers and their clients know how much is enough? In short, such an ad hoc approach to reviewability under CPLR 5501 (a) (1) does not provide the "certainty" *Sholes* demands (100 NY2d at 336).

CPLR article 22 defines an "order" as something procured as a result of a written motion on notice (*see* CPLR 2211, 2214). That article establishes the procedure for making motions and for the "time and form of an order" (CPLR 2219; *see* CPLR 2212, 2214). As germane here, CPLR 2212 (a) and (b) bifurcates motions into two general categories, i.e., motions on notice and ex parte motions. Under that "two-track" approach, the former is appealable as of right due to the existence of a record, whereas the latter is generally not appealable —except upon review under CPLR 5704 (a), which does not apply here. The dichotomy between motions on notice and ex parte motions is also reflected in CPLR article 57, which governs what papers can be appealed to this Court. Under that article, interlocutory orders from "motions . . . made upon notice" (CPLR 5701 [a] [2]) are appealable as of right when they meet an enumerated condition in the statute (*see* CPLR 5701 [a] [2] [i]-[viii]). By contrast, an interlocutory "ex parte" order can be reviewed by this Court on an appeal as of right only if the appellant makes a motion on notice to vacate or modify the ex parte order and appeals from the subsequent order (*see* CPLR 5701 [a] [3]; *see also* Siegel & Connors, NY Prac §§ 244, 526 at 467, 1005 [6th ed 2018]). However, "[a]n order on an ex parte application is not appealable" (Siegel & Connors, NY Prac § 244 at 467).

The distinction between written motions on notice and ex parte

motions dates back at least to the Civil Practice Act, effective October 1, 1921 (*see* Carlos C. Alden, A Handbook of Practice Under the Civil Practice Act of New York at 146-153 [2d ed 1921] [Alden]). Like CPLR 2211, the Civil Practice Act defined a motion as "[a]n application for an order" (Alden at 146 [internal quotation marks omitted]). Under the Act, a motion made on notice resulted in a written order reciting the papers relied upon (*see* Alden at 152). I have found nothing in the Civil Practice Act that authorized pretrial oral motions. Rather, a leading treatise about motion practice under the Act explained that pretrial motions were always in writing and made on notice: "Motions may be made either orally or in writing. Oral motions are made only in open court during the course of a trial. Written motions are made before trial or supplementary to the judgment. There are two types of written motions-contested and *ex parte*. (a) Contested motions are made on notice to all adverse parties to afford them an opportunity to submit proofs and to be heard in opposition. (b) *Ex parte* motions do not require the giving of any notice of the application" (Samuel S. Tripp, A Guide to Motion Practice § 1 at 3-4 [1949 rev ed]).

Furthermore, I note that CPLR article 22 and the Civil Practice Act did not originate the requirement of written motions and answering papers. As the First Department stated in 1898: "We do not understand that motions can be granted merely for reasons orally stated by counsel. The opposing party is entitled to be served with the papers upon which the motion was founded; and the decision of the court cannot be based simply upon oral statements of counsel, and that was all that was before the court at the time of the granting of this motion. Either a party is entitled to know the grounds of a motion, or there is no necessity of serving any papers at all, and the moving party may come into court and state orally to the court the grounds upon which he [or she] desires relief and his [or her] motion will be granted" (*Jenkins v Warren*, 25 App Div 569, 570 [1st Dept 1898]).

In short, I have found no clear authority for the proposition that an "order" procured without compliance with CPLR article 22 is an "order" as contemplated by CPLR 5501 (a) (1). Defendants cite various cases in support of their position that their oral motion was procedurally proper.[1] Those cases, however, are distinguishable because they largely involve circumstances where a notice of motion was not provided, but motion papers in some form were eventually supplied. It appears that the fundamental authority for all of those cases is *Matter of Shanty Hollow Corp. v Poladian* (23 AD2d 132 [3d Dept 1965], *affd* 17 NY2d 536 [1966]; *see* Siegel & Connors, NY Prac § 243, at 464 n 11). Although that case stands for the proposition that the court has the discretion under CPLR 2214 (c) to consider "for

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[1] These authorities do not acknowledge, however, Professor Siegel's observation that "the general rule from the cases is that motions must be made on notice" and that "the only time a party should attempt to move ex parte is when a statute or rule explicitly authorizes it" (Siegel & Connors, NY Prac § 244 at 466).

good cause" the papers which will support a motion in the absence of a notice of motion, the fact remains that, unlike here, papers were actually submitted in that case, and the opposing party had an opportunity to respond (*Shanty Hollow Corp.*, 23 AD2d at 134).

Defendants also cite to cases holding that "[t]here is no per se rule against oral motions" (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 107 [1st Dept 2009]; *see Kaiser v J&S Realty*, 173 AD2d 920, 921 [3d Dept 1991], citing, inter alia, *Shanty Hollow Corp.*, 23 AD2d at 133-134). Of course, while it does not preclude oral motions, CPLR article 22 does provide a specific manner by which motions are to be made, and the CPLR states that it "shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges" (CPLR 101). Thus, while oral motions are not precluded by the CPLR, it does not mean that they are reviewable on appeal. I submit instead that, when oral motions result in an order, those orders are not appealable as of right, and the parties have consciously made a decision to chart their own course to forego appellate review thereof.

Where the legislature has provided a specific means for effectuating motion practice and procuring orders, I am at a loss to explain how we can completely ignore it. I do not make that point to elevate form over substance, but to preserve procedures that the legislature enacted to ensure fairness by giving parties sufficient notice and an opportunity to be heard. Ultimately, those procedures allow for effective appellate review and, by effectively overwriting them, I fear that we undermine the process's fairness. When we review interlocutory pretrial orders based on oral motions after making an ad hoc evaluation of the record's sufficiency, we risk being perceived as having done so arbitrarily or according to a result-oriented analysis. As noted above, this Court has already determined that the "order" here was not the product of a motion made on notice and thus, under my analysis, we are precluded from reviewing that "order." Any other approach, such as evaluating the record's sufficiency on a case-by-case basis, provides neither certainty nor predictability (*see Sholes*, 100 NY2d at 335).

I also cannot overstate the importance of fairness in hearing from both sides as CPLR article 22 requires, a value that is undermined by our review of the "order" here. By reviewing the jury trial waiver issue and reversing, this Court does so solely based on spur-of-the-moment oral arguments, without any attempt by defendants to provide a reviewable record on appeal. That review works to plaintiff's detriment inasmuch as he had no real opportunity to present opposition papers, as provided by law, specifying the prejudice he would suffer by being required to suddenly change course and try the case before a jury. I submit that the procedural rules in article 22 provide a minimum level of substantive fairness, which is absent here.

The CPLR does not support an interpretation of the word "order" in CPLR 5501 (a) (1) as allowing review of anything other than an order that is the product of a written motion made on notice. Thus, a court's construction of that word in any other way would result in

judicial legislation, which is to be avoided (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 73), and would require the expansion of the definition of order to also include those procured ex parte, sua sponte, and by oral application. Such an interpretation would effectively render meaningless the procedure set forth in CPLR article 22 because it would allow review of any "order" irrespective of how it was procured when the appeal is from a final judgment. I do not think that the legislature, in providing the generous means to pursue interlocutory appeals, also intended to open the floodgates to our scope of review for any and all nonappealable orders.

Nothing in the CPLR alters the long-standing requirement that, to procure a reviewable "order," pretrial motions must be in writing and on notice to the opposition. While the CPLR authorizes a court, upon "good cause" (CPLR 2214 [c]), to consider on the motion "papers" in addition to those served in accordance with CPLR 2214, it does not follow that motions that are made orally result in a reviewable order. Further, although CPLR 104 provides that the CPLR "shall be liberally construed," a liberal construction does not allow a court to "pre-empt a legislative function and rewrite the provision under discussion" (*Wagner v Cornblum*, 36 AD2d 427, 429 [4th Dept 1971]). In my view, reviewing the "order" here is contrary to the well-established legislative directive requiring that reviewable orders be the product of a motion supported by at least some properly served papers, thereby ensuring a sufficient record for appellate review and fairness for all parties (*see generally* CPLR 5526).

Because I would not review the subject order, I would address the remaining issues raised by defendants and further conclude that there is an insufficient basis in the record to modify the court's apportionment of fault (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]; *Krueger v Wilde*, 204 AD2d 988, 989 [4th Dept 1994]). I conclude, however, that the amount of damages awarded for past and future pain and suffering deviated materially from what would be reasonable compensation (*see* CPLR 5501 [c]). I would therefore modify the judgment by setting aside the award of damages to that extent and grant a new trial on damages for past and future pain and suffering unless plaintiff stipulated to reduce the award to $3.25 million for past pain and suffering and to $7.5 million for future pain and suffering. Lastly, I conclude that defendants failed to meet their burden of establishing that further adjustment to the damages award is warranted under CPLR 4545 (a) (*see generally Kihl v Pfeffer*, 47 AD3d 154, 165-166 [2d Dept 2007]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

978

CA 18-00293

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

ESTATE OF DAVID SMALLEY AND JUDITH SMALLEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HARLEY-DAVIDSON MOTOR COMPANY GROUP LLC,
DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (PAUL BRITTON OF COUNSEL), AND QUARLES & BRADY LLP, MILWAUKEE, WISCONSIN, FOR DEFENDANT-APPELLANT.

LADUCA LAW FIRM, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered June 9, 2017. The judgment, among other things, awarded plaintiffs money damages as against defendant.

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

Memorandum: Plaintiff Judith Smalley and her husband, David Smalley (collectively, plaintiffs), commenced this strict products liability action seeking damages for injuries they sustained while they were riding a motorcycle manufactured by defendant Harley-Davidson Motor Company Group LLC (Harley-Davidson). Harley-Davidson appeals from a judgment entered following a jury trial that awarded plaintiffs damages, and we affirm.

At the time of the accident, David was operating the motorcycle, a Harley-Davidson Ultra Classic Electra Glide purchased new by plaintiffs in 1999, with Judith seated behind him. David had been riding motorcycles for approximately 40 years and had never before been involved in an accident. According to David, the motorcycle unexpectedly lost power while he was navigating a curve in the road at approximately 45 miles per hour. Fearing that he and his wife might get struck from behind by vehicles traveling in the same lane of traffic, David steered the motorcycle off the road and planned to come to a gradual stop. While traveling on a grassy area adjacent to the road, the motorcycle hit a rut in the ground and flipped several times, throwing plaintiffs to the ground. Both plaintiffs sustained serious injuries.

Harley-Davidson contends that Supreme Court abused its discretion

in refusing to give a spoliation charge at trial with respect to the allegedly defective motorcycle, which was salvaged by plaintiffs' insurance company approximately two months after the accident. We disagree. "On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the [evidence was] destroyed with a 'culpable state of mind,' which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense" (*Duluc v AC & L Food Corp.*, 119 AD3d 450, 451 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]; *see Burke v Queen of Heaven R.C. Elementary Sch.*, 151 AD3d 1608, 1608-1609 [4th Dept 2017]).

Here, there is no evidence that plaintiffs sought the destruction of the motorcycle with the intention of frustrating discovery (*see O'Reilly v Yavorskiy*, 300 AD2d 456, 457 [2d Dept 2002]). Judith gave permission to the insurance carrier to salvage the motorcycle almost three years before plaintiffs commenced this action, while she was still in the hospital. This was also while David was in a coma, and well before plaintiffs received the recall notice from Harley-Davidson that prompted them to file suit. Moreover, as the court noted, to the extent that Harley-Davidson was prejudiced as a result of being unable to inspect the motorcycle following the accident, plaintiffs were equally prejudiced (*see McLaughlin v Brouillet*, 289 AD2d 461, 461 [2d Dept 2001]). Under the circumstances, we cannot conclude that the court abused its discretion in refusing to give a spoliation charge.

We reject Harley-Davidson's further contention that the court should have granted its motion for a directed verdict at the close of plaintiffs' proof. " 'A directed verdict pursuant to CPLR 4401 is appropriate when, viewing the evidence in [the] light most favorable to the nonmoving party and affording such party the benefit of every inference, there is no rational process by which a jury could find in favor of the nonmovant' " (*Clune v Moore*, 142 AD3d 1330, 1331 [4th Dept 2016]; *see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Stated otherwise, a directed verdict should be granted only if it would be "utterly irrational" for the jury to render a verdict in favor of the plaintiff (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see generally Mazella v Beals*, 27 NY3d 694, 705 [2016]).

"In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer [or seller] breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]). Here, plaintiffs alleged that their motorcycle was defectively designed because it had a 40-amp circuit breaker in its electrical system, rather than a 50-amp circuit breaker. Plaintiffs asserted that, athough the circuit breaker itself was not defective, the electrical system allegedly produced excessive amperages that caused the circuit breaker to trip and shut off the engine and that the problem was more likely to happen with a 40-amp circuit breaker.

Plaintiffs' evidence at trial established that the 2001, 2002 and 2003 models of plaintiffs' motorcycle were recalled by Harley-Davidson because, according to the recall notice, they had a "condition whereby the 40 Amp. main circuit breaker could open due to reasons other than that for which it was designed, causing an unexpected interruption of all electrical power to the motorcycle." Harley-Davidson later recalled the 1999 models that had an upgraded stator, but plaintiffs' motorcycle had the original stator and was thus not subject to the recall.

Plaintiffs called an expert at trial who testified that, although their 1999 model (without the upgraded stator) was not subject to the recall, it should have been because it was in all respects identical to the recalled 2001, 2002 and 2003 models that undisputedly had a design defect. According to the expert, plaintiffs' motorcycle had the same defect as those recalled models because they all had the same engine specifications and identical circuit breakers, batteries, regulators and alternators. The expert also opined that plaintiffs' 1999 model was identical in all relevant respects to the 1999 models with upgraded stators that were recalled. The only difference was the stators and, according to the expert, the lack of an upgraded stator did not make the 1999 model less prone to losing power. It is undisputed that the expert was qualified to give an opinion on those matters and, although defense counsel vigorously challenged the expert's opinions, there is nothing in the record that renders the expert's testimony incredible as a matter of law.

We note that, because plaintiffs offered evidence of a specific design defect through the testimony of their expert, it was not necessary for plaintiffs to exclude all other possible causes of the accident (*see Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]). In any event, plaintiffs did exclude the other possible causes by establishing that the motorcycle unexpectedly lost power while David was operating it.

Contrary to the contention of Harley-Davidson, the evidence presented by plaintiffs did not establish that the accident was caused by driver error. At trial, Harley-Davidson presented the theory that the accident was caused by rider error and that the engine did not shut off, as plaintiffs alleged. More specifically, Harley-Davidson asserted that David negligently or intentionally drove the motorcycle off the roadway because he failed to negotiate a curve in the road or because he wanted to pass vehicles that had slowed ahead of him. Harley-Davidson also suggests that the accident may have resulted from Judith leaning the wrong way while the motorcycle was negotiating the curve. Thus, according to Harley-Davidson, plaintiffs' expert, in rendering his opinion that a design defect existed, improperly relied on the "inaccurate" or "mistaken assumption" that the motorcycle lost power.

In support of its contention that plaintiffs' evidence established driver error, Harley-Davidson relies in part on statements David made to a deputy sheriff who responded to the scene of the accident. While laying on the ground injured, David told the deputy

that, as he was entering the curved portion of the road, he "felt the weight of his passenger shift in the opposite direction." David did not tell the deputy that the motorcycle lost power. Harley-Davidson asserts that, if the motorcycle had lost power, David would surely have mentioned it to the deputy. However, plaintiffs' evidence also demonstrated that the deputy spoke to David for only 15 to 30 seconds while he and his wife were suffering from grievous injuries. Under the circumstances, the jury might well have concluded that David's primary concern at the time was not to give a full and complete accounting of the accident to the deputy.

Additionally, although plaintiffs introduced David's full deposition testimony, Harley-Davidson relies only on those portions of David's deposition in which he testified that he did not know whether the power shut off on the motorcycle. A review of the entire deposition testimony establishes that, immediately after answering "I don't know" to the question whether the engine shut off, David stated: "That's – I couldn't get it to do anything with the throttle and the gears were engaged . . . I didn't hear any clunks or anything, like I blew a rod or anything." David went on to state, "[t]here had to be a power failure or it wouldn't have shutdown like that. I don't know where it occurred." When counsel for Harley-Davidson reminded David that he had just said that he did not know whether the power shut off, David responded: "Really? How could I know? I'm not an engineer. I'm a rider and the bike was in dire straits. I had no control over it with the engine. We were on grass. My mind was not reading the bike, it was reading safety." David also stated that the motorcycle was not responding to "anything normal," and that he tried to restart it after it stalled, to no avail. He explained that the motorcycle could not have been running at the time of the accident because he had hit the restart button and did not hear the screeching noise that is heard when one turns on the ignition to a vehicle that is already running.

Further, plaintiffs presented the testimony of an eyewitness to the accident, who testified that he did not hear the motorcycle, which seemed odd to him because Harley-Davidson motorcycles make a lot of noise. The witness further testified that he did not see the headlight on plaintiffs' motorcycle, indicating that the engine had shut down. The witness had no interest in the outcome of the case and his testimony, although not dispositive, supports plaintiffs' claim that the engine shut down.

In sum, based on the evidence offered by plaintiffs, it cannot be said that it was irrational for the jury to conclude that plaintiffs experienced a "quit-while-riding" incident and that the stalling of the engine was a substantial factor in causing the accident and plaintiffs' resulting injuries. Nor was it irrational for the jury to accept the opinion of plaintiffs' expert that the motorcycle had a design defect due to its use of a 40-amp circuit breaker. We therefore conclude that the court properly denied Harley-Davidson's motion for a directed verdict and allowed the case to be decided by the jury.

We have reviewed Harley-Davidson's remaining contention and conclude that it lacks merit.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1089

CA 18-00793

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

JAMES J. KELLY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRENDA J. LEAIRD KELLY, DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAMES P. RENDA, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 15, 2017. The order, insofar as appealed from, denied plaintiff's application to terminate maintenance payments to defendant.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the application is granted.

Memorandum: Plaintiff appeals from an order that, inter alia, denied his application to modify the parties' judgment of divorce by terminating his maintenance obligation based on defendant's cohabitation with another man. Pursuant to the parties' separation and property settlement agreement, which was incorporated but not merged into the judgment of divorce, plaintiff's maintenance obligation terminates if defendant remarries or if there is "a judicial finding of cohabitation pursuant to Domestic Relations Law § 248." Following an evidentiary hearing, Supreme Court denied the application. Plaintiff appeals, and we reverse the order insofar as appealed from.

Pursuant to Domestic Relations Law § 248, cohabitation means "habitually living with another person" (*see Perez v Perez-Brache*, 148 AD3d 1647, 1647-1648 [4th Dept 2017]; *Mastrocovo v Capizzi*, 87 AD3d 1296, 1297-1298 [4th Dept 2011]), but simply residing with another adult is typically not considered to be "cohabitation," as that term is generally understood (*see generally Vega v Papaleo*, 119 AD3d 1139, 1139-1140 [3d Dept 2014]). Further, "while no single factor—such as residing at the same address, functioning as a single economic unit, or involvement in a romantic or sexual relationship—is determinative, the [Court of Appeals] found that a 'common element' in the various dictionary definitions [of cohabitation] is that they refer to people living together 'in a relationship or manner resembling or suggestive

of marriage' " (*id.* at 1140, quoting *Graev v Graev*, 11 NY3d 262, 272 [2008]).

At the hearing, defendant and the man with whom she lives testified that they have a friendship and landlord-tenant relationship. However, it is undisputed that defendant reconnected with the man on a dating website and moved directly into his home from her marital residence, after which they commenced a sexual relationship. They have taken multiple vacations together, including for his family reunion, and they sometimes shared a room while on those vacations. Defendant wears a diamond ring on her left hand that the man purchased. They also testified regarding their complicated financial interdependence. For example, defendant pays varying amounts of rent to the man depending on her financial situation, and the man pays defendant for work she purportedly performs for him. Notably, defendant did not declare as income the amounts she received from the man for the work she performed, and the man did not declare those amounts as an expense. Further, contrary to the court's finding, the record does not show that the sexual relationship between defendant and the man had ended. We therefore conclude that plaintiff established by a preponderance of the evidence that defendant was engaged in a relationship or living with the man in a manner resembling or suggestive of marriage (*see generally Graev*, 11 NY3d at 272; *Clark v Clark*, 33 AD3d 836, 838 [2d Dept 2006]; *Matter of Ciardullo v Ciardullo*, 27 AD3d 735, 736 [2d Dept 2006]), and thus the court erred in denying his application.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1102

KA 15-01730

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANQUAWN LINDER, 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 (Joseph E. Fahey, J.), rendered September 29, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). The conviction arises out of a police-executed traffic stop during which defendant handed a bag containing a "softball"-sized amount of crack cocaine to an accomplice, who then secreted the contraband between his buttocks. We now affirm.

Defendant first challenges the legal sufficiency and weight of the evidence underlying his conviction, arguing that the accomplice's testimony was insufficiently corroborated and that the People therefore failed to establish that defendant possessed the drugs recovered from the accomplice's buttocks. At trial, the accomplice testified that defendant possessed the drugs on his person before the traffic stop and that, shortly after the car was pulled over, defendant used his right arm to pass the bag of drugs to the accomplice. The accomplice testified that he then immediately stuffed the bag of drugs between his buttocks to avoid detection. The accomplice's testimony was corroborated by the testimony of a police officer who witnessed defendant reach over toward the accomplice with his right hand and who, seconds later, saw the accomplice's hand emerge from the back of his pants.

Contrary to defendant's contention, the officer's testimony satisfies the corroboration requirement of CPL 60.22 because it " 'tends to connect . . . defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth' " (*People v Reome*, 15 NY3d 188, 192 [2010]; *see People v Davis*, 28 NY3d 294, 303 [2016]; *People v Philbert*, 270 AD2d 210, 210 [1st Dept 2000], *lv denied* 95 NY2d 856 [2000]; *see also People v Young*, 48 AD3d 901, 903 [3d Dept 2008]; *People v Arrington*, 31 AD3d 801, 803 [3d Dept 2006], *lv denied* 7 NY3d 865 [2006]; *cf. People v Johnson*, 1 AD3d 891, 892-893 [4th Dept 2003]). Notably, " '[t]he role of the additional evidence is only to connect the defendant with the commission of the crime, not to prove that he committed it' " (*Reome*, 15 NY3d at 192). We thus conclude that there is legally sufficient evidence to establish defendant's possession of the subject cocaine (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Nichols*, 163 AD3d 39, 49 [4th Dept 2018]). Moreover, upon our independent review of 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 have no reasonable doubt that defendant possessed the drugs at issue (*see e.g. People v La Porte*, 217 AD2d 821, 821-822 [3d Dept 1995]). As such, the verdict is not against the weight of the evidence (*see generally People v Sanchez*, 32 NY3d 1021, 1023 [2018]; *People v Kancharla*, 23 NY3d 294, 302-303 [2014]).

Defendant next contends that the superceding indictment should be dismissed because the People violated his right to testify at the superceding grand jury presentation (*see generally* CPL 190.50 [5]). Defendant waived that contention, however, "by failing to move to dismiss the [superceding] indictment *on that ground* within five days after he was arraigned" (*People v Roach*, 1 AD3d 963, 964 [4th Dept 2003] [emphasis added], *lv denied* 1 NY3d 579 [2003], *reconsideration denied* 1 NY3d 633 [2004], *cert denied* 543 US 853 [2004]; *see* CPL 190.50 [5] [c]; *People v Osborne*, 88 AD3d 1284, 1286 [4th Dept 2011], *lv denied* 19 NY3d 999 [2012], *reconsideration denied* 19 NY3d 1104 [2012]).

In any event, the record establishes that defendant's right to testify was not violated. A person's right to testify before the grand jury on his or her own behalf is explicitly conditioned upon serving the "district attorney" with a "written notice" of intent to testify (CPL 190.50 [5] [a]). "The requirements of CPL 190.50 are to be strictly enforced" (*People v Kirk*, 96 AD3d 1354, 1359 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013] [internal quotation marks omitted]; *see People v Lawrence*, 64 NY2d 200, 206-207 [1984]). Here, although defendant sent a letter to the trial judge asking to testify before the grand jury and later orally reiterated that desire in open court, it is undisputed that defendant never "serve[d] upon the *district attorney* . . . a *written* notice" of his intent to testify as required by CPL 190.50 (5) (a) (emphasis added). Defendant thus failed to effectively invoke his statutory right to testify before the grand jury (*see People v Saldana*, 161 AD2d 441, 444 [1st Dept 1990], *lv denied* 76 NY2d 944 [1990]). "In the absence of an effective request to testify, the People were entitled to resubmit the charges

without notice to defendant" and without affording him an opportunity to testify (*People v Nix*, 265 AD2d 891, 891 [4th Dept 1999]; *cf. People v Greco*, 230 AD2d 23, 27-28 [4th Dept 1997], *lv denied* 90 NY2d 858 [1997], *reconsideration denied* 90 NY2d 940 [1997]). Contrary to defendant's assertion, the People were not obligated to preemptively notify him of the superceding grand jury proceeding because, at that time, there was no "currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending [superceding] grand jury proceeding" (CPL 190.50 [5] [a]; *see People v Lunney*, 84 Misc 2d 1090, 1095-1096 [Sup Ct, New York County 1975]; *see also People v Washington*, 42 AD2d 677, 677 [4th Dept 1973]; *see generally People v Franco*, 86 NY2d 493, 499-500 [1995]). There was thus no basis to dismiss the superceding indictment pursuant to CPL 190.50 (5) (*see People v Ponce*, 276 AD2d 921, 921-922 [3d Dept 2000], *lv denied* 96 NY2d 786 [2001]).

Defendant next contends that the prosecutor committed a *Batson* violation by peremptorily striking prospective juror 17, a black female. The prosecutor offered three undisputedly race-neutral reasons for striking the subject venireperson: (1) she was "not very forthcoming in her answers"; (2) she was "kind of quiet"; and (3) she was employed as a nursing assistant. County Court rejected defendant's *Batson* challenge, finding that the prosecutor's rationale for striking the subject venireperson was not pretextual. Initially, by failing to controvert the first and third race-neutral reasons offered by the prosecutor, defendant's claims of pretext as to those reasons are unpreserved for appellate review (*see People v Rubin*, 143 AD3d 846, 846 [2d Dept 2016], *lv denied* 28 NY3d 1126 [2016]; *People v Knowles*, 79 AD3d 16, 21 [3d Dept 2010], *lv denied* 16 NY3d 896 [2011]; *People v Holloway*, 71 AD3d 1486, 1486-1487 [4th Dept 2010], *lv denied* 15 NY3d 774 [2010]).

In any event, a "trial court's determination whether a proffered race-neutral reason is pretextual is accorded 'great deference' on appeal" (*People v Hecker*, 15 NY3d 625, 656 [2010]), and we see no reason to disturb the court's determination that the prosecutor's explanations in this case were not pretextual (*see e.g. People v English*, 119 AD3d 706, 706 [2d Dept 2014], *lv denied* 24 NY3d 1043 [2014]; *Holloway*, 71 AD3d at 1486-1487). Defendant's insistence that the prosecutor was obligated to link the venireperson's occupation with an "issue in the case" reflects a fundamental misapprehension of the *Batson* framework; indeed, it is well established that prosecutors are *"not* required to 'show that the peremptory challenge was specifically related to the facts of the case' " (*Hecker*, 15 NY3d at 664 [emphasis added]; *see People v Toliver*, 102 AD3d 411, 411 [1st Dept 2013], *lv denied* 21 NY3d 1011 [2013], *reconsideration denied* 21 NY3d 1077 [2013]). Nor need the prosecutor's race-neutral reasons " 'rise to the level of a challenge for cause' " in order to survive *Batson*'s step-three inquiry into pretextuality (*James*, 99 NY2d at 270, quoting *People v Allen*, 86 NY2d 101, 106 [1995]), and "there is no authority [holding] that a proffered race-neutral reason for seeking the peremptory strike of a prospective juror, while actually non-pretextual, was so insignificant as to be the equivalent of

pretext" (*People v Sprague*, 280 AD2d 954, 955 [4th Dept 2001]). The court therefore properly denied defendant's *Batson* challenge.

Defendant next contends that defense counsel rendered ineffective assistance at trial. First, defendant faults his attorney for failing to request a missing witness charge for a confidential informant who allegedly set up the drug deal to which defendant and the accomplice were driving when they were stopped by police. We reject that contention. Had defense counsel sought such a charge, the prosecutor might have responded by moving to reopen his case in order to call the informant to the stand (*see e.g. People v Miller*, 259 AD2d 1031, 1031 [4th Dept 1999], *lv denied* 93 NY2d 927 [1999]; *People v Parilla*, 158 AD2d 556, 557 [2d Dept 1990]). Such testimony could have undermined defendant's case and might have even resulted in his conviction on certain counts of which he was acquitted. We thus perceive a valid strategic basis for counsel's failure to request a missing witness instruction (*see People v Peake*, 14 AD3d 936, 937-938 [3d Dept 2005]; *People v Cruz*, 165 AD2d 205, 207-208 [1st Dept 1991], *lv denied* 77 NY2d 959 [1991]; *cf. People v Davydov*, 144 AD3d 1170, 1173 [2d Dept 2016], *lv denied* 29 NY3d 996 [2017]; *see generally People v Rivera*, 71 NY2d 705, 709 [1988]). Moreover, any testimony by the informant would have pertained only to the counts upon which defendant was acquitted. Thus, defendant suffered no prejudice from the absence of a missing witness instruction under these circumstances (*see People v Spallone*, 150 AD3d 556, 557 [1st Dept 2017], *lv denied* 29 NY3d 1134 [2017]; *People v Neil*, 289 AD2d 611, 613 [3d Dept 2001], *lv denied* 97 NY2d 758 [2002]).

Defendant's second claim of ineffectiveness centers on defense counsel's failure to exploit what defendant characterizes as a discrepancy between the police officer's trial testimony and suppression hearing testimony. At trial, the officer testified that, while questioning the accomplice, he told the accomplice that he had seen defendant give the accomplice the bag of drugs during the traffic stop. At the suppression hearing, the officer testified that he had not actually seen what, if anything, defendant handed the accomplice during the stop. There is nothing contradictory about these respective accounts, however. The officer never claimed at trial to have actually seen what, if anything, defendant handed to the accomplice; rather, the officer merely testified to using an interrogatory ruse with the accomplice in order to secure a confession. Thus, the officer's trial testimony about the interrogatory ruse was not inconsistent with his suppression hearing testimony about his actual observations during the stop. "Since the purported inconsistency was illusory, trial counsel was not deficient in failing to exploit it on cross-examination" (*People v Lewis*, 139 AD3d 571, 572 [1st Dept 2016], *lv denied* 28 NY3d 932 [2016], *reconsideration denied* 28 NY3d 1029 [2016]; *see People v Casey*, 149 AD3d 771, 772 [2d Dept 2017], *lv denied* 29 NY3d 1077 [2017]).

Third, defendant argues that defense counsel was ineffective for failing to challenge two alleged instances of prosecutorial misconduct. Again, we reject that contention. With respect to the first alleged instance of prosecutorial misconduct, it is well

established that a "defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]), and here, any challenge to the evidence of, or to the prosecutor's summation references to, the multiple cell phones discovered during the traffic stop would have been unavailing (*see e.g. People v Cartagena*, 9 AD3d 468, 468 [2d Dept 2004], *lv denied* 3 NY3d 672 [2004]; *People v Grajales*, 294 AD2d 657, 658 [3d Dept 2002], *lv denied* 98 NY2d 697 [2002]; *see also People v Porter*, 153 AD3d 857, 857 [2d Dept 2017], *lv denied* 30 NY3d 1022 [2017]). With respect to the second alleged instance of prosecutorial misconduct, any impropriety in the prosecutor's summation remark that the officers "weren't expecting to find drugs or anything in the[car]" was not sufficiently egregious to deprive defendant of a fair trial; as such, it cannot be said that defense counsel was ineffective for failing to object to that comment (*see People v Grant*, 160 AD3d 1406, 1407 [4th Dept 2018], *lv denied* 31 NY3d 1148 [2018]).

Fourth, because—as explained above—defendant had no viable grounds for securing the dismissal of the superceding indictment pursuant to CPL 190.50 (5), defense counsel's failure to seek the indictment's dismissal on that basis was not ineffective (*see People v Rotger*, 129 AD3d 1330, 1332 [3d Dept 2015], *lv denied* 26 NY3d 1011 [2015], 27 NY3d 1005 [2016]; *People v Caban*, 89 AD3d 1321, 1322-1323 [3d Dept 2011]). To the extent that defendant also contends that counsel was ineffective for failing to serve a proper cross grand jury notice prior to the superceding presentation, that contention lacks merit (*see People v Simmons*, 10 NY3d 946, 949 [2008]).

Given defendant's resentencing, we do not consider his challenge to the severity of his original sentence, and we dismiss the appeal from the judgment to that extent (*see People v Robinson*, 151 AD3d 1851, 1852 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; *People v Dean*, 41 AD3d 495, 495 [2d Dept 2007], *lv denied* 9 NY3d 1005 [2007]). The resentence itself is not before us because defendant did not appeal therefrom (*see People v Kuras*, 49 AD3d 1196, 1197 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]; *cf. Dean*, 41 AD3d at 495-496). Defendant's remaining contention is unpreserved for appellate review, and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see People v Cullen*, 110 AD3d 1474, 1475 [4th Dept 2013], *affd* 24 NY3d 1014 [2014]; *see generally* CPL 470.15 [6] [a]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1109

CA 18-00951

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

IN THE MATTER OF GROCHOLSKI CADY ROAD, LLC,
PETITIONER-PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

THOMAS SMITH, JR., INDIVIDUALLY, AND IN HIS
OFFICIAL CAPACITY AS HIGHWAY SUPERINTENDENT
OF THE TOWN OF WESTERN, TOWN OF WESTERN,
RESPONDENTS-DEFENDANTS-RESPONDENTS,
AND NOAH PALCZYNSKI,
RESPONDENT-DEFENDANT-APPELLANT.

THE AYERS LAW FIRM, PLLC, PALATINE BRIDGE (KENNETH L. AYERS OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, UTICA (RAYMOND A. MEIER OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered August 14, 2017 in a CPLR article 78 proceeding and a declaratory judgment action. The order, among other things, denied in part the motion of respondent-defendant Noah Palczynski to dismiss the petition/complaint.

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

Opinion by NEMOYER, J.:

Relief under CPLR article 78 is available only against a limited subset of official and institutional parties. It follows that the four-month statute of limitations applicable to article 78 proceedings cannot be imported to bar a declaratory judgment action against a private individual not subject to article 78.

FACTS

Petitioner-plaintiff (plaintiff), a limited liability corporation, owns land on Cady Road in respondent-defendant Town of Western, which is located in Oneida County. Respondent-defendant Noah Palczynski (defendant) owns land "directly opposite" plaintiff's property on Cady Road. Defendant is a natural person who occupies no governmental office or position.

In 2012, respondent-defendant Thomas Smith, Jr., the Highway Superintendent of the Town of Western, discontinued a portion of Cady Road. Plaintiff and defendant disagree about what portion of the road was actually discontinued, and plaintiff accuses defendant of erecting various obstructions to improperly block the road. Plaintiff asked the Highway Superintendent for help, but he declined to take any action against defendant.[1]

Plaintiff then commenced the instant hybrid CPLR article 78 proceeding/declaratory judgment action against defendant, the Highway Superintendent, and the Town itself. Liberally construed, the petition/complaint seeks:

1. a declaration and a judgment in the nature of mandamus to review that a certain portion of Cady Road was not lawfully discontinued and that defendant, with the assistance of the Town, had unlawfully closed and obstructed a portion of that road (*see* CPLR 3001; 7803 [3]);

2. a declaration that the Town and its Highway Superintendent "failed and refused to execute and carry out a duty enjoined upon them by law, namely keeping [the disputed] portion of Cady Road . . . open and free and clear of obstruction" (*see* CPLR 3001);

3. a judgment in the nature of mandamus to compel "directing [the defendants, the Town, and the Highway Superintendent] to reopen the [disputed] portion of Cady Road . . . and to take such steps as are necessary to remove obstructions and impediments to the use of the road" (*see* CPLR 7803 [1]); and

4. a judgment in the nature of mandamus to compel "directing and ordering [the Highway Superintendent] to exercise his authority under Highway Law § 319 to demand that [defendant] remove such obstructions as he may have placed in Cady Road and, in the event of his failure to do so, that [the Highway Superintendent] cause such obstructions to be removed and to levy the cost of such removal against the property of [defendant]" (*see* CPLR 7803 [1]).

Defendant moved to dismiss the petition/complaint in lieu of

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[1] Throughout this case, defendant has repeatedly insisted that the Highway Superintendent rendered a "determination" on August 8, 2016 that defendant "was not blocking the road and that the complaints [regarding obstructions] were unfounded." As plaintiff points out, however, no such formal "determination" appears in the record. Rather, the record merely contains oblique hearsay references to such a determination within other documents.

answering. Insofar as relevant here, defendant advanced three arguments to support his motion: (1) the CPLR article 78 claims were time-barred (*see* CPLR 217 [1]; 7804 [f]); (2) the article 78 claims for mandamus to compel improperly sought to compel the performance of discretionary acts (*see* CPLR 7804 [f]); and (3) the claims for declaratory relief were subject to the same four-month statute of limitations as the article 78 claims and were thus equally time-barred (*see* CPLR 3211 [a] [5]).

Plaintiff opposed the motion, arguing that its claims were timely. Of particular import, however, is the following language from plaintiff's attorney affirmation:

> "the nature of this case requires a judicial determination as to the rights of the [private] parties [i.e., plaintiff and defendant] to use Cady Road. This involves the legal interpretation of the 2012 [road closure] Resolution and would settle the rights of private [parties] ([plaintiff and defendant]) as well as public entities (the Town Board and the Highway Superintendent). Although the Court may have jurisdiction to compel the Highway Superintendent to act, it would be far more efficient to adjudicate and determine the legal rights of the parties via a declaratory judgment."[2]

Supreme Court, inter alia, dismissed the CPLR article 78 claims, but it refused to dismiss the declaratory claims.[3] Defendant now appeals. Plaintiff, however, did not cross appeal to contest the dismissal of its article 78 claims.

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[2] In his reply papers, defendant argued that "a request for a declaratory judgment regarding the status of Cady Road is not part of the [petition/complaint]." But defendant is simply wrong in that regard. "Read liberally in plaintiff[']s favor" (*Vandashield Ltd. v Isaacson*, 146 AD3d 552, 553 [1st Dept 2017]), the petition/complaint as a whole (especially the first claim) is easily broad enough to state a request for declaratory relief regarding "the status of Cady Road" as between itself and defendant. Tellingly, defendant does not press this argument on appeal.

[3] Although the court also purported to "convert" the article 78 proceeding into a declaratory judgment action, that formality was unnecessary since this case was already filed, in part, as a declaratory judgment action (*see e.g. Parker v Town of Alexandria*, 138 AD3d 1467, 1467 [4th Dept 2016]; *Centerville's Concerned Citizens v Town Bd. of Town of Centerville*, 56 AD3d 1129, 1129 [4th Dept 2008]).

DISCUSSION

I

On appeal, defendant devotes almost his entire brief to attacking the timeliness and merit of plaintiff's CPLR article 78 claims. Those particular arguments, however, are not properly before us. After all, the court actually gave defendant the very thing he wanted vis-à-vis the article 78 claims: their complete dismissal. Accordingly, defendant is not aggrieved by the dismissal of the article 78 claims, and he has no basis to continue challenging those claims on this appeal (*see T.D. v New York State Off. of Mental Health*, 91 NY2d 860, 862 [1997]; *Parker v Town of Alexandria*, 163 AD3d 55, 58 [4th Dept 2018]). Contrary to defendant's assertion at oral argument in this appeal, the fact that the court's decision " 'may contain language or reasoning which [defendant] deem[s] adverse to [his] interests does not furnish [him] with a basis . . . to take an appeal' " (*Matter of Olney v Town of Barrington*, 162 AD3d 1610, 1611 [4th Dept 2018], quoting *Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472-473 [1986]). In short, the vast bulk of defendant's brief seeks only to resurrect the already-buried CPLR article 78 proceeding, and that he cannot do.[4]

II

We turn, then, to the only portion of defendant's appeal that is properly before us: his challenge to the timeliness of plaintiff's declaratory claims. On that front, defendant argues that those claims are untimely and should have been dismissed because they were not brought within four months of the Highway Superintendent's purported August 8, 2016 determination that he (defendant) "was not blocking the road and that the complaints [regarding obstructions] were unfounded." Because plaintiff had only four months to file a CPLR article 78 petition against the Highway Superintendent's purported determination, defendant reasons, that same deadline must be imported and applied to plaintiff's factually-related declaratory claims.

We disagree completely. Even assuming, arguendo, that such a "determination" was ever made (*see generally* n 1, *supra*), defendant cannot weaponize it as a basis to dismiss the declaratory claims as

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[4] For purposes of the foregoing aggrievement analysis, we have assumed, arguendo, that defendant (as a private citizen) had standing to move against the article 78 claims in the first instance. Nothing said herein should be construed to endorse that proposition, however (*see generally Parker*, 138 AD3d at 1468 ["It is well established that separate procedural rules apply to declaratory judgment actions and CPLR article 78 proceedings" (internal quotation marks omitted)]; *cf. generally Matter of 381 Search Warrants Directed to Facebook, Inc. [New York County Dist. Attorney's Off.]*, 29 NY3d 231, 278-281 [2017, Wilson, J., dissenting]; *Matter of Town of Wallkill v New York State Bd. of Real Prop. Servs.*, 267 AD2d 788, 789-790 [3d Dept 1999]).

untimely. Here is why.

A declaratory judgment action is generally subject to a six-year statute of limitations (*see* CPLR 213 [1]). "[W]here a declaratory judgment action involves claims that could have been made in another proceeding for which a specific limitation period is provided," however, "the action is subject to the shorter limitations period" (*Save the View Now v Brooklyn Bridge Park Corp.*, 156 AD3d 928, 931 [2d Dept 2017]; *see Solnick v Whalen*, 49 NY2d 224, 229-230 [1980]). Thus, the question of whether plaintiff's declaratory claims against defendant "are subject to the four-month statute of limitations period under CPLR article 78 or the residuary six-year limitations period of CPLR 213 (1) turns on whether the *parties' rights* could have been resolved in an article 78 proceeding" (*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007] [emphasis added]). Put differently, only if "the rights of the *parties* sought to be stabilized in the action for declaratory relief are, or have been, open to resolution through [an article 78 proceeding]" will the four-month deadline applicable to such proceedings be imported and applied to the declaratory judgment action (*Solnick*, 49 NY2d at 229-230 [emphasis added]). And for the following two interrelated reasons, there can be no doubt that the rights of plaintiff and defendant *vis-à-vis each other* were not "open to resolution" in an article 78 proceeding (*id.* at 229).

First, defendant is not a "body or officer" within the meaning of CPLR 7802 (a), i.e., he is not a "court, tribunal, board, corporation, [or] officer," and it is well established that article 78 relief is available only against a "body or officer" as defined by section 7802 (a) (*see* CPLR 7803; *208 E. 30th St. Corp. v Town of N. Salem*, 88 AD2d 281, 285 [2d Dept 1982] ["a proceeding under article 78 is a proceeding against a body or officer *only*"]; *see e.g. Brasseur v Speranza*, 21 AD3d 297, 297 [1st Dept 2005] ["unincorporated associations . . . are not amenable to article 78 proceedings"]; *Ferrick v State of New York*, 198 AD2d 822, 823 [4th Dept 1993] ["The State . . . is not a 'body or officer' against whom an article 78 proceeding may be brought"]). Indeed, CPLR article 78 is entitled "Proceeding Against Body or Officer," and a special proceeding "is improperly brought insofar as it attempts to obtain relief pursuant to CPLR article 78 against a private party" like defendant (*Matter of Board of Assessors v Hammer*, 181 AD2d 885, 885 [2d Dept 1992]).

Second, as plaintiff noted below, the true gravamen of its declaratory claims "requires a judicial determination as to the rights of the parties to use Cady Road [which] would [thereby] settle the rights of private [parties]," i.e., plaintiff and defendant. And it is well established that such a contest between the "rights of private [parties]" cannot be adjudicated in an article 78 proceeding (*see Matter of Phalen v Theatrical Protective Union No. 1*, 22 NY2d 34, 39-40 [1968], *cert denied* 393 US 1000 [1968]; *Lacks v City of New York*, 201 AD2d 309, 311 [1st Dept 1994]).

Thus, because an article 78 proceeding was not a "proper vehicle"

for plaintiff's private claims for declaratory relief *against defendant*, the four-month "limitations period set forth in CPLR 217 [1] is not applicable to [such claims] and the six-year statute of limitations set forth in CPLR 213 (1) applies instead" (*East Suffolk Dev. Corp. v Town Bd. of Town of Riverhead*, 59 AD3d 661, 662 [2d Dept 2009]; *see Kamhi v Town of Yorktown*, 141 AD2d 607, 609 [2d Dept 1988], *affd* 74 NY2d 423 [1989]; *Lacks*, 201 AD2d at 311). And because there is no dispute that the complaint was filed within *that* six-year period, it follows that the court properly refused to dismiss the declaratory claims as time-barred.

CONCLUSION

Accordingly, in light of the foregoing, the order should be affirmed in all respects.

Mark W. Bennett

Entered: March 15, 2019

Clerk of the Court

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

1131

CAF 17-01276

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

IN THE MATTER OF ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF DECEMBER R.M., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS N.D., RESPONDENT-APPELLANT.

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

LAL, GINGOLD & FRANKLIN, PLLC, SYRACUSE (SUJATA LAL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 5, 2017 in a proceeding pursuant to Family Court Act article 5. The order, inter alia, denied that part of the motion of respondent seeking a cancellation of child support arrears.

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

Memorandum: Respondent was adjudicated the father of the subject child by a 1999 order of filiation entered on respondent's default. He moved by order to show cause filed in 2016 to vacate the default order of filiation and cancel his child support arrears, after another man was adjudicated the father of the same child in a Mississippi court, based upon, inter alia, DNA test results. He now appeals from an order that granted his motion in part and vacated the order of filiation, but denied that part of his motion seeking to vacate the arrears. We affirm.

The Family Court Act grants Family Court continuing jurisdiction over any child support proceeding, including the power to modify or vacate orders issued thereunder, but the Act unequivocally provides that the court "shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section" (§ 451 [1]). The purpose of that provision is to "preclude[] forgiveness of child support arrears to ensure that respondents are not financially rewarded for failing either to pay the order or to seek its modification . . . Under the present enforcement scheme, then, [n]o excuses at all are tolerated with respect to child support" (*Matter of Dox v Tynon*, 90 NY2d 166, 173-174 [1997] [internal

quotation marks omitted]; *see Lvovsky v Lvovsky*, 161 AD3d 542, 542 [1st Dept 2018]; *Matter of Pratt v Pratt*, 154 AD3d 1201, 1203 [3d Dept 2017]; *Matter of Cadwell v Cadwell*, 124 AD3d 649, 650 [2d Dept 2015]; *Rainey v Rainey*, 83 AD3d 1477, 1479 [4th Dept 2011]). Therefore, given that statute and the Court of Appeals' pronouncement that, "[u]nder the current scheme for enforcing court-ordered child support obligations, courts may not reduce or cancel any arrears that have accrued" (*Dox*, 90 NY2d at 168), the court properly determined that it had no authority to vacate the child support arrears that arose prior to the filing of the current motion to vacate.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1137

CA 18-00782

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

DENISE AMBROSE AND DAVID AMBROSE, INDIVIDUALLY, AND AS PARENTS AND NATURAL GUARDIANS OF MADELEINE AMBROSE, AN INFANT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JAMES E. BROWN, JR., M.D., ET AL., DEFENDANTS, SUCHITRA KAVETY, M.D., JANE FIELDS, C.N.M., INDIVIDUALLY AND AS OFFICERS, AGENTS AND/OR EMPLOYEES OF ASSOCIATES FOR WOMEN'S MEDICINE, AND ASSOCIATES FOR WOMEN'S MEDICINE, BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, DEFENDANTS-RESPONDENTS.

BOTTAR LAW, PLLC, SYRACUSE (SAMANTHA C. RIGGI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

FAGER AMSLER KELLER & SCHOPPMANN, LLP, LATHAM (NANCY E. MAY-SKINNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered June 15, 2017. The order denied the motion of plaintiffs to set aside the verdict and for a new trial.

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

Memorandum: Plaintiffs, individually and on behalf of their infant daughter, commenced this medical malpractice action against, inter alia, Suchitra Kavety, M.D., Jane Fields, C.N.M., and Associates for Women's Medicine (collectively, defendants), seeking damages for injuries allegedly sustained by the child during labor and delivery. Following a trial, the jury returned a verdict in favor of defendants, and plaintiffs made an immediate oral motion for a mistrial based on substantial juror confusion, which was granted by Supreme Court (Hafner, A.J.). Defendants thereafter made a posttrial motion pursuant to, inter alia, CPLR 2221 and 4404 (a), seeking leave to reargue their opposition to the mistrial motion and/or an order reversing the court's decision, reinstating the verdict, and directing that judgment be entered in their favor. Plaintiffs opposed the motion, again arguing that there was substantial juror confusion, but did not raise any other ground for setting aside the verdict. The court denied the motion, but on defendants' appeal we reversed the

order, granted defendants' motion, and reinstated the verdict (*Ambrose v Brown*, 142 AD3d 1312, 1313 [4th Dept 2016]). After our decision, plaintiffs made a posttrial motion pursuant to CPLR 4404 (a) to set aside the verdict in the interest of justice, raising various alleged trial errors (November 2016 motion). Supreme Court (Gilbert, J.) denied the November 2016 motion, and we now affirm.

Plaintiffs' November 2016 motion was properly denied because it was untimely (*see Gropper v St. Luke's Hosp. Ctr.*, 255 AD2d 123, 123 [1st Dept 1998]). Pursuant to CPLR 4405, a posttrial motion to set aside a jury verdict shall be made within 15 days after the jury renders its verdict or is discharged. Here, however, plaintiffs' November 2016 motion was made almost two years after the jury rendered its verdict and was discharged. Moreover, plaintiffs' November 2016 motion was in violation of CPLR 4406, which provides that, "[i]n addition to motions made orally immediately after decision, verdict or discharge of the jury, there shall be only one motion under this article with respect to any decision by a court, or to a verdict on issues triable as of right by a jury; and each party shall raise by the motion or by demand under rule 2215 every ground for post-trial relief then available to [the party]." Under that provision, plaintiffs, in opposition to defendants' posttrial motion, were required to "raise . . . every ground" supporting the new trial granted by the court as a result of their oral mistrial motion, including the issues that we previously found were not properly before us and are now advanced again before this Court (*id.*; *see* 2d Preliminary Rep of Advisory Comm on Prac and Pro, 1958 NY Legis Doc No. 13 at 315-316; *see generally* Siegel, NY Prac § 405 at 710-711 [5th ed 2011]). They failed to do so, and we agree with the court that plaintiffs' November 2016 motion was in violation of the single motion rule of CPLR 4406 (*see generally Trimarco v Data Treasury Corp.*, 146 AD3d 1008, 1009 [2d Dept 2017]).

In any event, we further conclude that the court properly denied plaintiffs' November 2016 motion on the merits. Contrary to plaintiffs' contention, the trial court (Hafner, A.J.) did not abuse its discretion in denying their application to preclude testimony of defendants' expert on the ground that defendants failed to disclose that the expert was board certified in neonatology in addition to child neurology and pediatrics (*see McLeod v Taccone*, 122 AD3d 1410, 1411-1412 [4th Dept 2014]). There was no intentional or willful failure to disclose by defendants and no showing of prejudice by plaintiffs (*see Sisemore v Leffler*, 125 AD3d 1374, 1375 [4th Dept 2015]; *McLeod*, 122 AD3d at 1411-1412). We further conclude that the trial court did not abuse its discretion in allowing defendants to set forth a defense that the injuries sustained by the child could have occurred during the birthing process (*cf. Muhammad v Fitzpatrick*, 91 AD3d 1353, 1354 [4th Dept 2012]). Plaintiffs waived their contention that there should have been a *Frye* hearing, and we reject their contention that defendants failed to lay the proper foundation for their defense under *Parker v Mobil Oil Corp.* (7 NY3d 434, 447-448 [2006], *rearg denied* 8 NY3d 828 [2007]). Unlike in *Muhammad*, defendants here met both the specific and general causation prongs of the *Parker* test (*see id.* at 448; *Muhammad*, 91 AD3d at 1354).

We reject plaintiffs' further contention that the trial court abused its discretion in not allowing one of the plaintiffs to testify to a statement allegedly made by a physician during the labor and delivery. That statement was hearsay, and the court properly determined that it did not qualify as an excited utterance (*see Tyrrell v Wal-Mart Stores*, 97 NY2d 650, 652 [2001]). Plaintiffs' further contention that the present sense impression exception applied is not preserved for our review. We have reviewed plaintiffs' remaining contentions and conclude that they are without merit.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1153

KA 16-01962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOE N. SMITH, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered May 9, 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 guilty plea of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). The charge arose after a police officer, while on routine patrol in his marked police vehicle, observed defendant standing on an open front porch, holding taut a transparent bag the size of a golf ball. According to the officer, he could see the outline of what appeared to be small cocaine rocks in the bag, in the same packaging that he had seen many times in his experience. After the officer stopped his vehicle, defendant dropped the bag onto the front porch. On appeal, defendant contends that County Court erred in refusing to suppress tangible evidence, i.e., the bag of cocaine, and his statements to the police. We affirm.

Contrary to defendant's contention, we conclude that the court properly determined that defendant lacked standing to challenge the warrantless seizure of the drugs from the porch inasmuch as he demonstrated no "personal legitimate expectation of privacy" in the premises (*People v Whitfield*, 81 NY2d 904, 905-906 [1993]; *see generally People v Ortiz*, 83 NY2d 840, 842 [1994]).

Even assuming, arguendo, that defendant met his burden of establishing standing (*see generally People v Ramirez-Portoreal*, 88 NY2d 99, 108-109 [1996]; *People v Sylvester*, 129 AD3d 1666, 1666-1667

[4th Dept 2015], *lv denied* 26 NY3d 1092 [2015]), we conclude that the evidence establishes that defendant abandoned the bag of drugs and that his abandonment of the drugs was not caused by unlawful police conduct. "Property is deemed abandoned when the expectation of privacy in the object or place searched has been given up by voluntarily and knowingly discarding the property" (*Ramirez-Portoreal*, 88 NY2d at 110; *see People v Brown*, 148 AD3d 1562, 1564 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *see also People v Rainey*, 110 AD3d 1464, 1466 [4th Dept 2013]). Here, while the officer was standing on the public sidewalk, having just exited the patrol vehicle, defendant attempted to pass the bag of drugs to another person and, in doing so, dropped the bag to the floor of the porch. Defendant then walked away from the dropped bag, which was subsequently recovered by the officer. Inasmuch as defendant's abandonment of the bag containing cocaine was not precipitated by illegal police conduct, defendant had no right to object to the officer's seizure of that evidence, and thus the court properly refused to suppress the drugs (*see Brown*, 148 AD3d at 1564).

Finally, defendant failed to preserve for our review his contention that the court erred in refusing to suppress his statements to the police on the ground that the police failed to obtain an express waiver of his *Miranda* rights (*see People v Harrison*, 128 AD3d 1410, 1411 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]). In any event, that contention lacks merit. "It is well settled that an explicit verbal waiver [of *Miranda* rights] is not required; an implicit waiver may suffice and may be inferred from the circumstances" (*People v Jones*, 120 AD3d 1595, 1595 [4th Dept 2014] [internal quotation marks omitted]; *see People v Sirno*, 76 NY2d 967, 968 [1990]; *People v Dangerfield*, 140 AD3d 1626, 1627 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]). We have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1175

TP 18-00667

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

IN THE MATTER OF SULAV SHARMA, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
RESPONDENT.

LIPPES & LIPPES, BUFFALO (JOSHUA R. LIPPES OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Paul Wojtaszek, J.], entered April 17, 2018) to review a determination of respondent. The determination found petitioner responsible for sexual violence and suspended petitioner from respondent State University of New York at Buffalo.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, and the preliminary injunction entered April 17, 2018 is vacated.

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner, a student at respondent State University of New York at Buffalo, seeks to annul a determination finding him responsible for a violation of the prohibition against sexual violence in respondent's student code of conduct and suspending petitioner for a period of two years. We reject petitioner's contention that respondent's alleged violations of Education Law § 6444 or its own procedural rules during the disciplinary proceeding either denied petitioner the "the full panoply of due process guarantees" to which he was entitled or rendered the finding of responsibility or the sanction imposed arbitrary or capricious (*Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo Sch. of Dental Med.*, 295 AD2d 944, 944 [4th Dept 2002] [internal quotation marks omitted]).

Contrary to petitioner's contention, he was not denied the assistance of counsel or other advisor at his disciplinary hearing. It is undisputed that respondent advised petitioner over a month prior to the hearing that he had a right to an advisor of his choice to

accompany him throughout the proceedings, including an attorney, and that a university law student could be provided to assist him free of charge. Petitioner nonetheless contends that respondent violated his right to "appear . . . *by* . . . counsel" pursuant to State Administrative Procedure Act (SAPA) § 501 (emphasis added). Even assuming, arguendo, that the hearing and record requirements of Education Law § 6444 triggered the application of SAPA generally, petitioner was not deprived of any right to counsel under SAPA because respondent's administrative hearing procedures authorized an attorney advisor to accompany involved students throughout the disciplinary process, including at the hearing. There also is nothing in Education Law § 6444 that prohibits involved students from being represented by counsel or from having an attorney advisor accompany him or her at the hearing. The statute does, however, authorize institutions, such as respondent, to set the "[r]ules for participation of such advisor" (§ 6444 [5] [c] [i]), and respondent was therefore within its rights to require that participating students speak on their own behalf at the disciplinary hearing.

Petitioner failed to raise his remaining procedural contentions during the administrative proceedings, and thus they are not properly before us (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *cf. Matter of Jacobson v Blaise*, 157 AD3d 1072, 1075 n 2 [3d Dept 2018]).

We further conclude that, contrary to petitioner's contention, respondent's determination is supported by substantial evidence. Here, the complainant's testimony constituted "such relevant proof as a reasonable mind may accept as adequate to support [the] conclusion" that petitioner perpetrated a sexual act against a person's will as charged by respondent (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The alleged inconsistencies in the complainant's testimony or conflict of that testimony with petitioner's version of events "presented credibility issues that were within the sole province of [the hearing officers] to determine," and we find no basis to disturb their findings (*Matter of Lampert v State Univ. of N.Y. at Albany*, 116 AD3d 1292, 1294 [3d Dept 2014], *lv denied* 23 NY3d 908 [2014]; *see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]; *Matter of Monti v New York State Div. of Human Rights*, 132 AD3d 1263, 1264 [4th Dept 2015]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1199

CA 18-00889

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

IN THE MATTER OF BISON ELEVATOR SERVICE, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, STEVEN STEPNIAK, AS COMMISSIONER
OF CITY OF BUFFALO DEPARTMENT OF PUBLIC WORKS, AND
D.C.B. ELEVATOR CO., INC., RESPONDENTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR RESPONDENTS-APPELLANTS CITY OF BUFFALO AND STEVEN STEPNIAK, AS COMMISSIONER OF CITY OF BUFFALO DEPARTMENT OF PUBLIC WORKS.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR RESPONDENT-APPELLANT D.C.B. ELEVATOR CO., INC.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (THOMAS J. GAFFNEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from a judgment (denominated order) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 14, 2018 in a CPLR article 78 proceeding. The judgment, inter alia, granted the petition, annulled the award of an elevator maintenance contract to respondent D.C.B. Elevator Co., Inc., and directed respondent City of Buffalo to readvertise for bids under the terms of the original request for proposals.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is denied, the undertaking is reinstated, petitioner is directed to post an undertaking in the amount of $30,000 within 30 days of service of a copy of the order of this Court with notice of entry, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the award of an elevator maintenance contract by respondents City of Buffalo (City) and Steven Stepniak, in his capacity as Commissioner of the City Department of Public Works (collectively, City respondents), to respondent D.C.B. Elevator Co., Inc. (DCB). Supreme Court, in effect, granted the petition by annulling the award of the contract to DCB and directing the City respondents to readvertise for bids under the terms of the original request for proposals (RFP). Respondents appeal.

The City respondents awarded DCB the contract after DCB submitted the lowest bid in response to the City respondents' RFP. Petitioner protested the award of the contract to DCB on the ground that DCB was unable to comply with the RFP's requirement that each bidder show that its main operating facilities were equipped with certain machine shop equipment (Machine Shop Clause) because DCB relied on outside contractors for access to such equipment. The Deputy Director of Building Operations for the City (deputy) sent an email to the City's corporation counsel in which he recommended that petitioner's protest be dismissed and opined that DCB's bid complied with the terms of the RFP. The deputy then forwarded the email to DCB but not to petitioner. Instead of dismissing the protest and awarding the contract to DCB, however, the City respondents rejected all bids and issued a revised RFP that, among other things, provided that the Machine Shop Clause could be satisfied through the use of outside contractors. Upon the submission of new bids, the City respondents awarded the contract to DCB, which was again the lowest bidder.

Respondents contend that the court erred in granting the petition because the City respondents' determination to reject the initial bids and to re-bid the contract was not irrational, dishonest, or unlawful. We agree. With respect to bidding on public contracts, "statutory law specifically authorizes the rejection of all bids and the readvertisement for new ones if deemed to be 'for the public interest so to do' . . . Although the power to reject any or all bids may not be exercised arbitrarily or for the purpose of thwarting the public benefit intended to be served by the competitive process . . . , the discretionary decision ought not to be disturbed by the courts unless irrational, dishonest or otherwise unlawful" (*Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth.*, 66 NY2d 144, 149 [1985]). "[T]he mere 'appearance' of impropriety is not [a] sufficient ground to disturb the decision . . . absent a showing of actual favoritism, fraud or similar evil which competitive bidding is intended to prevent" (*id.* at 148), and "where the party challenging the decision does not satisfy the burden of making such a demonstration, [the municipality's] decision should remain undisturbed" (*id.* at 149-150).

We conclude that petitioner failed to demonstrate actual favoritism or impropriety on the part of the City respondents based upon the City respondents' communication with DCB. While "it would have been wiser" for the City respondents to have communicated with all bidders regarding its interpretation of the Machine Shop Clause so as to avoid the appearance of impropriety, the single communication with DCB regarding that interpretation does not "show[ ] actual favoritism, fraud or similar evil" (*id.* at 148), and thus did not demonstrate "actual impropriety or unfair dealing" sufficient to merit disturbing the City respondents' determination to reject all bids and issue a revised RFP (*id.* at 149). Moreover, we note that the alleged appearance of impropriety arising from the City respondents' actions in communicating only with DCB was ameliorated by their issuance of the revised RFP, which clarified the Machine Shop Clause for all bidders and allowed them to revise their bids with that understanding.

We further conclude that petitioner failed to establish that the City respondents lacked a rational basis for rejecting the bids and issuing a revised RFP. By clarifying that the Machine Shop Clause allowed bidders to use equipment provided by outside contractors, the City respondents opened the bids to a larger competitive pool, an action that aligns with the public interest of "fostering honest competition" (*id.* at 148). Additionally, as noted, the clarification avoided the appearance of favoritism and allowed all bidders to have an equal understanding of the City respondents' requirements. Because petitioner has not overcome the presumption of regularity with respect to the City respondents' rejection of bids and issuance of a revised RFP, the court erred in granting the petition (*see Matter of Sicoli & Massaro, Inc. v Grand Is. Cent. Sch. Dist.*, 309 AD2d 1229, 1231 [4th Dept 2003]).

We therefore reverse the judgment, deny the petition, reinstate the undertaking, and remit the matter to Supreme Court, Erie County, to provide respondents an opportunity to make a motion for a determination of the damages, if any, sustained by reason of the preliminary injunction (*see* CPLR 6315; *see generally Canales v Finger*, 147 AD3d 549, 550 [1st Dept 2017]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1250

CA 18-00510

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

VASILIY SAVILO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICKY S. DENNER, DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (BRENDAN S. BYRNE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FEROLETO LAW, BUFFALO (JOEL FEROLETO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered November 17, 2017. The order and judgment, insofar as appealed from, granted the motion of plaintiff insofar as it sought summary judgment on the issue of serious injury.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs and the motion is denied in part with respect to the issue of serious injury within the meaning of Insurance Law § 5102 (d).

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of a motor vehicle collision. Defendant appeals, as limited by his brief, from those parts of an order and judgment that granted plaintiff's motion insofar as it sought summary judgment on the issue whether plaintiff sustained a serious injury under the permanent consequential limitation of use, the significant limitation of use, and the 90/180-day categories within the meaning of Insurance Law § 5102 (d). We reverse the order and judgment insofar as appealed from.

We conclude that plaintiff failed to meet his initial burden of establishing that he sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories that was causally related to the accident (*see generally Autiello v Cummins*, 66 AD3d 1072, 1073 [3d Dept 2009]; *McHugh v Marfoglia*, 65 AD3d 828, 828-829 [4th Dept 2009]) inasmuch as plaintiff's own submissions raise triable issues of fact (*see generally Schaubroeck v Moriarty*, 162 AD3d 1608, 1609 [4th Dept 2018]). Here, although plaintiff submitted the affidavit of his chiropractor, who opined that plaintiff had sustained a serious injury of a permanent nature that was caused by the accident, i.e., herniated

discs, plaintiff also submitted the report of defendant's medical expert, an orthopedic surgeon, who opined that plaintiff merely sustained spinal sprains and strains that had resolved and that plaintiff did not sustain a serious injury as the result of the accident. Additionally, plaintiff submitted the report of the radiologist who interpreted plaintiff's MRI, wherein the radiologist opined that plaintiff had disc herniations associated with "mild facet joint hypertrophy," a degenerative disc condition. "It is well established that conflicting expert opinions may not be resolved on a motion for summary judgment" (*Fonseca v Cronk*, 104 AD3d 1154, 1155 [4th Dept 2013] [internal quotation marks omitted]; *see Crutchfield v Jones*, 132 AD3d 1311, 1311 [4th Dept 2015]; *Edwards v Devine*, 111 AD3d 1370, 1372 [4th Dept 2013]). Further, a plaintiff may not recover under the permanent consequential limitation of use and significant limitation of use categories where there is " 'persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition' " (*Kwitek v Seier*, 105 AD3d 1419, 1420 [4th Dept 2013], quoting *Carrasco v Mendez*, 4 NY3d 566, 580 [2005]). Although plaintiff submitted a decision of the Social Security Administration in which an administrative law judge (ALJ) concluded that, since the date of the accident, plaintiff has a disability within the meaning of the Social Security Act, that conclusion was based on the ALJ's finding that plaintiff has a degenerative disc disease. We therefore conclude that plaintiff was not entitled to judgment as a matter of law with respect to the permanent consequential limitation of use and significant limitation of use categories.

Plaintiff also failed to meet his initial burden with respect to the 90/180-day category of serious injury. In order to establish a qualifying injury, a plaintiff must demonstrate that he or she sustained " 'a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment' . . . [T]he words 'substantially all' should be construed to mean that the person has been curtailed from performing his [or her] usual activities to a great extent rather than some slight curtailment" (*Licari v Elliott*, 57 NY2d 230, 236 [1982]). A showing that "plaintiff may have missed more than 90 days of work is not determinative" (*Amamedi v Archibala*, 70 AD3d 449, 450 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]; *see Blake v Portexit Corp.*, 69 AD3d 426, 426 [1st Dept 2010]).

Here, although plaintiff's chiropractor opined that plaintiff was disabled from working for more than 90 of the first 180 days following the accident, plaintiff also submitted the chiropractor's treatment notes from the relevant time period, which indicate that plaintiff reported that he "does not have difficulty taking care of [him]self." Plaintiff also submitted notes prepared by the physical therapists with whom he worked during the relevant time, which indicate that plaintiff was able to perform numerous exercises and walk on a treadmill. Consequently, the evidence submitted by plaintiff failed

to eliminate all issues of fact with respect to the 90/180-day category (*see generally Hartley v White*, 63 AD3d 1689, 1690 [4th Dept 2009]).

Inasmuch as plaintiff failed to meet his initial burden of demonstrating entitlement to judgment as a matter of law with respect to the three threshold categories at issue, we conclude that Supreme Court erred in granting that part of the motion seeking summary judgment on the issue of serious injury, regardless of the sufficiency of the opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1262

KA 18-00126

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW D. FITCH, DEFENDANT-APPELLANT.

PAUL G. DELL, BUFFALO, FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered October 11, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of marihuana in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking as a condition of probation the requirement that defendant submit to surveillance via electronic monitoring and pay the fees associated therewith and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of marihuana in the first degree (Penal Law §§ 110.00, 221.30). In November 2015, police investigators went to defendant's residence to execute a warrant for his arrest on charges arising out of his possession of an assault rifle. While outside the residence, one of the investigators detected an odor of marihuana. The police therefore obtained a warrant to search the residence. During the search, the police seized more than 20 pounds of marihuana. Defendant was arrested along with the codefendant, who was also present at the residence, and they were jointly indicted on one count each of criminal possession of marihuana in the first degree (§ 221.30). Thereafter, as part of her omnibus motion, the codefendant moved to suppress physical evidence or, alternatively, for a hearing pursuant to *Franks v Delaware* (438 US 154 [1978]) in order "to determine whether the statements . . . in the search warrant application were intentionally false, or were recklessly misleading, so as to constitute misconduct." Defendant joined in that part of the omnibus motion. Following a hearing, Supreme Court refused to suppress the physical evidence.

Defendant now contends that the court erred in refusing to

suppress the physical evidence because of alleged defects relating to both the arrest warrant and the search warrant. First, defendant contends that the People failed to establish that the arrest warrant was not based upon false statements with respect to the legality of the assault rifle because the police detective who prepared the warrant application did not testify at the hearing. That contention is not preserved for our review because defendant failed to request a *Franks* hearing to challenge the statements upon which the arrest warrant was based (*see People v Samuel*, 137 AD3d 1691, 1693 [4th Dept 2016]). In any event, the contention lacks merit. The burden at a *Franks* hearing is not on the People. Instead, it was defendant's burden to prove by a preponderance of the evidence that the police officer who prepared the arrest warrant application included false statements knowingly and intentionally or with reckless disregard for the truth (*see Franks*, 438 US at 171; *People v Tambe*, 71 NY2d 492, 504 [1988]; *People v Nunziata*, 10 AD3d 695, 695 [2d Dept 2004], *lv denied* 3 NY3d 759 [2004]), and defendant failed to meet that burden.

Defendant next contends that he was entitled to suppression because he established at the hearing that the search warrant was based on false statements made by the investigator who prepared the warrant application, i.e., that he was able to smell marihuana from outside the residence. We reject that contention. It is well settled that "[a] hearing court's credibility determinations are 'entitled to great weight' in light of its opportunity to see the witnesses, hear the testimony, and observe demeanor" (*People v Thibodeau*, 151 AD3d 1548, 1552 [4th Dept 2017], *affd* 31 NY3d 1155 [2018]). Although defendant contends that it would not have been possible for the investigator to have smelled the marihuana from outside the residence, the investigator testified that he smelled a "strong odor" of marihuana after defendant opened the door of the residence, and the court credited the investigator's testimony. Moreover, two other officers who were present testified that they smelled marihuana from outside the residence, and the court credited their testimony as well. Furthermore, the hearing testimony establishes that, after the police knocked on the door, it took defendant approximately 10 minutes to open the door and that, approximately 30 minutes later, the police entered the residence upon obtaining the search warrant and found the marihuana. Although much of it had been packaged in plastic bags and enclosed in coolers, the codefendant had been alone inside the residence during the 30 minutes between when the police first knocked and when the search commenced, and more than 80 live marihuana plants were found in the basement. In light of the foregoing, we decline to disturb the court's credibility determinations.

We agree with defendant, however, that the condition of his probationary sentence related to electronic monitoring was not lawfully imposed pursuant to Penal Law § 65.10 (4). As a preliminary matter, contrary to the People's assertion, that contention does not require preservation inasmuch as it implicates the legality of the sentence (*see generally People v Saraceni*, 153 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]). A sentencing court imposing probation may require the defendant, pursuant to the statute, to submit to electronic monitoring (*see* § 65.10 [4]). "Such condition

may be imposed only where the court, in its discretion, determines that requiring the defendant to comply with such condition will advance public safety, probationer control or probationer surveillance" (*id.*). Here, the court failed to make such a determination. To the contrary, it is evident from our review of the sentencing minutes that the court did not consider defendant or his actions to pose a threat to public safety. There may, however, be a legitimate purpose for the electronic monitoring based on probationer control or probationer surveillance. Therefore, we modify the judgment by striking the condition of probation requiring that defendant submit to surveillance via electronic monitoring and pay the fees associated therewith, and we remit the matter to Supreme Court to make a discretionary determination whether to impose electronic monitoring based on appropriate findings.

In the interest of judicial economy, we also address defendant's contention that the court lacked the authority to require him to pay the costs associated with electronic monitoring. We reject that contention. The sentencing court may impose such costs on a defendant as part of a condition of probation requiring electronic monitoring unless the defendant demonstrates that he is unable to afford such costs despite making a bona fide effort to do so (*see People v Hakes*, — NY3d —, —, 2018 NY Slip Op 08538, *1-4 [Dec. 13, 2018]; *People v Clause*, 167 AD3d 1532, 1534 [4th Dept 2018]).

We have reviewed defendant's remaining contentions and conclude that none warrants further modification or reversal of the judgment.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1264

KA 17-00286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALGERNON DIX, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ALGERNON DIX, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered March 10, 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]) arising from a shooting at a nightclub. Preliminarily, we deny the request of defendant in his pro se supplemental brief to hold the appeal inasmuch as "[i]t is not the practice of this Court to hold appeals from a judgment of conviction awaiting the outcome of a CPL article 440 motion" (*People v Toporczyk*, 175 AD2d 678, 678 [4th Dept 1991]).

Addressing the contentions in defendant's main brief, we first conclude that defendant's waiver of the right to appeal was voluntarily, knowingly and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256 [2006]). County Court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439 [4th Dept 2010], *lv denied* 15 NY3d 920 [2010], quoting *Lopez*, 6 NY3d at 256; *see People v Alfiere*, 156 AD3d 1446, 1446 [4th Dept 2017], *lv denied* 31 NY3d 980 [2018]; *People v Rogers*, 81 AD3d 1320, 1320 [4th Dept 2011], *lv denied* 16 NY3d 862 [2011]). Although defendant correctly notes that the court did not

specifically inquire during the plea colloquy whether he had been threatened, we conclude that "[t]here is no support in the record for defendant's contention that his appeal waiver was the result of coercion . . . , particularly considering the court's thorough colloquy and defendant's affirmative statements that he had discussed the waiver with [defense] counsel and that he agreed to it" (*People v Hayes*, 71 AD3d 1187, 1188 [3d Dept 2010], *lv denied* 15 NY3d 852 [2010], *reconsideration denied* 15 NY3d 921 [2010], citing *People v Holman*, 89 NY2d 876, 878 [1996]; *see People v Smith*, 138 AD3d 1415, 1416 [4th Dept 2016]).

Defendant also contends that the photo array used in an identification procedure with a witness was unduly suggestive and therefore the court should have suppressed the witness's identification of him as the shooter. The valid waiver of the right to appeal forecloses our review of that contention (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Gessner*, 155 AD3d 1668, 1669 [4th Dept 2017]). Moreover, defendant forfeited the right to raise that suppression issue on appeal inasmuch as he pleaded guilty before the court issued a ruling thereon (*see People v Fernandez*, 67 NY2d 686, 688 [1986]; *People v Rodgers*, 162 AD3d 1500, 1501 [4th Dept 2018], *lv denied* 32 NY3d 940 [2018]; *People v Woody*, 160 AD3d 1362, 1362-1363 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]).

Although defendant's further contention that his guilty plea was not knowing, voluntary, and intelligent survives the valid waiver of the right to appeal and is preserved for our review by his motion to withdraw the plea (*see People v Dames*, 122 AD3d 1336, 1336 [4th Dept 2014], *lv denied* 25 NY3d 1162 [2015]), we reject that contention for the reasons that follow.

First, defendant contends that the People violated their obligation to timely disclose *Rosario* material and, therefore, he was entitled to withdraw his plea. That contention lacks merit. Such material need not be disclosed until "[a]fter the jury has been sworn and before the prosecutor's opening address" (CPL 240.45 [1]; *see People v Pepe*, 259 AD2d 949, 950 [4th Dept 1999], *lv denied* 93 NY2d 1024 [1999]). Here, the People did not violate their obligation inasmuch as defendant pleaded guilty before the People were required to disclose *Rosario* material and therefore defendant was not entitled to withdraw his plea on that ground (*see generally People v Morrow*, 129 AD2d 863, 864 [3d Dept 1987], *lv denied* 70 NY2d 651 [1987]). In addition, defendant was not entitled to withdraw his plea on the ground that the People did not disclose their witnesses inasmuch as " '[t]here is neither a constitutional nor statutory obligation mandating the pretrial disclosure of the identity of . . . prosecution witness[es]' " (*People v Nesmith*, 144 AD3d 1508, 1509 [4th Dept 2016], *lv denied* 28 NY3d 1187 [2017]; *see People v Stacchini*, 108 AD3d 866, 867 [3d Dept 2013]). Defendant's further contention that he was entitled to withdraw his plea because the People did not disclose other information also lacks merit. "There is no claim by defendant, or any indication in the record, that the People failed to disclose

any exculpatory information in their possession" (*People v Montgomery*, 22 AD3d 379, 379-380 [1st Dept 2005], *lv denied* 6 NY3d 778 [2006]; *see generally People v Fisher*, 28 NY3d 717, 722 [2017]).

Contrary to defendant's additional contention with respect to the voluntariness of his plea, the fact that the court did not specifically inquire during the plea colloquy whether he had been threatened does not render his plea involuntary. "[W]hile it would have been better for [the c]ourt to inquire as to whether any threats or promises had been made to induce [defendant] to plead guilty, . . . defendant ma[de] no showing of prejudice by alleging that any such threats or promises actually occurred" (*People v Demontigny*, 60 AD3d 1152, 1152 [3d Dept 2009], *lv denied* 12 NY3d 914 [2009]). Moreover, "defendant's fear that a harsher sentence would be imposed if [he] were convicted after trial does not constitute coercion" (*People v Griffin*, 120 AD3d 1569, 1570 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014] [internal quotation marks omitted]). Similarly, "the fact that defendant was required to accept or reject the plea offer within a short time period does not amount to coercion" (*People v Carr*, 147 AD3d 1506, 1507 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017] [internal quotation marks omitted]; *see People v Pitcher*, 126 AD3d 1471, 1472 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]). To the extent that defendant contends that he was not afforded sufficient time to discuss the plea with defense counsel, that contention is belied by the record (*see People v Goodwin*, 159 AD3d 1433, 1434 [4th Dept 2018]). Furthermore, we conclude on this record that "the court did not coerce defendant into pleading guilty merely . . . by commenting on the strength of the People's evidence against him" (*Pitcher*, 126 AD3d at 1472; *see People v Hall*, 82 AD3d 1619, 1620 [4th Dept 2011], *lv denied* 16 NY3d 895 [2011]). Contrary to defendant's further contention, his conclusory and unsubstantiated claims of innocence and coercion made during the sentencing proceeding are not supported by the record (*see Dames*, 122 AD3d at 1336; *People v Adams*, 45 AD3d 1346, 1346 [4th Dept 2007]; *People v Dozier*, 12 AD3d 1176, 1177 [4th Dept 2004]).

Finally, defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *Alfiere*, 156 AD3d at 1446).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1265

KA 16-00918

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN WITHROW, DEFENDANT-APPELLANT.

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

CALVIN WITHROW, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 24, 2016. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [2] [a]). The conviction arose from an early morning incident in which the victim, having reached her front porch after walking home from her night-shift job, was accosted from behind by a man who put his arm around her neck. The victim testified that, as the man pulled her backward off the porch, he tugged at a bag that was strapped across her body and told her to give it to him. While yelling for help, the victim pulled a box cutter from the bag and slashed at the man's arm until she fell to the ground and dropped it. The man then punched the victim several times, slammed her head against some garden pavers, and pulled the bag away. He placed the bag on the ground nearby and turned back, ripping the victim's pants open. A neighbor then came outside, yelling that she had called the police, which prompted the man to flee. Police later recovered a wallet at the scene containing defendant's identification and other personal effects. Expert testimony at trial linked DNA evidence recovered from the victim's clothes and the box cutter to defendant.

Addressing defendant's contentions in his main brief first, we conclude that the evidence is legally sufficient to support the conviction 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 has been proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 113 [2011]). In addition, 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]). Contrary to defendant's contention, the jury was justified in inferring, based on the victim's testimony, that defendant intended to deprive her of her bag or to appropriate it to himself (*see* Penal Law § 155.05 [1]; *see generally People v Arroyo*, 54 NY2d 567, 578 [1982], *cert denied* 456 US 979 [1982]; *People v Cooper*, 134 AD3d 1583, 1584-1585 [4th Dept 2015]). Moreover, the victim's testimony was corroborated by physical evidence (*see generally People v Hurlbert*, 81 AD3d 1430, 1432 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). To the extent that her testimony was inconsistent with a prior statement that she made to the police, any inconsistencies merely presented issues of credibility for the jury to resolve (*see e.g. People v Brown*, 166 AD3d 1582, 1582 [4th Dept 2018], *lv denied* — NY3d — [Jan. 23, 2019]; *People v Odums*, 121 AD3d 1503, 1503-1504 [4th Dept 2014], *lv denied* 26 NY3d 1042 [2015]; *People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]), and we see no reason to disturb its determinations here.

We further reject defendant's contention that he was denied effective assistance of counsel at trial. Although defense counsel demonstrated some confusion regarding the procedure for impeaching a witness with a prior inconsistent statement, she nevertheless effectively cross-examined both the victim and a police detective with respect to the victim's prior statement to the police. To the extent that defendant contends that defense counsel was ineffective for failing to exercise her own professional judgment and instead relying on defendant's judgment, that contention involves matters outside the record on appeal and must be raised by way of a motion pursuant to CPL article 440 (*see generally People v McClary*, 162 AD3d 1582, 1583 [4th Dept 2018]). With respect to the remaining instances of alleged ineffective assistance of counsel at trial, we conclude that defendant received meaningful representation (*see id.*; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Indeed, we conclude that defense counsel, through her opening and closing statements and cross-examination of witnesses, pursued "a reasonable and legitimate [defense] strategy under the circumstances and evidence presented" (*People v Benevento*, 91 NY2d 708, 713 [1998]; *see People v Roberts*, 111 AD3d 1308, 1309 [4th Dept 2013], *lv denied* 23 NY3d 967 [2014]).

Contrary to defendant's additional contentions, his sentence is not unduly harsh or severe, and he was not denied effective assistance of counsel at sentencing. Given the violent nature of the crime, his criminal history, and his lack of remorse, we decline defendant's request to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *see also People v Smart*, 100 AD3d 1473, 1475 [4th Dept 2012], *affd* 23 NY3d 213 [2014]). We reject defendant's contention that his mental health disorders, for which he was receiving treatment, warrant such a reduction (*cf. People*

v Jagnjic, 85 AD2d 135, 138 [1st Dept 1982]), and we also reject his contention that defense counsel was ineffective for not advancing any argument at sentencing concerning his mental health disorders inasmuch as such an argument would have had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]).

We have reviewed the contentions raised in defendant's pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Finally, we note that the certificate of conviction incorrectly recites that robbery in the second degree is a class B felony and that defendant was sentenced as a second felony offender, and the certificate must therefore be amended to reflect that defendant was convicted of a class C felony (*see* Penal Law § 160.10; *People v Wallace*, 153 AD3d 1632, 1634 [4th Dept 2017]) and sentenced as a second violent felony offender (*see People v Mobayed*, 158 AD3d 1221, 1223 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1295

CAF 17-01028

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

IN THE MATTER OF EDEN S., ELYSIUM S., AND ARKADIAN S.

CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOSHUA S., RESPONDENT-APPELLANT.

IN THE MATTER OF EDEN S., ELYSIUM S., AND ARKADIAN S.

CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

CRYSTAL S., RESPONDENT-APPELLANT.

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

BRIDGET L. FIELD, ROCHESTER, FOR RESPONDENT-APPELLANT CRYSTAL S.

SAMUEL P. GIACONA, AUBURN, FOR PETITIONER-RESPONDENT.

LAURA ESTELA CARDONA, SYRACUSE, ATTORNEY FOR THE CHILDREN.

THEODORE W. STENUF, MINOA, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 14, 2017 in proceedings pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondents with respect to the subject children.

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

Memorandum: Respondent father and respondent mother appeal from an order that, inter alia, terminated their parental rights as to their three children pursuant to Social Services Law § 384-b on the ground of permanent neglect. The father contends on his appeal that Family Court erred in granting petitioner's motion, made in a prior proceeding against the father pursuant to Family Court Act article 10, to relieve it of its obligation to engage in diligent efforts to reunite him with his children because the motion was not in writing.

We conclude that, having failed to raise that issue on the appeal from the order entered in the prior proceeding, which, inter alia, excused petitioner from demonstrating diligent efforts (*Matter of Eden S. [Joshua S.]*, 117 AD3d 1562 [4th Dept 2014], *lv denied* 24 NY3d 906 [2014]), "the father is precluded from raising that contention now" (*Matter of Lewis v Lewis*, 144 AD3d 1659, 1660 [4th Dept 2016]; *see Hunt v Hunt*, 36 AD3d 1058, 1059 [3d Dept 2007], *lv denied* 8 NY3d 812 [2007]).

The father waived his further contention that the court violated his right to due process by holding the dispositional hearing in his absence inasmuch as the record reflects that the father chose not to appear and consented to the continuation of the hearing in his absence (*see Matter of Konard M.*, 257 AD2d 919, 920 [3d Dept 1999]). In any event, that contention lacks merit. "[A] parent's right to be present for fact-finding and dispositional hearings in termination cases is not absolute . . . [W]hen faced with the unavoidable absence of a parent, a court must balance the respective rights and interests of both the parent and the child in determining whether to proceed" (*Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315 [4th Dept 2015], *lv denied* 25 NY3d 909 [2015] [internal quotation marks omitted]). We conclude that, under the circumstances presented here, the court properly proceeded in the father's absence in order to provide the children with a "prompt and permanent adjudication" (*id.* [internal quotation marks omitted]). Moreover, inasmuch as the father's attorney represented his interests at the hearing, the father failed to demonstrate that he suffered any prejudice as a result of his absence (*see id.* at 1315-1316).

We reject the mother's contention on her appeal that the court erred in determining that she permanently neglected the children. Contrary to the mother's contention, we conclude that petitioner met its burden of establishing "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the [mother] and [the children]" by providing numerous services that were specifically tailored to the mother's needs, including parenting classes, mental health counseling, nonoffending parent classes, and assistance with cleaning, maintaining, and improving her home (*Matter of Jayveon S. [Timothy S.]*, 158 AD3d 1283, 1283 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018] [internal quotation marks omitted]). We reject the mother's contention that petitioner failed to engage in diligent efforts to facilitate visitation. Petitioner consistently facilitated the mother's visitation with the youngest child, including by providing an alternative location for visitation once it determined that the mother's home was an inappropriate venue. With respect to the mother's visitation with the two oldest children, we note that petitioner is required to make diligent efforts to encourage and strengthen the parental relationship only "when such efforts will not be detrimental to the best interests of the child" (Social Services Law § 384-b [7] [a]). Here, petitioner initially facilitated in-person visitation between the mother and the two oldest children. Based on events that occurred after the removal of the subject children from the home, however, the court entered the order in the article 10 proceeding against the father determining that

he sexually abused respondents' oldest child, and we affirmed (*Eden S.*, 117 AD3d at 1562-1563). The record establishes that the mother failed to acknowledge that abuse and instead prompted her oldest child to recant the abuse allegations in a video that the mother later posted online. The record further establishes that this incident and the mother's continued failure to acknowledge the abuse caused her two oldest children significant emotional and behavioral harm. We thus conclude that petitioner was thereafter permitted to facilitate the mother's relationship with them by means other than in-person visitation, which it did by arranging telephone contact, providing the mother with information from their school, and attempting to impress upon the mother the importance of emotionally supporting her children in light of the abuse.

We also reject the mother's contention that the court erred in finding that she failed to plan adequately for her children's future. Petitioner established that "the mother's progress was insufficient to warrant the return of the child[ren] to her care inasmuch as she failed to address or gain insight into the problems that led to the removal of the child[ren] and continued to prevent the child[ren's] safe return" (*Matter of Mirabella H. [Angela I.]*, 162 AD3d 1733, 1734 [4th Dept 2018], *lv denied* 32 NY3d 909 [2018] [internal quotation marks omitted]). Specifically, the record demonstrated that, although the mother complied with certain aspects of the service plan developed by petitioner, she failed to benefit from many of the services offered. Of particular significance, the mother failed to consistently maintain a safe, clean, and sanitary home to which the children could return and failed to provide the children with appropriate emotional support in light of her continued failure to acknowledge the father's sexual abuse.

Contrary to the mother's further contention, the court did not abuse its discretion in terminating the mother's parental rights rather than granting a suspended judgment (*see id.* at 1734-1735). The evidence in the record supports the court's determination that termination of the mother's parental rights is in the best interests of the children and that the mother's progress in addressing the issues that prevented their return was insufficient to warrant any further prolongation of the children's unsettled status (*see id.*).

The mother failed to preserve her contention that the court erred in failing to conduct a *Lincoln* hearing as part of the dispositional hearing and, in any event, the contention lacks merit (*see Matter of Montalbano v Babcock*, 155 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 31 NY3d 912 [2018]; *Matter of Tonjaleah H.*, 63 AD3d 1611, 1612 [4th Dept 2009]). We also reject respondents' contentions that the court erred in admitting in evidence photographs depicting respondents' home at the time the children were initially removed. Those photographs were generally relevant to support the service plans created for respondents. Even assuming, arguendo, that the court erred in admitting the photographs in evidence, we conclude that any error is harmless inasmuch as it does not appear from the court's decision that it relied on those photographs (*see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1402 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]);

indeed the court, when admitting the photographs, explicitly recognized their limited relevance.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1300

CAF 17-00796

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

IN THE MATTER OF JAIME D. AND JACOB D.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMES N., RESPONDENT,
AND JACQUELINA D., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

NELSON LAW FIRM, MEXICO (ALLISON J. NELSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered April 13, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Jacquelina D. had educationally neglected the subject children.

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

Same memorandum as in *Matter of Jaime D. [Jacquelina D.]* ([appeal No. 2] — AD3d — [Mar. 15, 2019] [4th Dept 2019]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1301

CAF 17-02044

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

IN THE MATTER OF JAIME D. AND JACOB D.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMES N., RESPONDENT,
AND JACQUELINA D., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

NELSON LAW FIRM, MEXICO (ALLISON J. NELSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered October 31, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that the subject children are neglected children and entered a suspended judgment with respect to respondent Jacquelina D.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order entered after a fact-finding hearing that, inter alia, found her two children to be neglected based on respondents' failure to supply them with an adequate education (*see* Family Ct Act § 1012 [f] [i] [A]). In appeal No. 2, the mother appeals from an order of fact-finding and disposition that adjudged the children to be neglected, ordered that judgment be suspended for a period of six months, and stated a number of conditions with which respondents were to comply during that period. The order in appeal No. 2 was silent as to what would occur at the conclusion of the six-month period upon the mother's compliance with its conditions. After entry of the orders in both appeals and after the conclusion of the six-month period, Family Court, in a subsequent order (later order), determined that the mother had complied with the conditions of the suspended judgment and dismissed the neglect petition. It does not appear on this record that the mother appealed from the later order or moved pursuant to Family Court Act § 1061 to vacate the neglect finding.

The mother's appeal from the order in appeal No. 1 must be dismissed inasmuch as the appeal from the dispositional order in appeal No. 2 brings up for review the propriety of the fact-finding

order (*see Matter of Lisa E.*, 207 AD2d 983, 983 [4th Dept 1994]). With respect to appeal No. 2, we note that the mother does not contest the underlying factual finding of neglect or the entry or the conditions of the suspended judgment. Instead, the mother challenges the later order, contending that the court erred in dismissing the neglect petition without also vacating the finding of neglect once it determined that she complied with the conditions of the suspended judgment. The mother contends that dismissal of the petition alone did not remove all negative consequences of the finding of neglect. Inasmuch as the mother fails to challenge any aspect of the order in appeal No. 2, we dismiss the appeal from that order as abandoned (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1310

TP 18-01178

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

IN THE MATTER OF MARTIN WASHINGTON, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 29, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination, following a tier III disciplinary hearing, that he violated several inmate rules. To the extent that petitioner contends that the determination finding that he violated inmate rules 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]), 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]), 100.13 (7 NYCRR 270.2 [B] [1] [iv] [fighting]), and 106.10 (7 NYCRR 270.2 [B] [7] [i] [direct order]) is not supported by substantial evidence, we note that his plea of guilty to those violations precludes our review of his contention (*see Matter of Ingram v Annucci*, 151 AD3d 1778, 1778 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]; *Matter of Williams v Annucci*, 133 AD3d 1362, 1363 [4th Dept 2015]). Contrary to petitioner's further contention, the misbehavior report, photographs of the weapon, video of the incident, and the testimony of the correction officer who observed the weapon in petitioner's hand constitute substantial evidence that petitioner violated inmate rules 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon]) and 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference]; *see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *People ex rel. Vega v Smith*, 66 NY2d 130, 140 [1985]). The contrary testimony of petitioner and the other inmate

involved in the disturbance raised, at most, an issue of credibility for resolution by the Hearing Officer (*see Foster*, 76 NY2d at 966).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1322

CAF 16-01378

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

IN THE MATTER OF DEON M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VERNON B., RESPONDENT-APPELLANT.

IN THE MATTER OF DAVID M.J.B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

VERNON B., RESPONDENT-APPELLANT.

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

ERIC R. ZIOBRO, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 4, 2016 in proceedings pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights and freed the subject children for adoption.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject children on the ground of permanent neglect. Contrary to the father's contention, we conclude that petitioner met its burden of establishing "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the [father] and [the children]" (*Matter of Jayveon S. [Timothy S.]*, 158 AD3d 1283, 1283 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018] [internal quotation marks omitted]; *see Matter of Walter DD. [Walter TT.]*, 152 AD3d 896, 897-898 [3d Dept 2017], *lv denied* 30 NY3d 905 [2017]; *Matter of Kaiden AA. [John BB.]*, 81 AD3d 1209, 1209-1210 [3d Dept 2011]). Contrary to the father's further contention, petitioner also established that the father "failed substantially and continuously to plan for the future

of the [children] although physically and financially able to do so" (*Matter of Makayla S. [David S.—Alecia P.]*, 118 AD3d 1312, 1312 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014] [internal quotation marks omitted]; *see* § 384-b [7] [a]). With respect to the younger child, although the father participated in some of the services offered by petitioner, petitioner established that the father "did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]). With respect to the older child, the father failed to "provide any realistic and feasible alternative to having the child[ ] remain in foster care until [the father's] release from prison" (*Matter of Skye N. [Carl N.]*, 148 AD3d 1542, 1544 [4th Dept 2017] [internal quotation marks omitted]; *see Kaiden AA.*, 81 AD3d at 1210-1211).

We reject the father's contention that petitioner failed to meet its burden of establishing by a preponderance of the evidence that termination of his parental rights, rather than a suspended judgment, is in the best interests of the children (*see Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1502 [4th Dept 2015]; *Matter of Justice A.A. [Tina M.G.]*, 121 AD3d 886, 887-888 [2d Dept 2014]; *Matter of Yasiel P. [Lisuan P.]*, 79 AD3d 1744, 1746 [4th Dept 2010], *lv denied* 16 NY3d 710 [2011]). The record establishes that the father "failed to complete [his] service plan[] and made inadequate efforts to visit the subject children despite being able to do so" (*Burke H.*, 134 AD3d at 1502).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1326

CA 18-01249

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

PATRICIA KAREN KILLIAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAPTAIN SPICER'S GALLERY, LLC, SPICER HOLDINGS, LLC, KENNETH A. HOOSON AND GREGORY K. HOOSON, DEFENDANTS-RESPONDENTS.

BARCLAY DAMON LLP, SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (IAN W. GILBERT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered October 4, 2017. The judgment dismissed the complaint after a jury trial.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, payment under a theory of quantum meruit for work she performed at a gift shop that was originally owned by defendant Kenneth A. Hooson (Hooson). Hooson and defendant Gregory K. Hooson are the owners of defendant Captain Spicer's Gallery, LLC (Gallery) and defendant Spicer Holdings, LLC, which are the current owners of the gift shop and the property on which it is located. Supreme Court previously granted defendants' motion for partial summary judgment dismissing certain claims but, on a prior appeal, this Court reinstated those parts of the quantum meruit cause of action against the Gallery that were not barred by the statute of limitations (*Killian v Captain Spicer's Gallery, LLC*, 140 AD3d 1764 [4th Dept 2016], *lv dismissed* 29 NY3d 981 [2017]). With respect to the reinstated claims, we concluded that defendants met their initial burden on the motion of establishing that plaintiff was not entitled to recover in quantum meruit for the services she rendered on the ground that, "because of the relationship between the parties, it is natural that such service[s] should be rendered without expectation of pay" (*id.* at 1766 [internal quotation marks omitted]), but we further concluded that plaintiff raised a triable issue of fact "whether 'she expected to be paid for the services' despite that relationship and, if so, whether that expectation was reasonable" (*id.*). Plaintiff now appeals from a judgment dismissing the complaint upon a jury verdict that answered

the latter questions in the negative. We affirm.

We reject plaintiff's contention that the verdict is contrary to the weight of the evidence. It is well settled that a verdict may be set aside as against the weight of the evidence only if "the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]), and that is not the case here. "In order to make out a cause of action in quantum meruit or quasi contract, a plaintiff must establish (1) the performance of services in good faith; (2) the acceptance of those services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services" (*Landcom, Inc. v Galen-Lyons Joint Landfill Commn.*, 259 AD2d 967, 968 [4th Dept 1999]; *see Killian*, 140 AD3d at 1766; *Moors v Hall*, 143 AD2d 336, 337-338 [2d Dept 1988]). In general, "[t]he performance and acceptance of services gives rise to the inference of an implied contract to pay for the reasonable value of such services" (*Killian*, 140 AD3d at 1766 [internal quotation marks omitted]; *see Farina v Bastianich*, 116 AD3d 546, 547-548 [1st Dept 2014]). "Th[at] inference, however, may not be drawn where[,] because of the relationship between the parties, it is natural that such service should be rendered without expectation of pay" (*Moors*, 143 AD2d at 338 [internal quotation marks omitted]; *see Robinson v Munn*, 238 NY 40, 43 [1924]; *Killian*, 140 AD3d at 1766), and we conclude that there is a fair interpretation of the evidence pursuant to which the jury could have concluded that plaintiff and Hooson had such a relationship.

We reject plaintiff's contention that the court abused its discretion in refusing to permit plaintiff to introduce into evidence checks that were written to her for services rendered on earlier dates, regarding claims that were barred by the statute of limitations. "A Trial Judge necessarily is vested with broad discretion to determine the materiality and relevance of proposed evidence" (*Hyde v County of Rensselaer*, 51 NY2d 927, 929 [1980]) and, even if certain evidence is generally admissible, "[s]uch evidence may be excluded if the trial court finds that the risk of confusion or prejudice outweighs the advantage in receiving it" (*Salm v Moses*, 13 NY3d 816, 818 [2009]). Here, we conclude that the court did not abuse its discretion in declining to admit the checks at issue into evidence.

Plaintiff further contends that the court erred in indicating to the jurors, during a sidebar conference with the attorneys, that the case had previously been dismissed. There is no indication in the record before us that any juror heard any part of whatever conversation occurred off the record. Consequently, we cannot review plaintiff's contention inasmuch as "it is well settled that '[m]atter[s] dehors the record [are] not to be considered on appeal' " (*Sanders v Tim Hortons*, 57 AD3d 1419, 1420 [4th Dept 2008]; *see Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 305 [4th Dept 2002], *lv denied* 99 NY2d 508 [2003]). The record belies plaintiff's further contention that, during a certain part of

the court's preliminary instruction, the court informed the jury that the matter had previously been dismissed. We have considered plaintiff's remaining contention and conclude that it does not require a different result.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1330

CA 18-00987

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

IN THE MATTER OF LAUREN L. SHEIVE,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HOLLEY VOLUNTEER FIRE COMPANY, INC.,
RESPONDENT-DEFENDANT-RESPONDENT.

WINSTON & STRAWN LLP, NEW YORK CITY (MULAN CUI OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

TADDEO & SHAHAN, LLP, SYRACUSE (STEVEN C. SHAHAN OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered August 4, 2017 in a CPLR article 78 proceeding and declaratory judgment action. The judgment dismissed the amended petition-complaint.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking to enjoin any future "Squirrel Slam" hunting contests conducted by respondent-defendant (respondent) until it complies with the State Environmental Quality Review Act (SEQRA), and seeking a declaration that respondent is required under SEQRA to prepare an environmental assessment form as well as an environmental impact statement. Supreme Court dismissed the amended petition-complaint, and we affirm.

Prior to 2017, the one-day hunting contests at issue had been held annually by respondent as fundraisers, with prizes having been awarded based on the weight of squirrels turned in at the end of each contest. Petitioner resides approximately 50 miles from the area where respondent has held the hunting contests. She alleges an environmental injury-in-fact based on her fondness for squirrels, the impact that the hunting contests may have on the "local ecology," and the possibility that the contests may result in the killing of squirrels that she sees near her residence. Petitioner contends that she therefore has standing to bring this proceeding/action. We reject that contention.

Standing is "a threshold requirement for a [party] seeking to challenge governmental action" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). The burden of establishing standing to challenge an action pursuant to SEQRA is "on the party seeking review" (*Society of Plastics Indus.*, 77 NY2d at 769). "The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action" (*id.* at 772). In addition, to establish standing under SEQRA, a petitioner must establish, inter alia, "an *environmental* injury that is in some way different from that of the public at large" (*Matter of Tuxedo Land Trust, Inc. v Town Bd. of Town of Tuxedo*, 112 AD3d 726, 727-728 [2d Dept 2013] [emphasis added]; *see Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 304-305 [2009]; *Society of Plastics Indus.*, 77 NY2d at 774).

Here, we conclude that petitioner has not met her burden of establishing an environmental injury-in-fact. Although petitioner may have alleged some environmental harm, she has alleged, at most, an injury that is "no different in either kind or degree from that suffered by the general public" (*Matter of Kindred v Monroe County*, 119 AD3d 1347, 1348 [4th Dept 2014]). Petitioner also has not established that the hunting activities at issue have affected the wildlife where she resides, nor has she established that she has used, or even visited, the area where the hunting contests have been conducted (*cf. Matter of Wooster v Queen City Landing, LLC*, 150 AD3d 1689, 1690 [4th Dept 2017]). In light of our determination that petitioner lacks standing to bring this proceeding/action, we do not address her remaining contentions.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1333

KA 17-01247

PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAMISI TRUITT, 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 (Stephen J. Dougherty, A.J.), rendered April 28, 2017. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting her, upon her plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [4]), defendant contends that her waiver of the right to appeal was not knowingly, voluntarily and intelligently entered. We reject that contention. Contrary to defendant's assertion, County Court did not conflate defendant's waiver of the right to appeal with the rights automatically forfeited by a plea of guilty, and indeed the court specifically apprised defendant that "[t]he right to appeal is separate and distinct from" those rights that were automatically forfeited upon a plea of guilty (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Joubert*, 158 AD3d 1314, 1315 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]; *People v Williams*, 49 AD3d 1281, 1282 [4th Dept 2008], *lv denied* 10 NY3d 940 [2008]). Defendant's valid waiver of the right to appeal encompasses her contention that the sentence is unduly harsh and severe (*see Lopez*, 6 NY3d at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]). Similarly, defendant's further contention that the court erred in refusing to suppress her statement to the police does not survive her valid waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Lynn*, 144 AD3d 1491, 1492 [4th Dept 2016], *lv denied* 28 NY3d 1186 [2017]).

Defendant also contends that the court erred in denying, without a hearing, her pro se motion to withdraw her plea on the ground that she is not guilty. Although that contention survives defendant's

valid waiver of the right to appeal (*see People v Colon*, 122 AD3d 1309, 1309-1310 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]; *People v Montgomery*, 63 AD3d 1635, 1635-1636 [4th Dept 2009], *lv denied* 13 NY3d 798 [2009]), we conclude that it lacks merit. "Only in the rare instance will a defendant be entitled to an evidentiary hearing [on a motion to withdraw her plea of guilty]; often a limited interrogation by the court will suffice" (*People v Tinsley*, 35 NY2d 926, 927 [1974]). Here, the court reviewed the plea colloquy and then denied defendant's motion to withdraw the plea, and we conclude that the court correctly determined that "defendant's assertions of innocence . . . were conclusory and belied by defendant's statements during the plea colloquy" (*People v Wright*, 66 AD3d 1334, 1334 [4th Dept 2009], *lv denied* 13 NY3d 912 [2009]; *see People v Roberts*, 126 AD3d 1481, 1481 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]; *see generally People v Haffiz*, 19 NY3d 883, 884-885 [2012]).

To the extent that defendant's contention that she was denied effective assistance of counsel survives her guilty plea and waiver of the right to appeal (*see People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]; *People v Strickland*, 103 AD3d 1178, 1178 [4th Dept 2013]), we conclude that it lacks merit inasmuch as the record before us establishes that defendant was afforded meaningful representation (*see People v Blarr* [appeal No. 1], 149 AD3d 1606, 1606 [4th Dept 2017], *lv denied* 29 NY3d 1123 [2017]; *see generally People v Ford*, 86 NY2d 397, 404 [1995]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1338

KA 16-02174

PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE CARRASQUILLO, 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 January 15, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault in the first degree, and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), assault in the first degree (§ 120.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). The prosecution arose from an incident that occurred at approximately 6:15 p.m. on a day in August 2014, outside of a house in Syracuse. Two victims were struck by bullets fired from a passing red Honda sedan as they sat on the front porch, killing one of them and injuring the other. Shortly after midnight that night, the police stopped defendant, who was driving a red Honda sedan. The police officer who stopped defendant observed a shell casing sitting in a crease between the car's hood and fender, and a recording from a video camera on a neighboring house depicted a handgun being fired from the driver's window of the car during the shooting. Several witnesses identified defendant as the driver of the car and the person who fired out of the window.

Defendant contends that the verdict is contrary to the weight of the evidence because, inter alia, the surviving victim described an additional shooter who fired a weapon from the rear driver's side seat of the car, thus creating reasonable doubt whether defendant is the person who fired the fatal and injurious shots. We reject that contention. Initially, although the surviving victim's testimony was

given through an interpreter and is difficult to follow, contrary to defendant's contention, the surviving victim did not testify that the rear driver's side passenger fired a weapon. In addition, the evidence establishes that the shell casings found at the scene and the shell casing found on defendant's car were all fired from the same weapon, that all of the projectiles recovered from the deceased victim and elsewhere at the scene were fired from a single weapon, that the driver is the only person who can be seen firing a weapon in the video recording, that defendant was the driver and fired a weapon at the victims, that his fingerprints were found on the inside of the driver's door, and that he was later found driving the car. 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]). " 'Numerous witnesses inculpated defendant[], and the jury could have reasonably concluded that differences in their perception and memory of details of this fast-paced, chaotic event accounted for the inconsistencies' " in the testimony upon which defendant relies (*People v Romero*, 7 NY3d 633, 636 [2006]). " '[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 further contention that he was deprived of effective assistance of counsel. Contrary to defendant's assertion, defense counsel was not ineffective for failing to call a witness who could bolster the purported testimony of the surviving victim that there was a second shooter. Inasmuch as the uncalled witness provided a deposition indicating, among other things, that she saw defendant shoot the victims, "defense counsel's failure to call [that] witness[ ] was a matter of strategy" (*People v Gonzalez*, 62 AD3d 1263, 1265 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]; *see People v Morgan*, 77 AD3d 1419, 1420 [4th Dept 2010], *lv denied* 15 NY3d 922 [2010]). To the extent that defendant contends that defense counsel was ineffective for failing to introduce evidence of a prior altercation between the deceased victim and the rear driver's side passenger that provided a motive for the passenger to attack the victims, his contention is based on matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Resto*, 147 AD3d 1331, 1334-1335 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]; *People v Lawrence*, 23 AD3d 1039, 1040 [4th Dept 2005], *lv denied* 6 NY3d 835 [2006]; *People v Ward*, 291 AD2d 906, 907 [4th Dept 2002], *lv denied* 98 NY2d 641 [2002]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1343

CAF 17-01749

PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND TROUTMAN, JJ.

IN THE MATTER OF ZACKERY S.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

STEPHANIE S., RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered August 24, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, placed her under the supervision of petitioner based on a finding that, as a result of her mental illness, she neglected the subject child. We affirm.

Initially, we reject the mother's contention that Family Court erred in admitting in evidence certain hearsay statements in her hospital records, which were generated following a mental hygiene arrest of the mother during the relevant time period. "Hospital records fall within the business records exception when they reflect[ ] acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of . . . [the particular patient's] hospitalization" (*People v Ortega*, 15 NY3d 610, 617 [2010] [internal quotation marks omitted]; *see* CPLR 4518 [a]; *Matter of Christopher D.B. [Lorraine H.]*, 157 AD3d 944, 947-948 [2d Dept 2018]). Here, the mother's hospital records contain information concerning how and why she was taken to the hospital and, due to her refusal or inability to inform hospital personnel of what had occurred, that information was required for an understanding of her condition. Thus, "the statements in the hospital records were properly admitted both because they related to diagnosis and treatment and thus were 'admissible as an

exception to the hearsay rule' . . . , and because they had the requisite indicia of reliability" (*People v Emanuel*, 89 AD3d 1481, 1482 [4th Dept 2011], *lv denied* 18 NY3d 882 [2012]). In any event, even assuming, arguendo, that the court erred in admitting certain parts of the records, we conclude that any such error is harmless because, "even if those records are excluded from consideration, the finding of neglect is nonetheless supported by a preponderance of the credible evidence" (*Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018]).

Contrary to the mother's further contention, we conclude that petitioner established by a preponderance of the evidence that the subject child was neglected as a result of the mother's mental illness (*see Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403-1404 [4th Dept 2016]; *see generally* Family Court Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]). The evidence at the hearing established that the mother engaged in " 'bizarre and paranoid behavior' " that placed the subject child's physical, mental, or emotional condition in imminent danger of becoming impaired (*Matter of Christy S. v Phonesavanh S.*, 108 AD3d 1207, 1208 [4th Dept 2013]; *see generally Matter of Alexis H. [Jennifer T.]*, 90 AD3d 1679, 1680 [4th Dept 2011], *lv denied* 18 NY3d 810 [2012]; *Matter of Senator NN.*, 11 AD3d 771, 772 [3d Dept 2004]). In addition, contrary to the mother's contention that the evidence is legally insufficient because the child did not suffer an actual injury, only "near or impending" injury or impairment is required (*Nicholson*, 3 NY3d at 369), and such impending injury was established here.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1349

CA 18-00881

PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND TROUTMAN, JJ.

JACQUELINE DEL ROSARIO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LIVERPOOL LODGING, LLC, AND MAPLEWOOD INN, LLC,
DEFENDANTS-RESPONDENTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 1, 2018. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion in part and reinstating the complaint, as amplified by the bill of particulars, except insofar as it alleges that defendants were negligent in failing to warn plaintiff of dangerous and defective conditions, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries she allegedly sustained when she fell while stepping out of a bath tub at a hotel. Supreme Court granted defendants' motion seeking summary judgment and dismissed the complaint, and we now modify. We agree with plaintiff that the court erred in granting the motion on the ground that the cause of plaintiff's fall was based on mere speculation (*see Gafter v Buffalo Med. Group, P.C.*, 85 AD3d 1605, 1606 [4th Dept 2011]; *cf. McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077 [4th Dept 2008]). In support of their motion, defendants submitted plaintiff's deposition testimony, which, when viewed in the light most favorable to plaintiff and giving her the benefit of every reasonable inference (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), establishes that plaintiff believed that the alleged dangerous or defective configuration or installation of the tub caused her to fall and sustain injuries. In addition, defendants failed to establish in support of their motion the absence of a dangerous or defective condition, and thus they were not entitled to summary judgment dismissing the complaint on that ground either (*see Zelie v Town of Van Buren*, 79 AD3d 1801, 1802 [4th Dept 2010];

LaPaglia v City of Buffalo, 239 AD2d 962, 962 [4th Dept 1997]). We agree with defendants, however, that the court properly granted their motion to the extent that plaintiff alleged that they were negligent in failing to warn of dangerous and defective conditions. Defendants met their initial burden of establishing that any dangerous or defective condition was open and obvious, and plaintiff failed to raise a triable issue of fact (*see Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1318-1319 [4th Dept 2012]; *see generally Tagle v Jakob*, 97 NY2d 165, 169 [2001]; *Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533 [4th Dept 2012]). We therefore modify the order by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, except to the extent that it alleges that defendants were negligent in failing to warn plaintiff of dangerous and defective conditions.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1359

KA 16-02286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL F. GEER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Michael F. Pietruszka, A.J.), rendered November 4, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree and unauthorized use of a vehicle in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and unauthorized use of a vehicle in the third degree (§ 165.05 [1]), defendant contends that his attorney was ineffective because he failed to properly investigate defendant's case. According to defendant, defense counsel would have learned from a proper investigation that his mother and stepfather, who were the victims of his crimes, did not want defendant to be convicted of a felony, notwithstanding that they provided supporting depositions to the police that contain facts sufficient to support the charges. Defendant's contention "survives his plea and valid waiver of the right to appeal only insofar as he demonstrates that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance' " (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). To the extent defendant contends that his plea was infected by the allegedly ineffective assistance of counsel, that contention " 'involve[s] matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL article 440' " (*id.*; *see People v Broomfield*, 134 AD3d 1443, 1445 [4th Dept 2015], *lv denied* 27 NY3d

1129 [2016]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1362

KA 16-00890

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

INNA NICHIPORUK, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, 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 (Thomas P. Franczyk, J.), rendered April 4, 2016. The judgment convicted defendant, upon her plea of guilty, of felony driving while intoxicated and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: On appeal from a judgment convicting her upon a plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), defendant contends that County Court erred in denying her motion to withdraw her guilty plea. We affirm.

Contrary to defendant's contention, the court did not abuse its discretion in denying her motion to withdraw her plea on the ground of actual innocence. It is well established that "[p]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Rosekrans*, 149 AD3d 1563, 1564 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017] [internal quotation marks omitted]). On her motion, defendant asserted that she had a "valid defense" to the crimes, i.e., that she had not operated the vehicle on the night of her arrest. In support of that purported defense, defendant submitted the affidavit of her brother, who averred that he had been on his way to pick defendant up from the parking lot in which she was arrested. Even assuming the truth of the brother's affidavit, we conclude that his averments do not establish that defendant had not been driving unlawfully *before* arriving at the parking lot. Indeed, the fact that, at the time of her arrest,

defendant was found alone, intoxicated, and in the driver's seat of a running vehicle with her seat belt fastened suggests that she had operated the vehicle before being found by the police in the commercial parking lot (*see People v Dunster*, 146 AD3d 1029, 1029-1030 [3d Dept 2017], *lv denied* 29 NY3d 997 [2017]; *see also People v Annis*, 126 AD3d 1525, 1526 [4th Dept 2015]; *People v Panek*, 305 AD2d 1098, 1098 [4th Dept 2003], *lv denied* 100 NY2d 623 [2003]). To the extent that defendant denied having operated the vehicle in letters she submitted to the court and in remarks she made to her probation officer during the presentence interview, those unsworn statements are not evidence in admissible form (*see generally Rosekrans*, 149 AD3d at 1564; *People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]), and are the sort of "conclusory and unsubstantiated" claims of innocence insufficient to contradict her admissions to the contrary during the plea colloquy (*People v Garner*, 86 AD3d 955, 955 [4th Dept 2011]; *see People v Haffiz*, 19 NY3d 883, 884 [2012]; *People v Goodwin*, 159 AD3d 1433, 1434 [4th Dept 2018]).

Defendant further contends that her plea was not knowingly, intelligently and voluntarily entered because she had suffered a traumatic brain injury approximately 10 months prior to entering the plea, which rendered her unable to appropriately understand and weigh her options, and that the court erred in denying her motion to withdraw the plea on that ground. We reject that contention. A traumatic brain injury, like any other cognitive or psychological disorder, does not necessarily prevent a " 'knowing and voluntary choice' " (*People v Gessner*, 155 AD3d 1668, 1669 [4th Dept 2017]; *see also People v Tracy*, 125 AD3d 1517, 1518 [4th Dept 2015], *lv denied* 27 NY3d 1008 [2016]). We decline to disturb a plea where, as here, there is no "indication that [the] defendant was uninformed, confused or incompetent" at the time it was entered (*People v Alexander*, 97 NY2d 482, 486 [2002]; *see People v Nudd*, 53 AD3d 1115, 1115 [4th Dept 2008], *lv denied* 11 NY3d 834 [2008]; *see also People v Scott*, 144 AD3d 1597, 1598 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v DeFazio*, 105 AD3d 1438, 1439 [4th Dept 2013], *lv denied* 21 NY3d 1015 [2013]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1372

CA 18-01276

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

GARRETT CULVER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN M. SIMKO, D.O., ET AL., DEFENDANTS,
AND CARL T. PEARSON, D.C., INDIVIDUALLY, AND
DOING BUSINESS AS PEARSON CHIROPRACTIC,
DEFENDANT-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (GORDON D. TRESCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Chautauqua County (Eugene F. Pigott, Jr., J.), entered October 5, 2017. The order, insofar as appealed from, denied the motion of defendant Carl T. Pearson, D.C., individually and doing business as Pearson Chiropractic, for summary judgment dismissing the complaint against him.

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

Memorandum: Carl T. Pearson, D.C., individually and doing business as Pearson Chiropractic (defendant), appeals from an order insofar as it denied his motion for summary judgment dismissing the complaint against him. We affirm.

"On a motion for summary judgment in a chiropractic malpractice action, a defendant has the burden of establishing, prima facie, that he or she did not deviate from good and accepted standards of chiropractic care, or that any such deviation was not a proximate cause of the plaintiff's injuries" (*Metcalf v O'Halleran*, 137 AD3d 758, 759 [2d Dept 2016]). Even assuming, arguendo, that defendant addressed both deviation and causation in his motion and met his initial burden by submitting his own affidavit and two expert affidavits, we conclude that plaintiff raised triable issues of fact (*see generally Orsi v Haralabatos*, 20 NY3d 1079, 1080 [2013]). In opposition to defendant's motion, plaintiff submitted the affidavits of his experts, who opined that defendant breached the applicable standard of care when he failed to diagnose plaintiff with cauda equina syndrome and did not ensure that plaintiff received the

appropriate tests and emergency care to facilitate treatment of that condition. Plaintiff's experts further opined that defendant's deviation from the standard of care was a proximate cause of plaintiff's injuries (*see Kless v Paul T.S. Lee, M.D., P.C.*, 19 AD3d 1083, 1084 [4th Dept 2005]). Thus, the affidavits submitted by the parties presented a " 'classic battle of the experts' " precluding summary judgment (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). Moreover, plaintiff submitted defendant's deposition testimony, which also raised triable issues of fact whether defendant deviated from the relevant standard of care.

Finally, defendant contends that Supreme Court erred in denying his motion because he, as the referring provider, cannot be held vicariously liable for the negligence of the treating provider. We reject that contention because plaintiff presented evidence that defendant was independently negligent (*see Datiz v Shoob*, 71 NY2d 867, 868 [1988]; *Derusha v Sellig*, 92 AD3d 1193, 1195 [3d Dept 2012]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1377

KA 14-00924

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT T. BITTLES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered May 9, 2014. The judgment convicted defendant, upon a nonjury verdict, of assault in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon a nonjury verdict, of assault in the third degree (Penal Law § 120.00 [1]), defendant contends that the evidence is legally insufficient to support the conviction because the People failed to establish that his actions, and not the actions of his codefendant, caused physical injury to the victim. Defendant failed to preserve that contention for our review inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at the alleged error now raised on appeal" (*People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017], quoting *People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Simmons*, 133 AD3d 1227, 1227 [4th Dept 2015]). In any event, we conclude that the contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Viewing the evidence in the light most favorable to the People (*see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that " 'there is a[ ] valid line of reasoning and permissible inferences which could lead a rational person to the conclusion . . . [which] as a matter of law satisf[ies] the proof and burden requirements for every element of the crime' " of which defendant was convicted (*People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006], quoting *Bleakley*, 69 NY2d at 495). Here, the evidence establishes that defendant aided and shared a " 'community of purpose' " with the principal (*People v La Belle*, 18 NY2d 405, 412 [1966]; *see* Penal Law § 20.00; *People v Scott*, 25 NY3d 1107, 1110 [2015]) to intentionally

cause physical injury to the victim (*see* § 120.00 [1]), who suffered such an injury, i.e., an "impairment of physical condition or substantial pain" (§ 10.00 [9]; *see People v Chiddick*, 8 NY3d 445, 447 [2007]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1387

CA 18-00884

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

MAUREEN A. WEINERT-SALERNO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

APRIL L. STEFANSKI, DEFENDANT-RESPONDENT,
CHRISTOPHER E. MONACO, DEFENDANT-APPELLANT,
AND ANDREW J. DAVID, DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARTYN AND MARTYN, MINEOLA (AMANDA L. RAIMONDI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered July 20, 2017. The order, insofar as appealed from, granted the motion of defendant April L. Stefanski for summary judgment dismissing the complaint and all cross claims and counterclaims against her.

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 allegedly sustained when the vehicle she was operating was involved in a series of collisions with three other vehicles that were operated by defendants. Contrary to the contention of defendant Christopher E. Monaco, Supreme Court properly granted the motion of defendant April L. Stefanski seeking summary judgment dismissing the complaint and any cross claims and counterclaims against her.

We conclude that Stefanski established that she was not responsible for any of the collisions, and thus that she was entitled to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In support of her motion, Stefanski submitted evidence that she was operating the lead vehicle, had activated her right turn signal and moved to the right-hand shoulder of the road, and had slowed her vehicle to 3 to 5 miles per hour in order to make a right-hand turn into her driveway. At that point, her vehicle was struck by plaintiff's vehicle.

In opposition to the motion, Monaco submitted deposition testimony from himself, plaintiff and Stefanski, but we conclude that those submissions failed to raise any triable issue of fact concerning Stefanski's alleged negligence (*see Ruzycki v Baker*, 301 AD2d 48, 50 [4th Dept 2002]; *Mascitti v Greene*, 250 AD2d 821, 822 [2d Dept 1998]; *see also Verdejo v Aguirre*, 8 AD3d 63, 63-64 [1st Dept 2004]). This is not a case where the lead vehicle, i.e., Stefanski's vehicle, stopped or slowed down suddenly (*cf. Macri v Kotrys*, 164 AD3d 1642, 1643 [4th Dept 2018]; *James v Thomas*, 156 AD3d 1440, 1441 [4th Dept 2017]; *Brooks v High St. Professional Bldg., Inc.*, 34 AD3d 1265, 1266-1267 [4th Dept 2006]). Instead, the submissions from all parties establish that Stefanski had activated her right turn signal and had slowed or stopped in anticipation of turning into the driveway. Plaintiff even conceded during her deposition testimony that she observed Stefanki's vehicle slowing from a distance of six car lengths.

Although there may be some unresolved questions concerning the weather and road conditions at the time that plaintiff's vehicle struck the rear end of Stefanski's vehicle, we reject Monaco's contention that such questions preclude an award of summary judgment to Stefanski. Indeed, it was plaintiff's duty to take heed of such conditions and account for them in how she reacted to seeing Stefanski activate her right turn signal and slow or stop in preparation for turning (*see LaMasa v Bachman*, 56 AD3d 340, 340 [1st Dept 2008]; *Montes v New York City Tr. Auth.*, 46 AD3d 121, 125 [1st Dept 2007]; *see also Rodriguez v City of New York*, 161 AD3d 575, 577 [1st Dept 2018]; *Mitchell v Gonzalez*, 269 AD2d 250, 251 [1st Dept 2000]).

Monaco further contends that Stefanski is not entitled to summary judgment because, during her deposition, plaintiff testified that Stefanski's vehicle was positioned at a 90-degree angle to plaintiff's vehicle when the two vehicles collided. The photographic evidence submitted in support of and in opposition to the motion, however, establish that plaintiff's testimony to that effect is incredible as a matter of law (*see generally Lewis v Carrols LLC*, 158 AD3d 1055, 1056-1057 [4th Dept 2018]; *Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]). The damage to Stefanski's vehicle was to the left quarter panel and rear bumper, i.e., the rear of the driver's side. Had Stefanski's vehicle been at a 90-degree angle to the road and entering her driveway on the right at the time of the collision, as plaintiff testified, the damage to Stefanski's vehicle would have been on the passenger side, not the rear driver's side. Finally, we reject Monaco's contention that the unresolved sequence in which the collisions occurred, i.e., whether plaintiff's vehicle collided with Stefanski's vehicle before or after Monaco's vehicle collided with plaintiff's vehicle, precludes an award of summary judgment to Stefanski. Whatever the sequence, the record establishes that Stefanski's actions had no part in determining it.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1393

CA 18-01347

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

R-J TAYLOR GENERAL CONTRACTING, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FAIRPORT CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

ALARIO & FISCHER, P.C., EAST SYRACUSE (HARRIS LINDENFELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

ADAMS BELL ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 19, 2017. The order, among other things, denied that part of defendant's motion seeking partial summary judgment.

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

Memorandum: Plaintiff contractor entered into two identical contracts with defendant for work to be performed at various schools within the school district. The contracts provided for, inter alia, the removal of "unsuitable soil," and plaintiff was to "provide a Unit Price for unsuitable soil removal work above or below [a set] quantity . . . All measurements of unsuitable soils removed [were to] be based on *in place volume* measurement, confirmed by the Construction Manager" (emphasis added). Plaintiff commenced action No. 1, alleging that it removed more soil than the set quantity and that defendant had breached the contracts by refusing to pay for that removal work. Both plaintiff and defendant sought summary judgment related to that complaint. Supreme Court denied the motion and cross motion, and we affirmed (*RJ Taylor Gen. Contr., Inc. v Fairport Cent. Sch. Dist.*, 99 AD3d 1231 [4th Dept 2012]).

Plaintiff thereafter commenced action No. 2, seeking, in the first and third causes of action, amounts it alleged were still due under the contracts and, in the second and fourth causes of action, damages related to defendant's "unforeseeably excessive number of changes and corrections to the original contract documents." The two actions were ultimately consolidated.

Contending that the second and fourth causes of action in action No. 2 sought damages that were precluded by the contracts' no-damages-for-delay clauses, defendant moved for, inter alia, partial summary judgment dismissing those causes of action. In addition, defendant sought a summary determination related to the removal of unsuitable soils, a summary determination that the contract provisions regarding defendant's right to perform are unambiguous and enforceable, and an order compelling plaintiff to respond to certain discovery requests. Supreme Court granted the motion in part with respect to some of the discovery requests, and denied the remainder of the motion. We now affirm.

Contrary to defendant's contention, there are triable issues of fact whether the second and fourth causes of action in action No. 2 are precluded by the contracts' no-damages-for-delay clauses. "It is well settled that '[a] clause which exculpates a contractee from liability to a contractor for damages resulting from delays in the performance of the latter's work is valid and enforceable and is not contrary to public policy if the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally' " (*Weydman Elec., Inc. v Joint Schs. Constr. Bd.*, 140 AD3d 1605, 1606 [4th Dept 2016], *lv dismissed* 28 NY3d 1024 [2016], quoting *Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986], *rearg denied* 68 NY2d 753 [1986]). Nevertheless, "even with such a clause, damages may be recovered for: (1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract" (*Corinno Civetta Constr. Corp.*, 67 NY2d at 309). Even assuming, arguendo, that defendant established that the damages sought by plaintiff were barred by the exculpatory clauses of the contracts, we conclude that plaintiff submitted evidence from which a jury could find that it met its " 'heavy burden' of establishing the applicability of one of the exceptions to the general rule that no-damages-for-delay clauses are enforceable" (*Weydman Elec., Inc.*, 140 AD3d at 1607; *see West Gate Landscaping, Inc. v County of Rockland*, 131 AD3d 1049, 1050 [2d Dept 2015]; *Bovis Lend Lease LMB v GCT Venture*, 6 AD3d 228, 229 [1st Dept 2004]; *Castagna & Son v Board of Educ. of City of N.Y. [New Dorp High School]*, 173 AD2d 405, 406 [1st Dept 1991]).

Defendant further contends that the damages sought by plaintiff are barred by the notice provisions of the contracts. Although we agree with defendant that, generally, the failure to comply with a condition precedent to recovery constitutes a waiver of a claim and precludes that claim (*see Rifenburg Constr., Inc. v State of New York*, 90 AD3d 1498, 1498-1499 [4th Dept 2011]), we agree with plaintiff that its request for delay damages does not constitute a claim as defined by the contracts, i.e., it "is not a demand premised, *as a matter of right*, on the terms of the contract" (*Huen N.Y., Inc. v Board of Educ. Clinton Cent. Sch. Dist.*, 67 AD3d 1337, 1339 [4th Dept 2009] [emphasis added]). To the contrary, plaintiff's "request for delay damages seeks relief wholly outside the scope of the contracts" (*id.*).

As a final contention related to the second and fourth causes of action in action No. 2, defendant contends that it is entitled to summary judgment dismissing those causes of action because plaintiff "has failed to provide proof of damage." As the Court of Appeals has written, "[a] contractor wrongfully delayed by its employer must establish the extent to which its costs were increased by the improper acts because its recovery will be limited to damages actually sustained" (*Berley Indus. v City of New York*, 45 NY2d 683, 687 [1978]). Even assuming, arguendo, that defendant met its initial burden of establishing that plaintiff could not "identify" any damages (*Aldridge v Brodman*, 100 AD3d 1537, 1538 [4th Dept 2012]), we conclude that plaintiff raised triable issues of fact precluding summary judgment to defendant (*see Ernst Steel Corp. v Horn Constr. Div., Halliburton Co.*, 104 AD2d 55, 60 [4th Dept 1984], *amended on other grounds* 109 AD2d 1104 [4th Dept 1985]; *cf. Rochester Acoustical Corp. v Reddick & Sons of Gouverneur*, 201 AD2d 968, 969 [4th Dept 1994]).

Contrary to defendant's remaining contention in action No. 1, plaintiff raised triable issues of fact regarding the method to measure the "in place volume" of the unsuitable soil that plaintiff removed pursuant to the contracts. With respect to defendant's remaining contention in action No. 2, we conclude that plaintiff raised triable issues of fact whether defendant "frustrate[d] [plaintiff's] performance" under the contracts and thus whether it can hold plaintiff liable for defendant's costs in asserting its right to perform under the contracts (*Water St. Dev. Corp. v City of New York*, 220 AD2d 289, 290 [1st Dept 1995], *lv denied* 88 NY2d 809 [1996]; *see Jupiter Envtl. Servs., Inc. v Graystone Constr. Corp.*, 31 AD3d 388, 390 [2d Dept 2006]; *Stardial Communications Corp. v Turner Constr. Co.*, 305 AD2d 126, 126 [1st Dept 2003]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1394

CA 18-01170

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

DIANA BEECHLER AND NICHOLAS BEECHLER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KILL BROTHERS COMPANY, ALSO KNOWN AS KILLBROS.,
UNVERFERTH MANUFACTURING COMPANY, INC., AND
BENTLEY BROS., INC., DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANTS-APPELLANTS KILL BROTHERS COMPANY, ALSO KNOWN AS KILLBROS. AND UNVERFERTH MANUFACTURING COMPANY, INC.

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANT-APPELLANT BENTLEY BROS., INC.

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

Appeals from an order of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered May 22, 2018. The order denied the motion of defendants Kill Brothers Company, also known as Killbros., and Unverferth Manufacturing Company, Inc. for summary judgment dismissing the complaint against them and denied the motion of defendant Bentley Bros., Inc. for partial summary judgment dismissing the fourth cause of action against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions are granted, the complaint against defendants Kill Brothers Company, also known as Killbros., and Unverferth Manufacturing Company, Inc., is dismissed, and the fourth cause of action against defendant Bentley Bros., Inc. is dismissed.

Memorandum: While Diana Beechler (plaintiff) was working inside of a piece of farm equipment known as a grain cart, she lost her footing and her right leg became caught in a rotating auger. Thereafter, plaintiffs commenced this action against defendant Kill Brothers Company, also known as Killbros., and defendant Unverferth Manufacturing Company, Inc. (collectively, the Killbros defendants), and defendant Bentley Bros., Inc. (Bentley), seeking to recover damages for injuries that plaintiff sustained in the accident. In the complaint, plaintiffs asserted, inter alia, causes of action against the Killbros defendants based upon strict products liability and

negligent design and manufacture, and a cause of action against Bentley based upon strict products liability. The Killbros defendants moved for summary judgment dismissing the complaint against them, and Bentley moved for partial summary judgment dismissing the strict products liability cause of action against it. We agree with defendants that Supreme Court erred in denying those motions. We therefore reverse the order, grant the motions, dismiss the complaint against the Killbros defendants, and dismiss the strict products liability cause of action against Bentley.

In the respective motions, defendants established their entitlement to summary judgment dismissing the strict products liability causes of action insofar as they are predicated on a manufacturing defect theory "by presenting competent evidence that [the] product was not defective" (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 221 [2008]; *see Cassatt v Zimmer, Inc.*, 161 AD3d 1549, 1550 [4th Dept 2018]), that is, that the product performed as intended and was not defective when it left the manufacturer's control (*see Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 968 [4th Dept 2004]). In support of their motions, defendants submitted the testimony of the Killbros defendants' production manager and foreman, who described the process of assembling a grain cart, during which a steel safety guard was welded over the exposed portion of auger on every grain cart. The deposition testimony further established that the guard was present on this particular unit at the time it left the manufacturer's control. Furthermore, the Killbros defendants submitted the affidavit of an expert, which was incorporated by reference into Bentley's moving papers, who opined that plaintiff's injuries would not have occurred if the steel safety guard had not been removed. Even assuming, arguendo, that the evidence submitted by plaintiffs in opposition to the motion demonstrated that the condition of the steps inside the grain cart constituted a manufacturing defect, we conclude that such evidence failed to raise an issue of fact inasmuch as defendants established that the absence of the guard, not the condition of the steps, was the proximate cause of plaintiff's injuries (*cf. Rutherford v Signode Corp.*, 11 AD3d 922, 922-923 [4th Dept 2004], *lv denied* 4 NY3d 702 [2005]).

Defendants established their entitlement to summary judgment dismissing the strict products liability causes of action insofar as they are predicated on a design defect theory by submitting evidence that the product was reasonably safe (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]; *see generally Denny v Ford Motor Co.*, 87 NY2d 248, 256-257 [1995], *rearg denied* 87 NY2d 969 [1996]). The Killbros defendants' expert averred that the steel safety guard was manufactured in accordance with industry standards, was designed to last the life of the product, and was "state of the art" inasmuch as it was permanently welded to the interior of the grain cart and could not be removed except by using an acetylene torch or other such heavy-duty tool (*see Reeps v BMW of N. Am., LLC*, 94 AD3d 475, 475-476 [1st Dept 2012]; *Guzzi v City of New York*, 84 AD3d 871, 873 [2d Dept 2011]; *Wesp*, 11 AD3d at 967). Plaintiffs failed to raise an issue of fact whether the grain cart, "as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to

design the product in a safer manner" (*Voss*, 59 NY2d at 108; *see Stalker v Goodyear Tire & Rubber Co.*, 60 AD3d 1173, 1175 [3d Dept 2009]). Although plaintiffs' expert averred that certain features of the grain cart violated industry standards, we conclude that none of the standards upon which he relied are applicable here.

Likewise, we conclude that the Killbros defendants are entitled to summary judgment dismissing the cause of action against them alleging negligent design and manufacture. "[I]nasmuch as there is almost no difference between a prima facie case in negligence and one in strict liability," we conclude that plaintiffs similarly failed to raise an issue of fact with respect to their cause of action for negligent design and manufacture (*Preston v Peter Luger Enters., Inc.*, 51 AD3d 1322, 1325 [3d Dept 2008]; *see generally Hokenson v Sears, Roebuck & Co.*, 159 AD3d 1501, 1502 [4th Dept 2018]).

Finally, we note that, in plaintiffs' responses to the Killbros defendants' interrogatories, plaintiffs asserted additional theories of liability. One was that the Killbros defendants were negligent in failing to warn plaintiff about a dangerous condition. The other was based on a breach of implied warranty, which was presumably restricted to the strict products liability cause of action asserted in the complaint. Plaintiffs did not oppose defendants' motions with respect to either of those theories in the motion court or in their appellate brief. We thus deem plaintiffs to have abandoned those theories, and any causes of action based upon them must therefore be dismissed (*see Mortka v K-Mart Corp.*, 222 AD2d 804, 804 [3d Dept 1995]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1397

KA 16-01755

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMARIO WASHINGTON, DEFENDANT-APPELLANT.

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

DEMARIO WASHINGTON, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 30, 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 and Supreme Court, Erie County, is directed to redact the phrase "described the defendant as a sociopath and" from all copies of defendant's presentence report.

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention in his main brief, " 'the waiver of the right to appeal 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]). Here, the plea colloquy and the written waiver of the right to appeal signed by defendant demonstrate that he "knowingly, intelligently and voluntarily waived the right to appeal, including the right to appeal the severity of the sentence" (*People v Hill*, 162 AD3d 1762, 1762 [4th Dept 2018], *lv denied* 32 NY3d 1004 [2018] [internal quotation marks omitted]). Defendant's contention in his main and pro se supplemental briefs that his sentence is unduly harsh and severe is foreclosed by his valid waiver of the right to appeal (*see People v Hidalgo*, 91 NY2d 733, 737 [1998]). We reject defendant's contention in his main brief that the waiver was rendered invalid with respect to the severity of the sentence based on the court's failure to advise him that, by operation of Penal Law § 70.25 (2-a), his sentence must run consecutively to an undischarged term of incarceration on a prior conviction (*see*

generally People v Belliard, 20 NY3d 381, 383, 389 [2013]).

Defendant further contends in his main brief that the court erred in failing to redact allegedly inaccurate or otherwise improper information contained in the presentence report (PSR) concerning the present offense. We note that defendant's contention survives his valid waiver of the right to appeal because it does not implicate the procedures utilized in entering his plea or in imposing his sentence (*cf. People v Abdul*, 112 AD3d 644, 645 [2d Dept 2013], *lv denied* 22 NY3d 1136 [2014]). A failure "to redact erroneous information from the PS[R] create[s] an unjustifiable risk of future adverse effects to defendant in other contexts, including appearances before the Board of Parole or other agencies" (*People v Freeman*, 67 AD3d 1202, 1203 [3d Dept 2009]). "An inaccurate PS[R] could keep a defendant incarcerated for a longer duration of time, affect future determinations of his or her legal status in court, as well as affect other rights regulated by the state. These risks are enough to justify redaction" (*id.*). We agree with defendant that the inclusion in the PSR of the arresting officer's reference to defendant as a "sociopath" was inappropriate and inflammatory. The term is a professional one and "such a diagnosis should be left to qualified professionals" (*People v Boice*, 6 Misc 3d 1014[A], 2004 NY Slip Op 51788[U], *6 [Chemung County Ct 2004]). We therefore direct Supreme Court to redact the phrase "described the defendant as a sociopath and" from all copies of defendant's PSR. We conclude, however, that defendant failed to meet his burden of establishing that the other challenged statement in the PSR is inaccurate (*see People v Richardson*, 142 AD3d 1318, 1319 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Rudduck*, 85 AD3d 1557, 1557-1558 [4th Dept 2011], *lv denied* 17 NY3d 861 [2011]).

The claims of ineffective assistance of counsel raised in defendant's pro se supplemental brief "concern[] matters outside the record and thus must be raised by way of a motion pursuant to CPL article 440" (*People v Atkinson*, 105 AD3d 1349, 1350 [4th Dept 2013], *lv denied* 24 NY3d 958 [2014]; *see People v Huddleston*, 160 AD3d 1359, 1361-1362 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]). Finally, although defendant's remaining contention in his pro se supplemental brief that his factual colloquy negated an essential element of the crime to which he pleaded guilty survives his valid waiver of the right to appeal, defendant failed to preserve that contention for our review "because he did not move to withdraw the plea or to vacate the judgment of conviction, and this case does not fall within the rare exception to the preservation requirement" (*People v Tapia*, 158 AD3d 1079, 1080 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1407

CAF 17-00126

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

IN THE MATTER OF CORY MORENO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAN ELLIOTT, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

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

VIVIAN CLARA STRACHE, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered December 21, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties shall share joint custody of the subject children, with primary placement with petitioner.

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

Memorandum: In appeal No. 1, respondent-petitioner mother appeals from an order that, among other things, modified a prior order of custody and visitation by awarding petitioner-respondent father primary placement of the three subject children and granting visitation to the mother. In appeal No. 2, the mother appeals from an order that dismissed her two petitions seeking a modification of the custody and visitation order at issue in appeal No. 1. We affirm in both appeals.

Addressing first the order in appeal No. 1, we reject the mother's contention that the father failed to make the requisite showing of a change of circumstances to warrant an inquiry into whether the best interests of the children would be served by a modification of the prior custody and visitation order (*see Matter of Carey v Windover*, 85 AD3d 1574, 1574 [4th Dept 2011], *lv denied* 17 NY3d 710 [2011]; *Matter of Dormio v Mahoney*, 77 AD3d 1464, 1465 [4th Dept 2010], *lv denied* 16 NY3d 702 [2011]). The father met that burden by establishing, inter alia, that the mother, in violation of an existing order, failed to enroll two of the children in counseling, failed to provide him with the children's educational, medical, dental and mental health appointment information (*see generally Matter of*

Green v Bontzolakes, 111 AD3d 1282, 1283 [4th Dept 2013]), and also interfered with his "visitation rights and/or telephone access" (*Matter of Murphy v Wells*, 103 AD3d 1092, 1093 [4th Dept 2013], *lv denied* 21 NY3d 854 [2013] [internal quotation marks omitted]; *see Matter of Amrane v Belkhir*, 141 AD3d 1074, 1075 [4th Dept 2016]; *Goldstein v Goldstein*, 68 AD3d 717, 720 [2d Dept 2009]). Contrary to the mother's further contention, we conclude that a sound and substantial basis exists in the record to support Family Court's determination that awarding the father primary placement of the children is in their best interests (*see Matter of Cross v Caswell*, 113 AD3d 1107, 1107-1108 [4th Dept 2014]).

Additionally, the mother contends that the court was not authorized under article 6 of the Family Court Act to make the order of protection, which had been made a condition of the prior custody and visitation order, a condition of the order in appeal No. 1. However, inasmuch as the propriety of that order of protection was determined on the merits in a prior proceeding between the same parties (*see Matter of Moreno v Elliott*, 155 AD3d 1561, 1562 [4th Dept 2017], *lv dismissed in part and denied in part* 30 NY3d 1098 [2018]), the doctrine of res judicata precludes the mother from challenging it here (*see generally Matter of Josey v Goord*, 9 NY3d 386, 389 [2007]).

Finally, contrary to the mother's contention in appeal No. 2, the court did not err in dismissing her modification petitions without a hearing. It is well settled that "[o]ne who seeks to modify an existing order of [custody and] visitation is not automatically entitled to a hearing[and] must make some evidentiary showing sufficient to warrant it" (*Matter of Richard R.G. v Rebecca H.*, 34 AD3d 1312, 1312 [4th Dept 2006], *lv denied* 8 NY3d 804 [2007] [internal quotation marks omitted]; *see Matter of Farner v Farner*, 152 AD3d 1212, 1213 [4th Dept 2017]; *see also Matter of Horowitz v Horowitz*, 154 AD3d 1207, 1208 [3d Dept 2017]), and we conclude that the court properly determined that the mother failed to establish a change of circumstances during the less than two-month period that had elapsed since the court transferred primary placement to the father. Moreover, we note that "the court was fully familiar with relevant background facts regarding the parties and the child[ren] from several past proceedings, and thus a hearing on the petition[s] was not necessary to determine [their] merits" (*Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447 [4th Dept 2009], *lv denied* 13 NY3d 715 [2010] [internal quotation marks omitted]; *see Matter of Walberg v Rudden*, 14 AD3d 572, 572 [2d Dept 2005]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1408

CAF 17-01138

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

IN THE MATTER OF JAN M. ELLIOTT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CORY A. MORENO, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR PETITIONER-APPELLANT.

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

VIVIAN CLARA STRACHE, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered May 11, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petitions.

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

Same memorandum as in *Matter of Moreno v Elliott* ([appeal No. 1] — AD3d — [Mar. 15, 2019] [4th Dept 2019]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1410

CAF 17-00999

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

IN THE MATTER OF CALLIE H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TALEENA W., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

AMBER R. POULOS, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RICHARD L. SULLIVAN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered May 18, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother contends that Family Court erred in terminating her parental rights with respect to the subject child on the ground of permanent neglect. We reject that contention. Contrary to the mother's contention, petitioner met its "burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and [the child] by providing services and other assistance aimed at ameliorating or resolving the problems preventing [the child's] return to [the mother's] care" (*Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1483 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of Alexander S. [David S.]*, 130 AD3d 1463, 1463 [4th Dept 2015], *lv denied* 26 NY3d 910 [2015], *lv denied and appeal dismissed* 26 NY3d 1030 [2015], *rearg denied* 26 NY3d 1132 [2016]). Initially, we note that the mother does not challenge the efforts that petitioner put forth before she was incarcerated. With respect to the time during which the mother was incarcerated, it is well settled that an agency seeking to terminate the parental rights of an incarcerated parent may fulfill its duty to make such diligent efforts by, inter alia, "apprising the incarcerated parent of the child's well-being, developing an appropriate service plan, investigating possible placement of the child with relatives suggested by the parent,

responding to the parent's inquiries and facilitating telephone contact between the parent and child" (*Matter of James J. [James K.]*, 97 AD3d 936, 937 [3d Dept 2012]; *see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 430 [2012]; *Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539-1540 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]). The record here establishes that petitioner engaged in those diligent efforts with the exception of facilitating telephone contact inasmuch as the child was too young to communicate by telephone. We reject the mother's contention that petitioner failed to arrange visitation while she was incarcerated (*see generally Hailey ZZ.*, 19 NY3d at 429) inasmuch as the record establishes that the mother's family arranged for her to have five personal visits with the child after the commencement of her incarceration, and "[o]f course, an agency should not be required to secure services for a parent which are merely duplicative of those already being received" (*Matter of Star A.*, 55 NY2d 560, 565 [1982]).

Contrary to the mother's further contention, petitioner established that, despite its diligent efforts, the mother failed to plan appropriately for the child's future (*see Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). The record demonstrates that the mother failed to "provide any realistic and feasible alternative to having the child[ ] remain in foster care until the [mother's] release from prison . . . [, which] supports a finding of permanent neglect" (*Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014] [internal quotation marks omitted]). Additionally, and of critical importance, we conclude that, "[a]lthough the mother participated in the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see Matter of Michael S. [Kathryne T.]*, 162 AD3d 1651, 1652 [4th Dept 2018], *lv denied* 32 NY3d 906 [2018]; *Matter of Jayveon S. [Timothy S.]*, 158 AD3d 1283, 1283-1284 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]).

Finally, the mother contends that the court erred in admitting in evidence at the hearing certain records of petitioner on the ground that they contain double hearsay. We are unable to review that contention because the mother has failed to identify any alleged instances of double hearsay (*see Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1422

KA 16-02115

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALEEM T. SPENCER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SALEEM T. SPENCER, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRITTANY L. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 13, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). The two pleas were entered in a single plea proceeding. We affirm in each appeal.

Defendant contends in his pro se supplemental brief that he was denied effective assistance of counsel, which rendered his pleas involuntary, based on defense counsel's alleged failures to properly investigate, explore potential defenses, follow through on discovery requests, and provide appropriate legal advice in light of the circumstances of the case. Defendant's contention survives his guilty pleas "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea[s] because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]). Here, however, defendant's contention "involves matters outside the record on appeal and, thus, it must be raised by way of a

motion pursuant to CPL article 440" (*People v Bradford*, 126 AD3d 1374, 1375 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]; *see People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]; *People v Wilson*, 49 AD3d 1224, 1225 [4th Dept 2008], *lv denied* 10 NY3d 966 [2008]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "received . . . advantageous plea[s], and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]).

Contrary to defendant's contention in his main brief, to the extent that his letter submitted to County Court prior to sentencing constitutes a motion to withdraw his pleas, we conclude that the court did not err in denying the motion without conducting an evidentiary hearing. " 'When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances' " (*People v Manor*, 27 NY3d 1012, 1013 [2016], quoting *People v Brown*, 14 NY3d 113, 116 [2010]; *see People v Tinsley*, 35 NY2d 926, 927 [1974]). Here, the court "accorded defendant a reasonable opportunity to present his contentions and did not 'abuse its discretion in concluding that no further inquiry was necessary' " (*People v Harris*, 142 AD3d 1391, 1392 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]; *see People v Alfred*, 142 AD3d 1373, 1373 [4th Dept 2016], *lv denied* 28 NY3d 1142 [2017]). Additionally, inasmuch as the record before us establishes that defendant understood the consequences of his guilty pleas and that he was pleading guilty in exchange for a negotiated sentence that was less than the maximum term of imprisonment, we conclude that the pleas were knowingly and voluntarily entered (*see People v Cubi*, 104 AD3d 1225, 1226-1227 [4th Dept 2013], *lv denied* 21 NY3d 1003 [2013]).

Finally, contrary to defendant's contention in his main brief, we conclude that the negotiated sentence is not unduly harsh or severe.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1423

KA 16-02114

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALEEM T. SPENCER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SALEEM T. SPENCER, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRITTANY L. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 13, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Spencer* ([appeal No. 1] — AD3d — [Mar. 15, 2019] [4th Dept 2019]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1444

CA 18-00322

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

DEBORAH A. CARR-HOAGLAND AND JAMES L. HOAGLAND,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOHN L. PATTERSON, AS EXECUTOR OF THE ESTATE
OF JOHN J. PATTERSON, DECEASED, AND CHERYL A.
PATTERSON, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (RACHEL EMMINGER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 12, 2017. The order denied the motion of plaintiffs to compel disclosure.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion to the extent that defendants are directed to submit to Supreme Court, for the six-month period immediately preceding the accident, pharmacy records identifying the medications prescribed to decedent and the prescribed dosages of those medications, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In this negligence action, plaintiffs seek to recover damages for injuries sustained by Deborah A. Carr-Hoagland (plaintiff) when the bicycle she was riding collided with a vehicle operated by decedent. In appeal No. 1, plaintiffs appeal from an order that denied their motion to compel disclosure of decedent's medical records and pharmacy records and, in appeal No. 2, defendants appeal from an order that denied their motion to bifurcate the trial with respect to the issues of liability and damages.

In appeal No. 1, we reject plaintiffs' contention that Supreme Court abused its discretion in denying that part of their motion with respect to the medical records. Plaintiffs failed to meet their burden of establishing that decedent's medical condition is "in controversy" (CPLR 3121 [a]; *see Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]; *Robinson v State of New York*, 103 AD3d 1247, 1248 [4th Dept 2013]).

We agree with plaintiffs, however, that decedent's pharmacy records are not protected by the physician-patient privilege (*see* CPLR 4504 [a]; *Neferis v DeStefano*, 265 AD2d 464, 466 [2d Dept 1999]) and are "material and necessary" to the prosecution of the action (CPLR 3101 [a]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Nevertheless, we conclude that plaintiffs' request for records "before and after" the collision was overly broad, and we therefore limit disclosure of the pharmacy records to the six-month period immediately preceding the collision. Furthermore, those records "should not be released to [plaintiffs] until the court has conducted an in camera review thereof, so that irrelevant information is redacted" (*Nichter v Erie County Med. Ctr. Corp.*, 93 AD3d 1337, 1338 [4th Dept 2012]; *see Snyder v Asher*, 153 AD3d 1647, 1648 [4th Dept 2017]). Thus, we modify the order in appeal No. 1 by granting plaintiffs' motion to the extent that defendants are directed to submit to the court, for the six-month period immediately preceding the accident, pharmacy records identifying the medications prescribed to decedent and the prescribed dosages of those medications, and we remit the matter to Supreme Court for an in camera review of those records.

In appeal No. 2, we conclude that the court properly denied defendants' motion seeking bifurcation of the trial. Contrary to defendants' contention, " 'the proof of [plaintiff's] injury would overlap with the proof regarding liability [and thus] the nature of the alleged injuries is intertwined with the question of liability' " (*Zbock v Gietz*, 162 AD3d 1636, 1636-1637 [4th Dept 2018]; *see Tate v Stevens*, 275 AD2d 1039, 1039-1040 [4th Dept 2000]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1445

CA 18-00324

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

DEBORAH A. CARR-HOAGLAND AND JAMES L. HOAGLAND,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOHN L. PATTERSON, AS EXECUTOR OF THE ESTATE
OF JOHN J. PATTERSON, DECEASED, AND CHERYL A.
PATTERSON, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (RACHEL EMMINGER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 25, 2017. The order denied the motion of defendants for bifurcation.

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

Same memorandum as in *Carr-Hoagland v Patterson* ([appeal No. 1] — AD3d — [Mar. 15, 2019] [4th Dept 2019]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

1448

KA 18-00177

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. CALEB, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Niagara County Court (William J. Watson, A.J.) entered September 6, 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 ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court's acceptance of his waiver of appearance constituted a violation of due process. Defendant failed to preserve that contention for our review because defendant's counsel did not raise any objection to the validity of the waiver and instead agreed to proceed with the hearing in defendant's absence after confirming that defendant had waived his appearance (*see People v Poleun*, 26 NY3d 973, 974-975 [2015]). In any event, we conclude that defendant's right to due process was not violated inasmuch as the record establishes that defendant "was advised of the [SORA] hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his . . . absence," and defendant waived his right to be present by informing the court in writing that he did not wish to appear (*People v Poleun*, 119 AD3d 1378, 1379 [4th Dept 2014], *affd* 26 NY3d 973 [2015] [internal quotation marks omitted]; *see People v Ensell*, 49 AD3d 1301, 1301 [4th Dept 2008], *lv denied* 10 NY3d 715 [2008]).

With respect to the merits, we reject defendant's contention that the People failed to present clear and convincing evidence to support the assessment of 15 points under risk factor 11 for defendant's history of drug abuse (*see* Correction Law § 168-n [3]). Defendant acknowledged during the presentence investigation that he had smoked

marihuana for several years and, despite his assertion that he had ceased regular use of that substance prior to the underlying offenses, the case summary and statements of the underage female victims established that defendant provided marihuana to the victims and repeatedly smoked it with them at his apartment during the course of his sexual misconduct against them (*see People v Kunz*, 150 AD3d 1696, 1697 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *People v Palacios*, 137 AD3d 761, 762 [2d Dept 2016]; *People v Rodriguez*, 134 AD3d 492, 492 [1st Dept 2015]; *People v Filkins*, 107 AD3d 1069, 1069-1070 [3d Dept 2013]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

11

CA 18-01380

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

TEALYE CARRINGTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, DEFENDANT-RESPONDENT.

LEGAL SERVICES OF CENTRAL NEW YORK, INC., SYRACUSE (JAMES M. WILLIAMS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 4, 2017. The order granted defendant's pre-answer motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for defendant's alleged violation of the Human Rights Law resulting from its denial of her employment application based solely on her previous criminal conviction (*see* Executive Law § 296 [15]). We reject plaintiff's contention that Supreme Court erred in granting defendant's pre-answer motion pursuant to CPLR 3211 (a) (5) and dismissing the complaint on the ground that it was time-barred by CPLR 214 (2). "[D]efendant had the initial burden of establishing prima facie that the time in which to sue ha[d] expired . . . , and thus was required to establish . . . when . . . plaintiff's cause of action accrued" (*Wendover Fin. Servs. v Ridgeway*, 137 AD3d 1718, 1719 [4th Dept 2016] [internal quotation marks omitted]). Here, defendant demonstrated that the last discriminatory act set forth in the complaint occurred on August 30, 2013, and thus the cause of action accrued and the three-year statute of limitations for the Human Rights Law began to run on that date (*see State Div. of Human Rights v Burroughs Corp.*, 73 AD2d 801, 801 [4th Dept 1979], *affd* 52 NY2d 748 [1980]; *New York State Div. of Human Rights v Folino*, 140 AD3d 1730, 1730 [4th Dept 2016]; *Martinez-Tolentino v Buffalo State Coll.*, 277 AD2d 899, 899 [4th Dept 2000]). Defendant further demonstrated that plaintiff did not file her complaint until March 10, 2017, i.e., over six months after the limitations period had expired.

Inasmuch as defendant met its burden, the burden shifted to

plaintiff to establish that an exception to the limitations period applies (*see Siegel v Wank*, 183 AD2d 158, 159 [3d Dept 1992]), and we conclude that plaintiff failed to meet that burden. Contrary to plaintiff's contention, the denial of an employment application is a single act rather than an ongoing policy of discrimination, and thus the continuing violation exception did not apply to toll the statute of limitations (*see generally Burroughs Corp.*, 73 AD2d at 801; *Martinez-Tolentino*, 277 AD2d at 899).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

26

KA 16-00893

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LISA M. BUTLER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered April 16, 2015. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the second degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon her plea of guilty of two counts of grand larceny in the second degree (Penal Law § 155.40 [1]). In appeal No. 2, defendant appeals from an order directing her to pay restitution to the two victims.

With respect to the judgment in appeal No. 1, we conclude that by pleading guilty, defendant "forfeited [her] right to claim that [she] was deprived of a speedy trial under CPL 30.30" (*People v Allen*, 159 AD3d 1588, 1588 [4th Dept 2018]; *see People v O'Brien*, 56 NY2d 1009, 1010 [1982]; *People v Walter*, 138 AD3d 1479, 1479 [4th Dept 2016], *lv denied* 27 NY3d 1141 [2016]).

Contrary to defendant's further contention in appeal No. 1, County Court properly denied that part of her omnibus motion seeking to suppress her statements to the police. The suppression court credited the testimony of the People's witnesses at the *Huntley* hearing, which established that defendant was not "impaired to the level of mania or to the level where [she was] unable to comprehend the meaning of [her] words so as to render [her] statement involuntary" (*People v Cummings*, 157 AD3d 982, 985 [3d Dept 2018], *lv denied* 31 NY3d 982 [2018] [internal quotation marks omitted]; *see People v Schompert*, 19 NY2d 300, 305 [1967], *cert denied* 389 US 874 [1967]; *People v Case*, 150 AD3d 1634, 1638 [4th Dept 2017]). We

perceive no basis to disturb the court's credibility determination, which is entitled to great deference (*see People v Tyler*, 166 AD3d 1556, 1556 [4th Dept 2018], *lv denied* — NY3d — [Jan. 29, 2019]; *People v Lee*, 165 AD3d 1616, 1617 [4th Dept 2018], *lv denied* 32 NY3d 1113 [2018]).

With respect to appeal No. 2, we conclude that defendant failed to preserve for our review her contention that the amount of restitution ordered lacks a record basis inasmuch as she "fail[ed] to object to the imposition of restitution at sentencing or to request a hearing" (*People v Meyer*, 156 AD3d 1421, 1421 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]; *see People v M&M Med. Transp., Inc.*, 147 AD3d 1313, 1314-1315 [4th Dept 2017]; *People v Paul*, 139 AD3d 1383, 1384 [4th Dept 2016], *lv denied* 28 NY3d 973 [2016]). Moreover, defendant waived that contention because she "expressly consented to the amount of restitution" ordered (*People v Lewis*, 114 AD3d 1310, 1311 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]; *see People v Wright*, 79 AD3d 1789, 1790 [4th Dept 2010]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

31

KA 16-00894

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LISA M. BUTLER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Steuben County Court (Joseph W. Latham, J.), entered June 29, 2015. The order, among other things, directed defendant to pay restitution.

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

Same memorandum as in *People v Butler* [appeal No. 1] — AD3d — [Mar. 15, 2019] [4th Dept 2019]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

64

CA 18-01485

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

STATE BANK OF TEXAS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KAANAM, LLC, MILIND K. OZA AND NAYNA M. OZA,
DEFENDANTS-APPELLANTS.

CARL E. PERSON, NEW YORK CITY, FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF RICHARD J. MORRISROE, DUNKIRK (RICHARD J. MORRISROE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Drury, J.), entered June 23, 2016. The order, among other things, awarded plaintiff damages in the amount of $300,000, with interest.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Chautauqua County, for further proceedings in accordance with the following memorandum: Defendants appeal from an order entered following a nonjury trial that, inter alia, awarded plaintiff damages in the amount of $300,000 together with interest. Supreme Court's written decision fails to set forth the "facts it deem[ed] essential" to its determination (CPLR 4213 [b]). Under the circumstances, we conclude that the case must be held and that the decision must be reserved, and we remit the matter to Supreme Court to make the requisite findings of fact and to conduct a new trial or hearing, if necessary (*see Chavoustie v Stone St. Baptist Church of Chaumont*, 163 AD2d 856, 856 [4th Dept 1990]; *Treadway Inns Corp. v Robe of New Hartford*, 91 AD2d 828, 829 [4th Dept 1982]; *Mastin v Village of Lima*, 77 AD2d 786, 787 [4th Dept 1980]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

65

CA 18-01432

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

IN THE MATTER OF NED E. DEAN, JR., JOHN A. PIERCE, TIMOTHY J. MEAD, STEVEN K. SMITH, AND MICHELE ROSS, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF POLAND ZONING BOARD OF APPEALS, BRENDA M. BUNCE, TERRY A. NUNEZ, DENNIS R. ORMOND, DAWN ORMOND CONSTANTINE AND THE BROADWAY GROUP, LLC, RESPONDENTS-RESPONDENTS.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (EDWARD P. WRIGHT OF COUNSEL), FOR PETITIONERS-APPELLANTS.

THE BROADWAY GROUP, LLC, JAMESTOWN (DAVID R. STAPLETON OF COUNSEL), AND BUNCE, NUNEZ, ORMOND AND CONSTANTINE, FOR RESPONDENTS-RESPONDENTS BRENDA M. BUNCE, TERRY A. NUNEZ, DENNIS R. ORMOND, DAWN ORMOND CONSTANTINE AND THE BROADWAY GROUP, LLC.

Appeal from a judgment of the Supreme Court, Chautauqua County (Paula L. Feroleto, J.), entered December 29, 2017 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to respondent Town of Poland Zoning Board of Appeals for further proceedings in accordance with the following memorandum: Petitioners appeal from a judgment dismissing their CPLR article 78 petition, in which they sought to annul the determination of respondent Town of Poland Zoning Board of Appeals (ZBA) granting a use variance to the remaining respondents. "Generally, [f]indings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination" (*Matter of Livingston Parkway Assn., Inc. v Town of Amherst Zoning Bd. of Appeals*, 114 AD3d 1219, 1219-1220 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of South Blossom Ventures, LLC v Town of Elma*, 46 AD3d 1337, 1338 [4th Dept 2007], *lv dismissed* 10 NY3d 852 [2008]). Inasmuch as the ZBA "failed to articulate the reasons for its determination and failed to set forth findings of fact in its decision" (*Matter of Fike v Zoning Bd. of Appeals of Town of Webster*, 2 AD3d 1343, 1344 [4th Dept 2003]), the record does not permit review of Supreme Court's conclusion that the ZBA's determination has a rational basis and is not arbitrary and capricious (*cf. Matter of Dietrich v Planning Bd. of Town of W. Seneca*, 118 AD3d 1419, 1421 [4th

Dept 2014]; *Matter of Concerned Citizens of Perinton v Town of Perinton*, 261 AD2d 880, 880 [4th Dept 1999], *appeal dismissed* 93 NY2d 1040 [1999], *cert denied* 529 US 1111 [2000]). Consequently, we hold the case, reserve decision and remit the matter to the ZBA to set forth the factual basis for its determination and articulate the reasons for it.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

69

TP 18-01378

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

IN THE MATTER OF JAHMEL CLARK, PETITIONER,

V MEMORANDUM AND ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered July 30, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III hearing, that he violated various inmate rules. Contrary to petitioner's contention, the misbehavior reports, hearing testimony, documentary evidence, and video evidence constitute substantial evidence supporting the determination that petitioner violated the applicable inmate rules (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *Matter of Jones v Annucci*, 141 AD3d 1108, 1108-1109 [4th Dept 2016]).

Although we agree with petitioner that there was a violation of 7 NYCRR 251-4.2 based on the failure of his employee assistant to interview witnesses and to collect requested documentary and video evidence (*see Matter of Gray v Kirkpatrick*, 59 AD3d 1092, 1092 [4th Dept 2009]), we conclude that " '[t]he Hearing Officer remedied any alleged defect in the prehearing assistance' " by obtaining that evidence and reviewing it with petitioner and by having relevant inmate witnesses interviewed and obtaining statements from them reflecting that they refused to testify at the hearing (*id.*; *see also Matter of Jones v Fischer*, 111 AD3d 1362, 1363 [4th Dept 2013]).

Moreover, petitioner has not demonstrated that he was prejudiced by any of the employee assistant's shortcomings (*see Matter of Coleman v Goord*, 39 AD3d 1048, 1048 [3d Dept 2007]).

We also reject petitioner's contentions that he was denied his right to call certain witnesses and that the Hearing Officer did not sufficiently inquire into why the inmate witnesses refused to testify. The Hearing Officer obtained the list of inmates who were involved in the relevant callout and attempted to secure their testimony, but they each refused to testify. Petitioner's contention that the Hearing Officer was required to make a further inquiry into the inmates' respective refusals is unpreserved because petitioner failed to raise an objection on that ground at the hearing (*see Matter of Blackwell v Goord*, 5 AD3d 883, 885 [3d Dept 2004], *lv denied* 2 NY3d 708 [2004]). In any event, that contention lacks merit. An inmate's right to present witnesses is violated when there has been "*no* inquiry at all into the reason for the witness's refusal to testify, without regard to whether the inmate previously agreed to testify" (*Matter of Hill v Selsky*, 19 AD3d 64, 66 [3d Dept 2005]). "When the refusing witness gives no reason for the refusal, but that witness did not previously agree to testify, an inquiry by the hearing officer through a correction officer adequately protects the inmate's right to call witnesses" (*id*.). Here, there is no indication that any of the relevant inmate witnesses had previously agreed to testify at the hearing, and the Hearing Officer dispatched a correction officer, who ascertained that the relevant witnesses were unwilling to testify either because they did not want to become involved in the hearing or because they lacked relevant information. Additionally, the Hearing Officer properly denied petitioner's request to call non-inmate witnesses for the purpose of supporting petitioner's retaliation claim inasmuch as their testimony would have been redundant to information contained in the documentary evidence (*see generally Matter of Inesti v Rizzo*, 155 AD3d 1581, 1582 [4th Dept 2017]). Thus, petitioner was not deprived of his right to present witnesses.

Contrary to petitioner's further contention, the record does not establish " 'that the Hearing Officer was biased or that the determination flowed from the alleged bias' " (*Matter of Colon v Fischer*, 83 AD3d 1500, 1501 [4th Dept 2011]; *see Matter of Rodriguez v Herbert*, 270 AD2d 889, 890 [4th Dept 2000]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

70

KA 17-00360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIE NICPON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (David W. Foley, A.J.), rendered December 19, 2016. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]). We agree with defendant that her "waiver of the right to appeal does not encompass [her] challenge to the severity of the sentence because 'no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal' with respect to [her] conviction that [she] was also waiving [her] right to appeal any issue concerning the severity of the sentence" (*People v Peterson*, 111 AD3d 1412, 1412 [4th Dept 2013]; *see People v Grucza*, 145 AD3d 1505, 1506 [4th Dept 2016]; *see generally People v Maracle*, 19 NY3d 925, 928 [2012]). Although defendant executed a written waiver of the right to appeal in which she specifically waived her right to appeal "all aspects of [her] case, including the severity of the sentence," we conclude that the written waiver does not preclude our review of the severity of the sentence inasmuch as County Court "did not inquire of defendant whether [she] understood the written waiver or whether [she] had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see Grucza*, 145 AD3d at 1506; *People v Saeli*, 136 AD3d 1290, 1291 [4th Dept 2016]). We nevertheless conclude that the sentence is not unduly harsh or severe.

We note, however, that the certificate of conviction incorrectly reflects that defendant was convicted of grand larceny in the second degree under Penal Law § 155.50 (1), and it must therefore be amended

to reflect that she was convicted under Penal Law § 155.40 (1) (*see People v Green*, 132 AD3d 1268, 1269 [4th Dept 2015], *lv denied* 27 NY3d 1069 [2016], *reconsideration denied* 28 NY3d 930 [2016]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

74

KA 16-01787

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD CROUSE, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (David W. Foley, A.J.), rendered September 14, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, " 'the waiver of the right to appeal was not rendered invalid based on [County 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]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

81

CAF 16-01182

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

IN THE MATTER OF JUSTIN T.

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

MEMORANDUM AND ORDER

JOSEPH M., RESPONDENT-APPELLANT.

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

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

JOHN W. SHARON, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered June 6, 2016 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined the subject child to be abused and neglected.

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

Memorandum: Respondent father appeals from an order that, inter alia, determined that he derivatively abused and neglected the subject child. We affirm for reasons stated in the February 10, 2016 bench decision at Family Court. We add only that the father did not " 'demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings' at the hearing" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390-1391 [4th Dept 2015], quoting *People v Benevento*, 91 NY2d 708, 712 [1998]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

89

CA 18-01636

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

KATHRYN ANTONACCI-BROWN, PLAINTIFF-RESPONDENT,

V ORDER

PETER R. WOODS, AS ADMINISTRATOR OF THE ESTATE
OF RUTH E. WIEGAND, DECEASED, DEFENDANT-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PORTER NORDBY HOWE LLP, SYRACUSE (MICHAEL S. PORTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 15, 2018. The order, inter alia, granted the motion of plaintiff to compel discovery.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 11, 2019,

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

93

TP 18-01387

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

IN THE MATTER OF JASON BAXTER, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered August 2, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules, including inmate rule 100.10 (7 NYCRR 270.2 [B] [1] [i] [assault on an inmate]). Contrary to petitioner's contention, the misbehavior report and a videotape of the incident constitute substantial evidence to support the charges (*see Matter of Rudolph v Annucci*, 156 AD3d 1415, 1415 [4th Dept 2017]). Petitioner's denial of the reported misbehavior raised, at most, an issue of credibility for resolution by the Hearing Officer (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]). Contrary to petitioner's further contention, the charge of assault on an inmate is supported by substantial evidence despite the lack of evidence that another inmate was injured because that inmate rule is violated by, inter alia, an "attempt to inflict bodily harm upon any other inmate" (7 NYCRR 270.2 [B] [1] [i]; *see Matter of Price v Goord*, 308 AD2d 625, 626 [3d Dept 2003]).

We reject petitioner's contention that he was denied effective employee assistance inasmuch as any alleged defect in the assistance was cured by the actions of the Hearing Officer in ensuring that

petitioner received the documents to which he was entitled (*see Matter of Gray v Kirkpatrick*, 59 AD3d 1092, 1092-1093 [4th Dept 2009]).

Finally, we reject petitioner's contention that he was denied his right to call an inmate witness to testify on his behalf. The inmate originally agreed to testify, but subsequently refused to do so at the time of the hearing. In an interview with the inmate, the Hearing Officer attempted, but failed, to obtain an explanation about his refusal to testify. " '[W]hen the [H]earing [O]fficer conducts a personal interview but is unable to elicit a genuine reason from the refusing witness, the charged inmate's right to call witnesses will have been adequately protected' " (*Matter of Yarborough v Annucci*, 164 AD3d 1667, 1668 [4th Dept 2018]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

123

CA 18-01391

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

IN THE MATTER OF THE BUFFALO NEWS, INC.,
PETITIONER-APPELLANT,
AND E.W. SCRIPPS COMPANY, INTERVENOR-APPELLANT,

V ORDER

BUFFALO POLICE DEPARTMENT, DANIEL DERENDA, IN HIS OFFICIAL CAPACITY AS BUFFALO POLICE DEPARTMENT COMMISSIONER AND AS FOIL RESPONSE OFFICER OF BUFFALO POLICE DEPARTMENT, TIMOTHY A. BALL, CORPORATION COUNSEL FOR CITY OF BUFFALO AND IN HIS OFFICIAL CAPACITY AS FOIL APPEAL OFFICER FOR BUFFALO POLICE DEPARTMENT AND CITY OF BUFFALO,
RESPONDENTS-RESPONDENTS.

BARCLAY DAMON LLP, BUFFALO (KARIM A. ABDULLA OF COUNSEL), FOR PETITIONER-APPELLANT AND INTERVENOR-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MAEVE E. HUGGINS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered February 16, 2018. The judgment, among other things, denied the release of certain video recordings pursuant to New York's Freedom of Information Law.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 21, 2019,

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

134

KA 18-00162

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMIN HOBBS, DEFENDANT-APPELLANT.

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered October 5, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the fourth degree and unlawful fleeing a police officer in a motor vehicle in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal mischief in the fourth degree (Penal Law § 145.00 [3]) and unlawfully fleeing a police officer in a motor vehicle in the third degree (§ 270.25), defendant contends that County Court lost jurisdiction to impose sentence on those offenses due to an unreasonable delay between the entry of the plea and sentencing (*see generally* CPL 380.30 [1]). We reject that contention.

Defendant pleaded guilty in May 2014 to the two offenses in full satisfaction of the indictment and was released pending sentencing. After he was arrested in Monroe County, New York in August 2017, he moved pro se to dismiss that indictment on the ground that the court lost jurisdiction to sentence him due to the delay in imposing sentence. He asserted that he had moved to Colorado prior to the scheduled sentencing date and that he had been arrested several times and incarcerated there, but he provided no specific information concerning when or for how long he had been incarcerated. The People asserted that, although they knew that defendant had been living in Colorado, they were not aware that he had been incarcerated there.

We conclude that the court properly denied the motion without a hearing. Although an unreasonable delay in imposing sentence will cause a court to lose jurisdiction over a defendant, "[w]hen delay is caused by the conduct of the defendant which frustrates the entry of

judgment, it is excusable" (*People v Brazeau*, 144 AD2d 977, 978 [4th Dept 1988], *lv denied* 73 NY2d 889 [1989]). Furthermore, "[w]here a delay in sentencing is due to an absconding defendant, the People are under no obligation to make efforts to apprehend the defendant to avoid a loss in jurisdiction" (*People v Cook*, 133 AD3d 775, 776 [2d Dept 2015], *lv denied* 27 NY3d 1067 [2015]). Here, defendant contends that the People had a duty to act diligently in securing his presence in New York because the People knew or should have known that he was incarcerated while in Colorado. We reject that contention inasmuch as the delay in sentencing was caused by defendant's conduct in absconding, and there is nothing in the record to suggest that the People had actual or constructive knowledge of defendant's incarceration in Colorado at any time while he was incarcerated there (*see id.*; *People v Saunders*, 93 AD3d 487, 487 [1st Dept 2012], *lv denied* 19 NY3d 967 [2012]; *People v James*, 78 AD3d 862, 863 [2d Dept 2010], *lv denied* 16 NY3d 832 [2011]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

144

CA 18-01483

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

DOUGLAS RIZZO AND RUTHANN RIZZO,
PLAINTIFFS-RESPONDENTS,

V ORDER

DHARAM PAUL SINGLA, M.D., DEFENDANT,
WYOMING COUNTY COMMUNITY HOSPITAL AND
WYOMING COUNTY COMMUNITY HEALTH SYSTEM,
DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, ROCHESTER (SANJEEV DEVABHAKTHUNI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (MICHELE A. BRAUN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Michael F. Griffith, A.J.), entered May 15, 2018. The order denied the motion of defendants Wyoming County Community Hospital and Wyoming County Community Health System for summary judgment dismissing the complaint against them.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

157

CA 18-00882

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

DIXIE CHAMBERLIN, AS ADMINISTRATRIX OF THE ESTATE OF FALLON CHAMBERLIN, AND DIXIE CHAMBERLIN, INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V ORDER

TANVIR DARA, M.D., AND WCA HOSPITAL, DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANT-APPELLANT TANVIR DARA, M.D.

FELDMAN KIEFFER, LLP, BUFFALO (MATTHEW J. KIBLER OF COUNSEL), FOR DEFENDANT-APPELLANT WCA HOSPITAL.

CANTOR & WOLFF, BUFFALO (DAVID J. WOLFF, JR., OF COUNSEL), AND GENTILE & ASSOCIATES, NEW YORK CITY (JASON CHAMIKLES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 15, 2017. The order denied in part defendants' motions for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 20, 2019,

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

159

CA 18-01557

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

STEVEN M. PATRICOLA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GENERAL MOTORS CORPORATION, GM POWERTRAIN,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

SUGARMAN LAW FIRM, BUFFALO (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered November 22, 2017. The order, among other things, denied the motion of defendants General Motors Corporation and GM Powertrain for summary judgment.

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

Memorandum: Plaintiff commenced this premises liability action seeking damages for injuries he allegedly sustained when he slipped on a walkway on property owned by defendants-appellants (defendants). Defendants appeal from an order that, inter alia, denied their motion for summary judgment dismissing the complaint against them. We affirm.

Contrary to their contention, defendants failed to establish their entitlement to summary judgment based on the storm in progress doctrine. It is well settled that "[a] landowner is not responsible for a failure to remove snow and ice until a reasonable time has elapsed after cessation of the storm" (*Cerra v Perk Dev.*, 197 AD2d 851, 851 [4th Dept 1993]; *see Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153, 1154 [4th Dept 2006]). But "if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied" (*Mazzella v City of New York*, 72 AD3d 755, 756 [2d Dept 2010] [internal quotation marks omitted]; *see Rabinowitz v Marcovecchio*, 119 AD3d 762, 762 [2d Dept 2014]; *Boarman v Siegel, Kelleher & Kahn*, 41 AD3d 1247, 1248 [4th Dept 2007]). Here, defendants' own submissions, which included deposition testimony establishing that snow removal

efforts had been underway for more than an hour prior to plaintiff's accident and that only a negligible amount of snow had accumulated in the three hours prior to the accident, raise a triable issue of material fact whether the storm had sufficiently abated to preclude application of the doctrine (*see Boarman*, 41 AD3d at 1248). Further, defendants submitted deposition testimony establishing that, prior to plaintiff's accident, workers were removing snow in the area of the walkway where plaintiff fell and should have salted that walkway, but may not have adequately done so. Thus, triable issues of fact exist whether defendants created or had actual or constructive notice of the slippery condition (*see Santiago v Weisheng Enters. LLC*, 134 AD3d 570, 571 [1st Dept 2015]; *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566 [1st Dept 2010]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

174

KA 16-00796

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAMEIYA MCKINNEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 29, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, leaving the scene of an incident without reporting personal injury, attempted assault in the first degree, menacing in the third degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of, inter alia, assault in the first degree (Penal Law § 120.10 [1]), attempted assault in the first degree (§§ 110.00, 120.10 [1]), and leaving the scene of an incident without reporting personal injury (Vehicle and Traffic Law § 600 [2] [a]). The charges stem from an incident in which defendant drove her vehicle at a romantic rival, who jumped clear of impact. Defendant's vehicle, however, struck the romantic rival's friend, who was dragged underneath the vehicle for over 200 feet, causing serious physical injury and the stillbirth of that victim's 24-week-old fetus.

Defendant contends that the verdict with respect to the charges of assault in the first degree and attempted assault in the first degree is against the weight of the evidence inasmuch as she did not have the intent to cause serious physical injury to the victims. 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]), and affording great deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury was entitled to infer defendant's criminal intent from the two victims' testimony that

defendant drove her car directly at them, which was corroborated by surveillance video of the incident.

Defendant failed to preserve for our review her contention that she was deprived of a fair trial by prosecutorial misconduct inasmuch as she failed to object to the alleged error (*see People v Paul*, 78 AD3d 1684, 1684-1685 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]; *People v Smith*, 32 AD3d 1291, 1292 [4th Dept 2006], *lv denied* 8 NY3d 849 [2007]). In any event, defendant's contention lacks merit because the allegedly inflammatory remarks about the stillbirth of one victim's fetus were fair comment on the evidence (*see generally People v Ashwal*, 39 NY2d 105, 109-110 [1976]). Finally, the sentence is not unduly harsh or severe. We have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

175

KA 18-00174

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENITO LENDOF-GONZALEZ, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

BENITO LENDOF-GONZALEZ, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (John L. Michalski, A.J.), rendered September 19, 2017. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree (two counts), attempted murder in the second degree (two counts) and criminal solicitation in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of attempted murder in the first degree and attempted murder in the second degree, and dismissing counts three through six of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [vi]; [b]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), and one count of criminal solicitation in the second degree (§ 100.10). Defendant contends in his main brief that the conviction is not supported by legally sufficient evidence on the four counts charging him with the crimes of attempted murder in the first and second degrees, because the evidence is insufficient to establish attempts to commit those crimes. We agree.

Prior to the events that led to this conviction, defendant had been arrested for allegedly attacking his wife, and he was remanded to the Niagara County Jail. The evidence from the trial in this matter, viewed in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), establishes that defendant, while in the jail, passed a series of notes to an inmate in a neighboring cell, asking that inmate to kill defendant's wife and her mother. In those notes, defendant explained that he wanted the two women killed by

injecting them with heroin and other substances, and that defendant's children were to be taken from his wife's house and given to a friend. Defendant also indicated a date on which the inmate was to commit the crimes, stated the place where it was to occur, told the inmate how to place certain items within the crime scene, and provided a map to the location where the inmate would find the friend who would take the children. Defendant promised to give the inmate a house in return for the killings. Defendant and the inmate also discussed the plan in person after the inmate was released on bail, and defendant made telephone calls to the inmate and the inmate's girlfriend concerning the plan.

Unbeknownst to defendant, the inmate immediately contacted jail authorities and informed them of defendant's proposal. The inmate spoke to investigators, allowed them to copy the notes and eventually gave them the original notes, made a deal with an assistant district attorney, and told defendant that the crimes had been committed. Nevertheless, the inmate did nothing to effectuate the crimes.

In order to be legally sufficient to support a conviction of an attempt to commit any of the charged crimes, the evidence must establish that defendant engaged in conduct that "tends to effect the commission of such crime" (Penal Law § 110.00). The Court of Appeals has made it clear that the statute "was not intended to eliminate the preexisting requirement that an attempt come very near to the accomplishment of the intended crime before liability could be imposed" (*People v Mahboubian*, 74 NY2d 174, 190 [1989] [internal quotation marks omitted]). Thus, "[t]he defendant's conduct 'must have passed the stage of mere intent or mere preparation to commit a crime,' but the defendant need not have taken 'the final step necessary' to accomplish the crime in order to be guilty of an attempted crime" (*People v Denson*, 26 NY3d 179, 189 [2015]). "Acts of preparation to commit an offense do not constitute an attempt . . . There must be a step in the direct movement towards the commission of the crime after preparations have been made . . . Likewise, acts of conspiring to commit a crime, or of soliciting another to commit a crime do not per se constitute an attempt to commit the contemplated crime" (*People v Trepanier*, 84 AD2d 374, 377 [4th Dept 1982], *lv denied* 56 NY2d 655 [1982] [internal quotation marks omitted]). Consequently, the People must establish that defendant "engaged in conduct that came dangerously near commission of the completed crime" (*People v Naradzay*, 11 NY3d 460, 466 [2008], *rearg dismissed* 17 NY3d 840 [2011] [internal quotation marks omitted]; *see Denson*, 26 NY3d at 189; *People v Kassebaum*, 95 NY2d 611, 618 [2001], *rearg denied* 96 NY2d 854 [2001], *cert denied* 532 US 1069 [2001]; *People v Acosta*, 80 NY2d 665, 670 [1993]).

Initially, we conclude that the People's reliance upon accessorial liability in several of the attempted murder counts is unavailing. As is the case with defendant, as discussed below, the People failed to establish that any accessory took any step that brought the crimes "dangerously near" to completion (*Naradzay*, 11 NY3d at 466 [internal quotation marks omitted]). To the contrary, the people who defendant thought were assisting him did not actually take

any steps to bring the crimes closer to completion.

With respect to both the actions of the purported accessories and to defendant's actions, we conclude that the evidence, viewed in the light most favorable to the People (*see Gordon*, 23 NY3d at 649; *People v Contes*, 60 NY2d 620, 621 [1983]), fails to establish that defendant engaged in conduct that came "dangerously near commission of the completed crime" (*Naradzay*, 11 NY3d at 466 [internal quotation marks omitted]). The evidence establishes only that defendant planned the crimes, discussed them with the inmate in the next cell and with that inmate's girlfriend, and exchanged notes about them. Thus, inasmuch as " 'several contingencies stood between the agreement in the [jail] and the contemplated [crimes],' defendant[] did not come 'very near' to accomplishment of the intended crime[s]" (*Acosta*, 80 NY2d at 671). Where, as here, the evidence fails to establish that defendant took any action that brought the crime close to completion, no matter how slight (*see e.g. People v Bush*, 4 Hill 133, 135 [Sup Ct of Judicature 1843]; *cf. People v Lamagna*, 30 AD3d 1052, 1053 [4th Dept 2006], *lv denied* 7 NY3d 814 [2006]), the evidence is not legally sufficient to support a conviction of attempt to commit that crime (*see People v Flores*, 83 AD3d 1460, 1461 [4th Dept 2011], *affd* 19 NY3d 881 [2012]). We therefore modify the judgment by reversing those parts convicting defendant of attempted murder in the first and second degrees, and we dismiss those four counts of the indictment.

Contrary to defendant's further contention in his main brief, the court did not violate the requirements of CPL article 730 in determining his competency. After the first indication that defendant might be an incapacitated person, the court issued the requisite "order of examination" (CPL 730.30 [1]), two psychiatric examiners properly examined defendant (*see* CPL 730.20 [1], [5]), and each psychiatric examiner provided a report to the court opining that defendant was not an incapacitated person within the meaning of the statute (*see* CPL 730.10 [1]). With respect to the subsequent requests for evaluations of defendant's competence, we conclude that "[t]he record establishes that the court granted defense counsel's request for a forensic examination of defendant by ordering only an informal psychological examination and not by issuing an order of examination pursuant to CPL article 730 . . . [T]he decision of the court to order an informal psychological examination was within its discretion . . . and did not automatically require the court to issue an order of examination or otherwise comply with CPL article 730" (*People v Castro*, 119 AD3d 1377, 1378 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014] [internal quotation marks omitted]; *see People v Morales*, 148 AD3d 1638, 1638-1639 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]). We note that all four evaluations that were conducted indicated that defendant was not an incapacitated person, and no hearing on the issue of defendant's competency was requested by anyone, including defense counsel.

Inasmuch as defendant challenges in his main brief the severity of the sentence only with respect to the counts of attempted murder in the first and second degree, that contention is moot in light of our determination.

Defendant's contention in his pro se supplemental brief that he was deprived of effective assistance of counsel "is based on matters outside the record on appeal, [and therefore] his contention must be raised by way of a motion pursuant to CPL article 440" (*People v McClary*, 162 AD3d 1582, 1583 [4th Dept 2018]). We reject the further contention in his pro se supplemental brief that the prosecutor committed misconduct by failing to call defendant's wife as a witness. To the contrary, "the prosecution had no duty to call her as a witness" (*People v Miles*, 212 AD2d 975, 975 [4th Dept 1995]). "The prosecution had the obligation to prove its case beyond a reasonable doubt, and it could select the witnesses it considered necessary to accomplish this" (*People v Vaughn*, 35 AD2d 889, 889 [3d Dept 1970]).

Finally, we have considered the remaining contentions in defendant's main and pro se supplemental briefs, and we conclude that none warrant reversal or further modification of the judgment.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

177

KAH 18-00368

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
THEODORE PRICE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

CHARLES A. MARANGOLA, MORAVIA, FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 19, 2017 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner seeks habeas corpus relief based on his contention that the two misdemeanor informations filed against him in Syracuse City Court were facially insufficient and thus jurisdictionally defective. Supreme Court properly dismissed the petition inasmuch as petitioner could have raised his contention on his direct appeal from the judgment of conviction that stemmed from the same incident that gave rise to those misdemeanor informations (*People v Price*, 129 AD3d 1484 [4th Dept 2015], *lv denied* 26 NY3d 970 [2015]), or in a motion pursuant to CPL article 440 (*see People ex rel. Martinez v Graham*, 98 AD3d 1312, 1312 [4th Dept 2012], *lv denied* 20 NY3d 853 [2012]). In any event, we note that petitioner's contention is without merit inasmuch as the misdemeanor informations were superseded by a valid, unchallenged indictment on which defendant was prosecuted and found guilty (*see People v Hart*, 25 AD3d 815, 816 [3d Dept 2006], *lv denied* 6 NY3d 834 [2006]; *see also People ex rel. Van Steenburg v Wasser*, 69 AD3d 1135, 1136 [3d Dept 2010], *lv denied in part and dismissed in part* 14 NY3d 883 [2010]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

178

CAF 17-01219

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

IN THE MATTER OF JACOB W., JALEN W., AND JANAIR W.

---------- MEMORANDUM AND ORDER

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

SHARMEL W., RESPONDENT, AND JERMAINE W., 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.

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

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered May 31, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Jermaine W. had neglected Jacob W. and Jalen W. and had derivatively neglected Janair W.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, determined that he neglected two of the subject children and derivatively neglected the other subject child, and issued a 12-month stay away order of protection in favor of all three children.

Contrary to the father's contention, Family Court did not err in denying his motion to dismiss the petition at the close of petitioner's proof. Viewing the evidence in the light most favorable to petitioner, we conclude that it adduced sufficient evidence to make a prima facie case of neglect (*see generally Matter of Christian Q.*, 32 AD3d 669, 670 [3d Dept 2006]).

We reject the father's contention that the court erred in determining that he neglected the two older children. The evidence at the hearing established that the father engaged in abusive behavior against respondent mother while the children were present (*see generally Matter of Michael WW.*, 20 AD3d 609, 611-612 [3d Dept 2005])

and, more egregiously, choked his oldest son twice in two months (*see generally Matter of Nah-Ki B. [Nakia B.]*, 143 AD3d 703, 706-707 [2d Dept 2016]). Furthermore, both of the older children, when interviewed by an investigator employed by petitioner, expressed fear and apprehension of the father. Thus, petitioner established by a preponderance of the evidence that the two oldest children's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" by the father's actions (Family Ct Act § 1012 [f] [i] [B]; *see Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]).

Likewise, there was sufficient evidence to establish that the father derivatively neglected the youngest child, inasmuch as "the evidence of . . . neglect of [the older] child[ren] indicates a fundamental defect in [the father's] understanding of the duties of parenthood . . . or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care" (*Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 774 [2d Dept 2017] [internal quotation marks omitted]).

The court did not abuse its discretion in issuing a stay-away order of protection with a duration of one year. We conclude that the order of protection was in the best interests of the children (*see Matter of Victoria X.*, 34 AD3d 1117, 1118 [3d Dept 2006], *lv denied* 8 NY3d 806 [2007]).

The father "failed to preserve for our review [his] contention that the [Attorney for the Children (AFC)] . . . failed to advocate for the [children's] position regarding custody and visitation and thus failed to provide [them] with effective representation" (*Matter of Lopez v Lugo*, 115 AD3d 1237, 1237-1238 [4th Dept 2014] [internal quotation marks omitted]). He also did not preserve his contention that the AFC had a conflict of interest (*see Matter of Aaliyah H. [Mary H.]*, 134 AD3d 1574, 1575 [4th Dept 2015], *lv denied* 27 NY3d 906 [2016]). Finally, we conclude that the father was not deprived of his right to confer with counsel (*see generally People v Joseph*, 84 NY2d 995, 997-998 [1994]; *Matter of Jaylynn R. [Monica D.]*, 107 AD3d 809, 810-811 [2d Dept 2013]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

181

CAF 18-00112

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

IN THE MATTER OF JUSTIN M.F.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

RANDALL L.F., RESPONDENT-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD,
APPELLANT.

TANYA J. CONLEY, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeals from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered December 29, 2017 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and facts without costs and the petition is granted insofar as it seeks a determination that the child is a neglected child as defined in Family Court Act § 1012 (f) (i) (B).

Memorandum: In this proceeding pursuant to Family Court Act article 10, petitioner and the Attorney for the Child (AFC) appeal from an order that dismissed the petition after a fact-finding hearing. In the petition, petitioner alleged that respondent father neglected the subject child by inflicting excessive corporal punishment. We agree with petitioner and the AFC that petitioner established that the father neglected the child by inflicting excessive corporal punishment, and we therefore reverse the order and grant the petition insofar as it seeks a determination that the child is a neglected child as defined in Family Court Act § 1012 (f) (i) (B).

A party seeking to establish neglect must establish, by a preponderance of the evidence, " 'first that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Jayla A.*

[Chelsea K.–Isaac C.], 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). Although a parent may use reasonable force to discipline his or her child to promote the child's welfare (*see Matter of Damone H., Jr. [Damone H., Sr.]* [appeal No. 2], 156 AD3d 1437, 1438 [4th Dept 2017]), the "infliction of excessive corporal punishment" constitutes neglect (Family Ct Act § 1012 [f] [i] [B]). Indeed, " 'a single incident of excessive corporal punishment is sufficient to support a finding of neglect' " (*Matter of Dustin B. [Donald M.]*, 71 AD3d 1426, 1426 [4th Dept 2010]; *see Matter of Nicholas W. [Raymond W.]*, 90 AD3d 1614, 1615 [4th Dept 2011]).

Here, petitioner established by a preponderance of the evidence that the father neglected the child by inflicting excessive corporal punishment (*see generally* Family Ct Act § 1012 [f] [i] [B]). At the hearing, petitioner presented, among other things, witness testimony and medical records indicating that the child sustained a bruised left temple, a bruised eye, and a bloody and swollen nose after the father struck him (*see Matter of Padmine M. [Sandra M.]*, 84 AD3d 806, 807 [2d Dept 2011]; *Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]; *see generally Matter of Castilloux v New York State Off. of Children & Family Servs.*, 16 AD3d 1061, 1062 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

184

TP 18-01499

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

IN THE MATTER OF JONATHAN L., PETITIONER,

V MEMORANDUM AND ORDER

SHEILA POOLE, ACTING COMMISSIONER, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, AND SHEILA MCBAIN, DIRECTOR, NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, A DIVISION OF CHILD WELFARE AND COMMUNITY SERVICES, RESPONDENTS.

JASON R. DIPASQUALE, BUFFALO, FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [E. Jeannette Ogden, J.], entered August 17, 2018) to review a determination of the New York State Office of Children and Family Services. The determination denied petitioner's request that an indicated report maintained in the New York State Central Register of Child Abuse and Maltreatment be amended to unfounded and sealed.

It is hereby ORDERED that the determination with respect to petitioner is unanimously annulled on the law without costs, the petition is granted and respondent Sheila Poole, Acting Commissioner, New York State Office of Children and Family Services is directed to amend and seal the indicated report.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination made after a fair hearing that denied his request to amend and seal an indicated report of child maltreatment maintained at New York State Central Register of Child Abuse and Maltreatment. In the petition, petitioner contends that the Erie County Department of Social Services (DSS) failed to sustain its burden at the fair hearing of establishing that petitioner committed an act of maltreatment. We agree with petitioner.

The record establishes that, after confronting his 10-year-old son regarding the child's misbehavior, petitioner struck the child two to three times with a belt. At the fair hearing, petitioner testified that he struck the child over his clothing. Both petitioner and his wife, the child's mother, testified that the child seemed unfazed by

the incident and did not appear to be in or complain of being in pain either immediately after the incident or the following morning. The record further establishes that, the day after the incident, school personnel observed marks on the child's legs and back. A case worker examined the child later that same day and noted marks on the child's legs, but did not see a mark on the back. The indicated report contained the conclusion that petitioner maltreated his son and substantiated the allegations of excessive corporal punishment.

Following the fair hearing, the Administrative Law Judge (ALJ) found that a "preponderance of the evidence showed that [petitioner] caused the marks on [the child's] back" and that petitioner "most likely" also caused one mark on the child's right leg, but the ALJ declined to attribute other marks on the child's leg to petitioner. The ALJ determined that petitioner "placed [the child] at imminent risk of physical and emotional impairment" and that petitioner committed the maltreatment alleged in the report.

We conclude on the record before us that the determination is not supported by substantial evidence, i.e., " 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' " (*Matter of Kordasiewicz v Erie County Dept. of Social Servs.*, 119 AD3d 1425, 1426 [4th Dept 2014], quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *see Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1493 [4th Dept 2016]). At the fair hearing, DSS had the burden of establishing by a fair preponderance of the evidence that petitioner maltreated the child by the use of excessive corporal punishment (*see* Social Services Law § 424-a [2] [d]), and that such corporal punishment impaired or was in imminent danger of impairing the child's physical, mental, or emotional condition (*see* Social Services Law § 412 [2] [a]; Family Ct Act § 1012 [f] [i]). Impairment of mental or emotional condition is defined as "a state of substantially diminished psychological or intellectual functioning" (Family Ct Act § 1012 [h]). Physical impairment is defined as " 'a state of substantially diminished physical growth, freedom from disease, and physical functioning' " (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 78 [1995]; *see Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1294 [4th Dept 2008]).

Other than a general reference in DSS records that the child was "upset" by the incident, DSS did not present evidence that the incident physically, mentally, or emotionally impacted the 10-year-old child. The marks observed on the child's back, i.e., the sole marks attributed to petitioner by a preponderance of the evidence, apparently resolved the day after petitioner struck him, and before the DSS case worker examined the child. Under the circumstances here, the evidence is insufficient to establish that the child suffered the requisite impairment of his physical, mental, or emotional well-being to support a finding of maltreatment. Thus, the determination that petitioner placed the child in imminent risk of physical or emotional impairment is not supported by substantial evidence, and we therefore annul the determination and grant the petition (*see Matter of*

Jacqueline G. v Peters, 292 AD2d 785, 786 [4th Dept 2002]; *see also Matter of Maurizio XX. v New York State Off. of Children & Family Servs.*, 125 AD3d 1174, 1175-1176 [3d Dept 2015]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

200

KA 17-00129

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENDYN J. SINGLETON-PRADIA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Daniel J. Doyle, J.), rendered February 10, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, his valid waiver of the right to appeal encompasses his current challenge to the severity of his sentence (*see People v Hymes*, 160 AD3d 1386, 1388 [4th Dept 2018]; *cf. People v Grucza*, 145 AD3d 1505, 1506 [4th Dept 2016]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

202

KA 16-00636

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THERESA A. FERGUSON, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (JESSICA J. BURGASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered March 29, 2016. The judgment convicted defendant, upon her plea of guilty, of criminal sexual act in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of criminal sexual act in the third degree (Penal Law § 130.40 [2]). The record establishes that defendant knowingly, voluntarily and intelligently waived her right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

205

KA 16-02152

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY REINARD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO 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 (Penny M. Wolfgang, J.), rendered November 7, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of two counts of robbery in the first degree (Penal Law § 160.15 [2], [4]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]). For reasons stated in the codefendant's appeal (*see People v Arroyo*, 167 AD3d 1537, 1538 [4th Dept 2018]), we reject defendant's contention that Supreme Court erred in refusing to suppress physical evidence seized following a traffic stop of the vehicle in which he was a passenger (*see generally People v Washington*, 153 AD3d 1663, 1664 [4th Dept 2017], *lv denied* 30 NY3d 1023 [2017]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

206

KA 17-02061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. DAVIS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered April 11, 2017. The amended order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an amended decision and order, issued after our remittal (*see People v Davis*, 145 AD3d 1625 [4th Dept 2016], *lv dismissed* 29 NY3d 976 [2017]), determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*) and denying his request for a downward departure from his presumptive risk level. Although Supreme Court should have applied a preponderance of the evidence standard to defendant's request for a downward departure rather than a clear and convincing evidence standard (*see People v Gillotti*, 23 NY3d 841, 860-861 [2014]), we conclude that another remittal is not required because the record is sufficient to enable us to determine under the proper standard whether the court erred in denying defendant's request (*see People v Merkley*, 125 AD3d 1479, 1479 [4th Dept 2015]).

Here, defendant's lack of prior criminal history, acceptance of responsibility, and completion of sex offender counseling cannot be mitigating circumstances because they are already adequately taken into account by the guidelines inasmuch as the court did not assign defendant points on the risk assessment instrument for criminal history, lack of acceptance of responsibility, or poor conduct while confined/supervised (*see People v Varin*, 158 AD3d 1311, 1312 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]; *People v Reber*, 145 AD3d 1627, 1627-1628 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *see generally Gillotti*, 23 NY3d at 861). Although an offender's response to sex

offender treatment, if exceptional, can be the basis for a downward departure (*see People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]), defendant failed to meet his burden of proving by a preponderance of the evidence that his response to treatment was exceptional. Regarding defendant's contention that his past employment history is a mitigating circumstance, we conclude that defendant failed to demonstrate by a preponderance of the evidence how this alleged mitigating circumstance would reduce his risk of sexual recidivism or danger to the community (*see generally People v Asfour*, 148 AD3d 1669, 1671 [4th Dept 2017], *lv denied* 29 NY3d 914 [2017]; *People v Loughlin*, 145 AD3d 1426, 1428 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]). The court therefore lacked discretion to depart from the presumptive risk level (*see Loughlin*, 145 AD3d at 1428).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

210

KA 17-00128

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENDYN J. SINGLETON-PRADIA, ALSO KNOWN AS BRENDYN SINGLETON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Daniel J. Doyle, J.), rendered February 10, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the case is held, decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). We agree with defendant that Supreme Court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501 [2013]; *People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]). Defendant is an eligible youth and, as the People correctly concede, the sentencing court must make "a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it" (*Rudolph*, 21 NY3d at 501; *see People v Lester*, 155 AD3d 1579, 1579 [4th Dept 2017]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see Rudolph*, 21 NY3d at 503; *Lester*, 155 AD3d at 1579).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

213

CA 18-01843

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

IN THE MATTER OF ARBITRATION BETWEEN CITY OF BUFFALO, PETITIONER-RESPONDENT,

AND ORDER

BRAND-ON SERVICES, INC., RESPONDENT.

MORTON H. WITTLIN, INTERVENOR-PLAINTIFF-APPELLANT.

FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR INTERVENOR-PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered April 2, 2018. The order and judgment granted the motion of petitioner for summary judgment, denied the cross motion of Morton H. Wittlin for summary judgment, and declared that Morton H. Wittlin does not have a valid security interest in certain floating docks and that petitioner has priority over the security interest claimed by Morton H. Wittlin in the floating docks.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

215

CA 18-01180

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

TAMAICA M. TAYLOR, PLAINTIFF-APPELLANT,

V ORDER

MARCIA A. BIRDSONG, DEFENDANT,
AND DAVID L. VANGALIO, DEFENDANT-RESPONDENT.

FRANK S. FALZONE, BUFFALO (LOUIS ROSADO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH, SULLIVAN BEHR, BUFFALO (PHILIP C. BARTH, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 3, 2016. The judgment, inter alia, dismissed the complaint against defendant David L. Vangalio and awarded said defendant costs and disbursements.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

222.1

CA 18-01581

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

MARLENE A. STODDARD, PLAINTIFF-APPELLANT,

V ORDER

WILLIAM M. STODDARD, DEFENDANT-RESPONDENT.

COPPS DIPAOLA SILVERMAN, PLLC, ALBANY (LORRAINE R. SILVERMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Richard A. Dollinger, A.J.), entered January 17, 2018. The order, inter alia, granted the motion of defendant to modify a qualified domestic relations order.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

223

KA 14-00670

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MILES S. MITCHELL, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, 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 (Thomas E. Moran, J.), rendered October 29, 2013. The appeal was held by this Court by order entered November 10, 2016, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (144 AD3d 1598). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of attempted robbery in the first degree (§§ 110.00, 160.15 [4]). We previously held this case, reserved decision, and remitted the matter to Supreme Court to reopen the *Huntley* hearing with respect to recorded statements that defendant made to an agent of the police (*People v Mitchell*, 144 AD3d 1598, 1600 [4th Dept 2016]). Upon remittal, the court held the hearing and concluded that defendant's statements should not be suppressed, and we now affirm. The statements in question were made by defendant to the mother of his children while they were riding in her vehicle after she agreed to allow the police to place recording devices in her vehicle. Defendant requested that the witness give him a ride, and defendant was in the vehicle less than 10 minutes, during which there was a conversation between defendant and the witness. The testimony at the suppression hearing and the recording support the court's determination "that 'a reasonable person in defendant's position, innocent of any crime, would not have believed that he or she was in custody, and thus *Miranda* warnings were not required' " (*People v Leta*, 151 AD3d 1761, 1762 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]; *see People v Clark*, 136 AD3d 1367, 1368 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]). In addition, considering the totality of the circumstances,

we agree with the court's further determination that defendant's statements were voluntarily made (*see generally People v Huff*, 133 AD3d 1223, 1225 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *People v Alexander*, 51 AD3d 1380, 1381 [4th Dept 2008], *lv denied* 11 NY3d 733 [2008]). The witness made no threats, promises, or exertions of improper influence to elicit defendant's statements (*see People v Taplin*, 1 AD3d 1044, 1045 [4th Dept 2003], *lv denied* 1 NY3d 635 [2004]; *People v Lussier*, 298 AD2d 763, 764 [3d Dept 2002], *lv denied* 99 NY2d 630 [2003]; *People v Keene*, 148 AD2d 977, 978 [4th Dept 1989]).

Defendant's sentence is not unduly harsh or severe.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

224

KA 16-01482

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY HOPPER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 June 22, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

225

KA 18-00387

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM R. OLIVER, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 5, 2017. The judgment convicted defendant, upon his plea of guilty, of welfare fraud in the third degree.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

227

KA 17-01634

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KOLTON F. COTTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered July 7, 2017. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]). Defendant validly waived his right to appeal (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Conley*, 161 AD3d 1486, 1487 n [3d Dept 2018]; *People v Nichols*, 155 AD3d 1186, 1187 [3d Dept 2017]), and that waiver forecloses his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

228

KA 16-01271

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER CHURCH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 22, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]), defendant contends that he did not validly waive his right to appeal and that the sentence is unduly harsh and severe. The record establishes that defendant's waiver of the right to appeal was knowing, intelligent and voluntary (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Colon*, 122 AD3d 1309, 1309 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]), and the valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

235

CAF 17-01563

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

IN THE MATTER OF ERIC B. GUTHRIE,
PETITIONER-RESPONDENT,

V ORDER

HOLLY M. YOUNG, RESPONDENT-APPELLANT.

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

SUSAN GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered June 6, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject children.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

237

CAF 17-00774

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

IN THE MATTER OF JAIME D. AND JACOB D.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMES N., RESPONDENT-APPELLANT,
AND JACQUELINA D., RESPONDENT.
(APPEAL NO. 1.)

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

JEFFERY G. TOMPKINS, CAMDEN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered April 13, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent James N. had educationally neglected the subject children.

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

Same memorandum as in *Matter of Jaime D. [James N.]* ([appeal No. 2], — AD3d — [Mar. 15, 2019] [4th Dept 2019]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

238

CAF 17-02042

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

IN THE MATTER OF JAIME D. AND JACOB D.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMES N., RESPONDENT-APPELLANT,
AND JACQUELINA D., RESPONDENT.
(APPEAL NO. 2.)

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

JEFFERY G. TOMPKINS, CAMDEN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered October 31, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that the subject children are neglected children and entered a suspended judgment with respect to respondent James N.

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

Memorandum: In appeal No. 1, respondent father appeals from an order entered after a fact-finding hearing that, inter alia, found his two children to be neglected based on respondents' failure to supply them with an adequate education (*see* Family Ct Act § 1012 [f] [i] [A]). In appeal No. 2, the father appeals from an order of fact-finding and disposition that adjudged the children to be neglected and, among other things, ordered a suspended judgment.

The father's appeal from the order in appeal No. 1 must be dismissed inasmuch as the appeal from the fact-finding and dispositional order in appeal No. 2 brings up for review the propriety of the fact-finding order in appeal No. 1 (*see Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]). Further, the father's appeal from the order in appeal No. 2 insofar as it concerns the disposition must be dismissed as moot because that part of the order has expired by its terms (*see Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1136 [4th Dept 2013]). The father "may nevertheless challenge the underlying neglect adjudication because it constitutes a permanent stigma to a parent and it may, in future

proceedings, affect a parent's status" (*id.* [internal quotation marks omitted]; *see Matter of Matthew B.*, 24 AD3d 1183, 1183 [4th Dept 2005]). Contrary to the father's contention, we conclude that petitioner met its burden of establishing educational neglect by a preponderance of the evidence by demonstrating that each child had a significant unexcused absentee and tardiness rate that had a detrimental effect on his education (*see Gabriella G.*, 104 AD3d at 1137; *Matter of Cunntrel A. [Jermaine D.A.]*, 70 AD3d 1308, 1308 [4th Dept 2010], *lv dismissed* 14 NY3d 866 [2010]; *see generally Matter of Airionna C. [Shernell E.]*, 118 AD3d 1430, 1431 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014], *lv dismissed* 24 NY3d 951 [2014]). We reject the father's contention that his proffered explanations established a reasonable justification for the significant absences and tardiness (*see Cunntrel A.*, 70 AD3d at 1308).

Finally, we conclude that the father has "failed to demonstrate that [he] was afforded less than meaningful representation by counsel" (*Matthew B.*, 24 AD3d at 1183 [internal quotation marks omitted]). Although the father was at first unable to meet with his attorney on the morning of the fact-finding hearing, Family Court thereafter provided the father and counsel time to discuss the father's concerns prior to the beginning of the hearing.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

239

CAF 18-00110

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

IN THE MATTER OF JAKE ROSS FOWLER, SR.,
PETITIONER-RESPONDENT,

V ORDER

CRYSTAL LEE FOWLER, RESPONDENT-APPELLANT.

SCOTT T. GODKIN, UTICA, FOR RESPONDENT-APPELLANT.

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

TIMOTHY A. BENEDICT, ROME, ATTORNEY FOR THE CHILD.

DOUGLAS M. DEMARCHÉ, JR., NEW HARTFORD, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Gerald Neri, R.), entered December 22, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal custody of the subject children.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

246

KA 17-00951

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BAQI MUTI, 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 Erie County Court (Sheila A. DiTullio, J.), rendered April 5, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see People v Porterfield*, 107 AD3d 1478, 1478 [4th Dept 2013], *lv denied* 21 NY3d 1076 [2013]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). County Court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Suttles*, 107 AD3d 1467, 1468 [4th Dept 2013], *lv denied* 21 NY3d 1046 [2013] [internal quotation marks omitted]), and the record establishes that he "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256). Contrary to defendant's further contention, his waiver of the right to appeal was "not rendered invalid based on the court's failure to require [him] to articulate the waiver in his own words" (*People v Dozier*, 59 AD3d 987, 987 [4th Dept 2009], *lv denied* 12 NY3d 815 [2009]). "Although defendant's release to parole supervision does not render his challenge to the severity of the sentence moot because he remains under the control of the Parole Board until his sentence has terminated" (*People v Williams*, 160 AD3d 1470, 1471 [4th Dept 2018] [internal quotation marks omitted]), we conclude that the valid waiver of the right to appeal with respect to both the conviction and sentence forecloses defendant's challenge to the

severity of his sentence (*see Lopez*, 6 NY3d at 255-256; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

247

KA 15-01808

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CURTIS WILSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH R. PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 17, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

248

KA 18-00940

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD M. SINCLAIR, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered January 16, 2018. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention inasmuch as "Supreme Court did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea . . . and the court engaged defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Flinn*, 162 AD3d 1761, 1761 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018] [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal encompasses his contention that the sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

249

KA 16-01162

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MALCOLM WALKER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 27, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

250

KA 18-00917

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAYLON HEMPHILL, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered January 8, 2018. The judgment convicted defendant, upon his plea of guilty, 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: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31). 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]). That valid waiver forecloses defendant's challenge to the severity of his sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

254

KA 17-01281

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM C. SMITH, DEFENDANT-APPELLANT.

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

ADAM C. SMITH, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRITTANY GROME ANTONACCI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 17, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends in his main brief that the plea was not knowingly, intelligently, or voluntarily entered. Defendant failed to preserve his contention for our review because he did not move to withdraw his plea or to vacate the judgment of conviction on that ground, and this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]).

Defendant further contends in his main and pro se supplemental briefs that he received ineffective assistance of counsel. Contrary to the People's assertion, defendant was not required to preserve that contention by moving to withdraw his plea or to vacate the judgment of conviction on that ground (*see generally People v Irby*, 158 AD3d 1050, 1051 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]; *People v Long*, 151 AD3d 1886, 1886 [4th Dept 2017]). Nevertheless, that contention "does not survive his plea . . . inasmuch as defendant failed to demonstrate that the plea bargaining process was infected by the allegedly ineffective assistance or that he entered the plea because of defense counsel's allegedly poor performance" (*People v Alsaifullah*, 162 AD3d 1483, 1485-1486 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018]; *see People v Ware*, 159 AD3d 1401, 1402 [4th Dept

2018], *lv denied* 31 NY3d 1122 [2018]).

Finally, we have considered the remaining contentions in defendant's pro se supplemental brief, and we conclude that none warrants reversal or modification of the judgment.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

259

CAF 18-00266

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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IN THE MATTER OF DESIRE M. EUSON,
PETITIONER-APPELLANT,

V ORDER

DASHAWN WRIGHT, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered January 2, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

260

CAF 18-00267

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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IN THE MATTER OF DASHAWN WRIGHT,
PETITIONER-RESPONDENT,

V ORDER

DESIREE EUSON, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered January 2, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

265

CA 18-02079

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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CARMEN BRITT, AND CARMEN BRITT AS EXECUTOR OF THE ESTATE OF LULA BAITY, PLAINTIFF-APPELLANT,

V ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, GRACE MANOR HEALTH CARE FACILITY, INC., PHILLIP J. RADOS, M.D., NELDA LAWLER, M.D., TERESA CHAU, M.D., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

TIMOTHY R. LOVALLO, BUFFALO, FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 8, 2018. The order denied plaintiff's motion to restore the actions to the trial calendar.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

272

KA 17-00957

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HOLLEY, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 6, 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 his contention, the record demonstrates that defendant validly waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 255-256 [2006]). Defendant's valid waiver of his right to appeal forecloses his challenge to the severity of his sentence (*see id.* at 255).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

273

KA 17-00958

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN QUINONES-RIVERA, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), entered April 13, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of rape in the second degree (Penal Law § 130.30 [1]) and sentencing him to a determinate term of imprisonment. Even assuming, arguendo, that defendant's waiver of the right to appeal during the underlying plea proceeding was valid, we conclude, and the People correctly concede, that the waiver does not encompass his challenge to the severity of the sentence imposed following his violation of probation (*see People v Giuliano*, 151 AD3d 1958, 1959 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]; *People v Tedesco*, 143 AD3d 1279, 1279 [4th Dept 2016], *lv denied* 28 NY3d 1075 [2016]). Moreover, as the People further correctly concede, defendant's purported waiver of the right to appeal at the proceeding in which he admitted that he violated the terms of his probation is invalid inasmuch as County Court "failed to engage him in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Maloney*, 140 AD3d 1782, 1783 [4th Dept 2016] [internal quotation marks omitted]; *see People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). We further conclude, however, that the sentence imposed upon defendant's violation of probation is not unduly harsh or severe.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

278

KA 17-01903

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered August 18, 2017. The order denied the petition of defendant for a downward modification of his risk level 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 denying his petition pursuant to Correction Law § 168-o (2) seeking to modify the prior determination that he is a level two risk pursuant to the Sex Offender Registration Act (§ 168 *et seq.*). We conclude that County Court properly determined that defendant failed to meet his "burden of proving the facts supporting the requested modification by clear and convincing evidence" (§ 168-o [2]; *see People v Higgins*, 55 AD3d 1303, 1303 [4th Dept 2008]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

283

CA 18-01940

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

JOHN D. CADORE, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 129681.)

JOHN D. CADORE, CLAIMANT-APPELLANT PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Catherine C. Schaewe, J.), entered November 28, 2017. The order denied the motion of claimant for a default judgment.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

289

TP 18-01517

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

IN THE MATTER OF JONATHAN ALVARADO, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered August 23, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

292

KA 18-00043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRUCE C. WADSWORTH, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Stephen T. Miller, A.J.), entered September 30, 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.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

293

KA 18-00242

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN WILSON, 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 (Thomas J. Miller, J.), rendered October 16, 2017. 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 [4]). Defendant validly waived his right to appeal (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Colon*, 122 AD3d 1309, 1309 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]), and that waiver encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

299

CAF 18-01362

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

IN THE MATTER OF JOSHUA T. ATHOE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NIA M. GOODMAN (BOTKIN), RESPONDENT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JENNIFER M. LORENZ, ORCHARD PARK, FOR PETITIONER-RESPONDENT.

CHRISTINE F. REDFIELD, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 6, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Memorandum: Respondent mother appeals from an order that, inter alia, awarded petitioner father sole legal and physical custody of the subject child. We reject the mother's contention that Family Court's custody determination lacks a sound and substantial basis in the record. In making an initial custody determination, the court is "required to consider the best interests of the child by reviewing such factors as maintaining stability for the child, . . . the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, and the willingness of each parent to foster a relationship with the other parent" (*Matter of Buckley v Kleinahans*, 162 AD3d 1561, 1562 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Chilbert v Soler*, 77 AD3d 1405, 1406 [4th Dept 2010], *lv denied* 16 NY3d 701 [2011]). We agree with the court that those factors weigh in the father's favor, particularly in light of the mother's efforts to interfere with the father's contact with the child, and thus the record supports the court's determination that it is in the child's best interests to award sole custody to the father (*see Matter of Wojciulewicz v McCauley*, 166 AD3d 1489, 1490-1491 [4th Dept 2018]; *Matter of Marino v Marino*, 90 AD3d 1694, 1695-1696 [4th Dept 2011]).

Contrary to the mother's further contention, we conclude that the court properly denied her motion to remove the Attorney for the Child (AFC), inasmuch as the motion was based solely upon unsubstantiated allegations of bias and nothing in the record establishes that the AFC failed to diligently represent the child's best interests (*see Matter of Brooks v Greene*, 153 AD3d 1621, 1622 [4th Dept 2017]; *Matter of Petkovsek v Snyder* [appeal No. 6], 251 AD2d 1087, 1087 [4th Dept 1998], *lv dismissed in part and denied in part* 92 NY2d 942 [1998]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

307

CA 18-00965

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

NICHOLAS CARUSO, PLAINTIFF,
AND RONALD J. CARUSO, PLAINTIFF-RESPONDENT,

V ORDER

MICHAEL D. CHATFIELD, LANDSTAR RANGER, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PETER D. CANTONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRIAN CHAPIN YORK, JAMESTOWN, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered March 19, 2018. The order, insofar as appealed from, denied the motion of defendants Michael D. Chatfield and Landstar Ranger, Inc., for summary judgment as to plaintiff Ronald J. Caruso's claim of a significant limitation of use of a body function or system.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 19 and December 17, 2018,

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

311

CA 18-01258

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

JEFFREY SIMPSON, PLAINTIFF-RESPONDENT,

V ORDER

SYRACUSE SIGNAL SYSTEMS, INC., DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (NICOLE MARMANILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SIDNEY P. COMINSKY, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 6, 2018. The order denied the motion of defendant for summary judgment.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

322

CA 18-00038

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF SCOTT P., CONSECUTIVE NO. 395757, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V ORDER

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

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered November 1, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the commitment of petitioner to a secure treatment facility.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

327

CA 18-00158

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

JON P. RICHEAL, PLAINTIFF-APPELLANT,

V ORDER

ANGELIA RICHEAL, DEFENDANT-RESPONDENT.

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

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 23, 2016 in a divorce action. The judgment, among other things, awarded defendant non-durational maintenance.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

331

TP 18-01907

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

IN THE MATTER OF KYLE WATSON, PETITIONER,

V ORDER

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

KYLE WATSON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered March 14, 2018) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

336

KA 15-02009

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SYLVESTER E. BAXTRUM, JR., DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered September 9, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts) and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]) and one count of assault in the second degree (§ 120.05 [2]), defendant contends that he was denied effective assistance of counsel because defense counsel failed to make a timely motion to sever his trial from that of his codefendant and failed to request a limiting instruction regarding testimony that defendant contends was relevant only to the issue of his codefendant's guilt. We reject defendant's contention. "Any motion to sever . . . would have had little or no chance of success," and thus counsel's failure to make such a motion does not indicate ineffectiveness of counsel (*People v Dozier*, 32 AD3d 1346, 1347 [4th Dept 2006], *lv dismissed* 8 NY3d 880 [2007] [internal quotation marks omitted], citing *People v Caban*, 5 NY3d 143, 152 [2005]). With respect to the limiting instruction, defendant failed to show the absence of strategic or other legitimate explanations for defense counsel's alleged deficiency (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]). Moreover, we conclude that the evidence, the law and the circumstances of this case, viewed in totality and as of the time of representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant's remaining contention is raised for the first time in defendant's reply brief and thus is not properly before us (*see People*

v Larkins, 153 AD3d 1584, 1586 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]; *People v Sponburgh*, 61 AD3d 1415, 1416 [4th Dept 2009], *lv denied* 12 NY3d 929 [2009]; *People v Boatman*, 53 AD3d 1053, 1054 [4th Dept 2008]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

344

CAF 16-02242

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

IN THE MATTER OF HAKEEM S. HAMEED,
PETITIONER-RESPONDENT,

V ORDER

ASIA A. BRELAND, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered March 15, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal custody of the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Pugh v Richardson*, 138 AD3d 1423, 1423-1424 [4th Dept 2016]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

351

CA 18-01255

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

WILMINGTON SAVINGS FUND SOCIETY FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS A TRUSTEE FOR BCAT 2014-4TT, PLAINTIFF-RESPONDENT,

V ORDER

ESTATE OF PATRICIA NUGENT, ET AL., DEFENDANTS, AND DEANNA FERRY, DEFENDANT-APPELLANT.

RALPH A. HORTON, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Wyoming County (Michael F. Griffith, A.J.), dated May 31, 2017. The order, among other things, denied the motion of defendant Deanna Ferry to dismiss.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

352

KA 15-01192

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVONNE PARRIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 24, 2015. The judgment convicted defendant, upon his plea of guilty, of gang assault 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 gang assault in the first degree (Penal Law § 120.07). We agree with defendant that the waiver of the right to appeal is invalid. In addition to conflating the right to appeal with those rights automatically forfeited by the guilty plea (*see People v Rogers*, 159 AD3d 1558, 1558-1559 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]), the perfunctory inquiry made by Supreme Court was "insufficient to establish that the court 'engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]; *see People v Brown*, 160 AD3d 1426, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1115 [2018]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 16-01560

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRANDON GRANT, DEFENDANT-APPELLANT.

I. AURORA FLORES, MANLIUS, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered October 19, 2015. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

354

KA 16-01951

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHAUN A. HOLT, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (David W. Foley, A.J.), rendered September 29, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree (Penal Law §§ 110.00, 220.06 [5]), defendant contends that his agreed-upon sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's contention is not encompassed by his waiver of the right to appeal, we perceive no basis in the record to exercise our power to modify defendant's negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We note that defendant has four prior felony drug convictions and that he was on parole when he committed this offense.

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 17-00760

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PEDRO ROMERO, DEFENDANT-APPELLANT.

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

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

Appeal from a sentence of the Onondaga County Court (Thomas J. Miller, J.), rendered March 1, 2017. Defendant was sentenced upon his conviction of assault in the second degree.

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

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 18-00859

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIUS L. BRAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered January 31, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. Supreme Court "did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Tilford*, 162 AD3d 1569, 1569 [4th Dept 2018], *lv denied* 32 NY3d 942 [2018] [internal quotation marks omitted]), and defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see id.*).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 17-00962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL GREER, 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 Erie County Court (Sheila A. DiTullio, J.), rendered June 27, 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, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: March 15, 2019

Mark W. Bennett
Clerk of the Court

MOTION NO. (649/91) KA 02-00858. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. BARNES, JR., DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (796/12) KA 11-00972. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MIGUEL A. JARAMILLO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (673/16) KA 12-00874. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FAHEEM ABDUL-JALEEL, DEFENDANT-APPELLANT. -- Motion for reargument and other relief denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (1453/17) KA 10-00859. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GERALD ADGER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (638/18) KA 15-01174. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALEXANDER KATES, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (732/18) KA 15-01997. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY LANKFORD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (849/18) KA 16-01773. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V QUENTIN HILL, ALSO KNOWN AS QUINTON HILL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (962/18) CA 17-01501. -- IN THE MATTER OF THE PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN FOR EUGENE DAVID COLELLO, PURSUANT TO SCPA ARTICLE 17-A. MICHELLE A. COLELLO, PETITIONER-RESPONDENT, V EUGENE G. COLELLO, RESPONDENT-APPELLANT. LISA J. ALLEN, ESQ. AND STANLEY J. COLLESANO, ESQ., RESPONDENTS. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (963/18) CA 17-01502. -- IN THE MATTER OF THE PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN FOR EUGENE DAVID COLELLO, PURSUANT TO SCPA ARTICLE 17-A. MICHELLE A. COLELLO, PETITIONER-RESPONDENT, V EUGENE G. COLELLO, RESPONDENT-APPELLANT. LISA J. ALLEN, ESQ. AND STANLEY J. COLLESANO, ESQ., RESPONDENTS. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (964/18) CA 17-01503. -- IN THE MATTER OF THE PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN FOR EUGENE DAVID COLELLO, PURSUANT TO SCPA ARTICLE 17-A. MICHELLE A. COLELLO, PETITIONER-RESPONDENT, V EUGENE G. COLELLO, RESPONDENT-APPELLANT. LISA J. ALLEN, ESQ. AND STANLEY J. COLLESANO, ESQ., RESPONDENTS. (APPEAL NO. 3.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (982/18) CA 17-02161. -- MARILYN BROWN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF J.L., AN INFANT, PLAINTIFF-RESPONDENT, V FIRST STUDENT, INC., BUFFALO PUBLIC SCHOOL DISTRICT, ET AL., DEFENDANTS-RESPONDENTS, CATHOLIC DIOCESE OF BUFFALO, OUR LADY OF BLACK ROCK SCHOOL, MARTHA J. EADIE, SISTER CAROL CIMINO, AND DEBBIELYNN DOYLE, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (1072/18) TP 17-02208. -- IN THE MATTER OF DENNIS BRENNAN, PETITIONER, V MICHAEL C. GREEN, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DEPUTY COMMISSIONER OF DIVISION OF CRIMINAL JUSTICE SERVICES, AND NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (1228/18) CA 18-00015. -- IN THE MATTER OF MATTHEW NIX, PETITIONER-APPELLANT, V NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND NEMOYER, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (1256/18) CA 17-01273. -- IN THE MATTER OF SALEEM SPENCER, PETITIONER-APPELLANT, V ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (1302/18) CA 18-00604. -- IN THE MATTER OF M. B., PETITIONER-APPELLANT, V NEW YORK STATE OFFICE OF MENTAL HEALTH, ERIE COUNTY

MEDICAL CENTER, SUICIDE PREVENTION AND CRISIS SERVICES, INC., BRYLIN HOSPITAL, AND LAKESHORE BEHAVIORAL HEALTH, RESPONDENTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (1303/18) CA 18-00605. -- IN THE MATTER OF M. B., PETITIONER-APPELLANT, V NEW YORK STATE OFFICE OF MENTAL HEALTH, ERIE COUNTY MEDICAL CENTER, SUICIDE PREVENTION AND CRISIS SERVICES, INC., BRYLIN HOSPITAL AND LAKESHORE BEHAVIORAL HEALTH, RESPONDENTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ. (Filed Mar. 15, 2019.)

MOTION NO. (1440/18) CA 18-01353. -- ALBERT G. FRACCOLA, JR., INDIVIDUALLY AND AS 50 PERCENT SHAREHOLDER, PRESIDENT AND DIRECTOR, COMMITTEEMAN OF ONE, AND CREDITOR OF 1ST CHOICE REALTY, INC., ET AL., PLAINTIFF-APPELLANT, V 1ST CHOICE REALTY, INC., A DOMESTIC CORPORATION IN DISSOLUTION, ET AL., DEFENDANTS, ROBERT K. HILTON, III, JAY G. WILLIAMS, III, AND GETNICK, LIVINGSTON, ATKINSON, GIGLIOTTI AND PRIORE, LLP, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Mar. 15, 2019.)

KA 18-00654. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BARON LOPSEY, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matter is remitted to Oneida County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Mar. 15, 2019.)

KA 16-02222. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MERRELL K. TAYLOR, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Supreme Court, Erie County, Russell P. Buscaglia, A.J. - Attempted Robbery, 2nd Degree). PRESENT: SMITH, J.P., CARNI, LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed Mar. 15, 2019.)

KA 15-01689. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALFRED D.

VAZQUEZ, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see* *People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Mar. 15, 2019.)