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ALFORD PLEA, APPEALS, PROBABLE CAUSE.

WAIVER OF APPEAL INVALID; THERE WAS PROBABLE CAUSE FOR THE DWI ARREST EVEN THOUGH NO FIELD SOBRIETY TESTS WERE CONDUCTED; BETTER PRACTICE WOULD BE FOR THE PROSECUTOR TO PLACE THE EVIDENCE OF DEFENDANT'S GUILT ON THE RECORD AT THE TIME OF AN ALFORD PLEA (THIRD DEPT).

The Third Department, affirming defendant's DWI conviction by guilty plea, determined the waiver of appeal was insufficient. The Third Department noted that the better practice would have been to place the evidence of defendant's guilt on the record at the time of the Alford plea, and found the arresting officer had probable cause without conducting field sobriety tests. With regard to the waiver of appeal, the court wrote:

During the brief colloquy with defendant, County Court did not sufficiently distinguish the waiver of the right to appeal from the trial-related rights that defendant was forfeiting by virtue of his guilty plea, and the record does not reflect that defendant executed a written waiver. Additionally, in response to County Court's inquiry regarding defendant's willingness to waive his right to appeal, defendant replied, "Yes, if that's what I gotta do, yes. If that's what you're making me do, I'll do it." Under these circumstances, we are unable to conclude that defendant knowingly, intelligently and voluntarily waived his right to appeal. People v Crandall, 2020 NY Slip Op 01857, Third Dept 3-16-20

ATTORNEYS, RIGHT TO COUNSEL.

BECAUSE DEFENDANT INVOKED HIS RIGHT TO COUNSEL WHEN HE WAS NOT IN CUSTODY HE COULD VALIDLY WITHDRAW HIS REQUEST WITHOUT THE PRESENCE OF COUNSEL (FOURTH DEPT).

The Fourth Department determined defendant invoked his right to counsel when he was not in custody and therefore defendant could validly withdraw his request for counsel without the presence of counsel:

The Court of Appeals has stated that a defendant who asserts his or her right to counsel while out of custody may later withdraw that assertion without an attorney present and speak to law enforcement agents … . A hearing court may infer that a defendant has withdrawn a request for counsel when the defendant's conduct unambiguously establishes such a withdrawal, which requires consideration of all relevant factors, including

"whether defendant was fully advised of his or her constitutional rights before invoking the right to counsel and subsequently waiving it, whether the defendant who has requested assistance earlier has initiated the further communication or conversation with the police . . . , and whether there has been a break in the interrogation after the defendant has asserted the need for counsel with a reasonable opportunity during the break for the suspect to contact an attorney" … . Here, defendant was repeatedly advised of his rights, including twice immediately before he resumed speaking with the police. Moreover, after an overnight break in questioning, defendant initiated the conversation with the police to inquire about taking a polygraph examination, and he provided his own transportation to the investigators' office. Consequently, we conclude that the court properly determined that defendant withdrew his assertion of his right to counsel … . We reject defendant's contention that a different result is required because he did not cause the break in the interrogation. The relevant consideration is not which party caused the break in the questioning, rather it is whether there was "a reasonable opportunity during the break for the suspect to contact an attorney" … , and in this case defendant had such an opportunity during the overnight break in questioning. People v Brown, 2020 NY Slip Op 01981, Fourth Dept 3-20-20

ATTORNEYS, RIGHT TO COUNSEL.

BECAUSE THE ISSUE WAS NOT PRESERVED, THE APPELLATE COURT DID NOT ADDRESS DEFENDANT'S OBJECTION TO THE TRIAL JUDGE'S PROHIBITING DEFENDANT FROM COMMUNICATING WITH HIS ATTORNEY DURING OVERNIGHT RECESSES WHEN DEFENDANT WAS ON THE STAND (FOURTH DEPT).

The Fourth Department determined the defendant did not preserve for appeal his objection to the trial judge's prohibiting defendant from communicating with his lawyer during overnight recesses when defendant was testifying. The legitimacy of the objection was not addressed:

Defendant … contends in his main brief that the court committed reversible error by depriving him of the constitutional right to counsel when it prohibited him from communicating with defense counsel about his testimony during overnight recesses while defendant was in the midst of testifying in his defense. Defendant failed to preserve that contention for our review inasmuch as defense counsel was " present and available to register a protest' to [the] restriction on communication that would [have] provide[d] the court with an opportunity to rectify its error" but did not make a timely protest … . Under the circumstances of this case, we decline to exercise our power to review that contention as a matter of discretion in the interest of justice … . Contrary to defendant's related contention in his main brief, we conclude under the circumstances of this case

that defense counsel's failure to timely object to the prohibition on communication was not so "egregious and prejudicial as to compromise . . . defendant's right to a fair trial" … . People v Tetro, 2020 NY Slip Op 01973, Fourth Dept 3-20-20

ATTORNEYS, RIGHT TO COUNSEL.

DEFENDANT'S RIGHT TO COUNSEL ATTACHED AT THE PENNSYLVANIA ARRAIGNMENT; SUBSEQUENT QUESTIONING BY PENNSYLVANIA POLICE IN THE ABSENCE OF COUNSEL VIOLATED DEFENDANT'S RIGHT TO COUNSEL; NEW YORK POLICE DID NOT MAKE A REASONABLE INQUIRY INTO DEFENDANT'S REPRESENTATIONAL STATUS (FOURTH DEPT).

The Fourth Department, affirming the suppression of statements made by defendant, determined defendant had requested counsel at his arraignment in Pennsylvania and therefore subsequent questioning by Pennsylvania police about New York (Jamestown) offenses in the absence of counsel violated his right to counsel:

On March 28, 2017, defendant participated in a preliminary arraignment in Pennsylvania … , and the record supports the finding of County Court that defendant requested counsel during that proceeding. On April 4, 2017, members of the Jamestown Police Department traveled to Pennsylvania to interview defendant about the Jamestown arsons. Although the Jamestown police officers ultimately did not interview defendant themselves, they observed while Pennsylvania State Troopers interrogated defendant, in the absence of defense counsel, about the offenses allegedly committed in Pennsylvania. During that interrogation, the Pennsylvania State Troopers also questioned defendant about the New York offenses, and defendant made inculpatory statements about the Jamestown fires. * * *

…[E]even though the interview was carried out by Pennsylvania State Troopers, their interrogation is nevertheless subject to this state's right to counsel jurisprudence inasmuch as they were agents of the Jamestown police officers … . „„

The Court of Appeals has held that "an officer who wishes to question a person in police custody about an unrelated matter must make a reasonable inquiry concerning the defendant's representational status when the circumstances indicate that there is a probable likelihood that an attorney has entered the custodial matter, and the accused is actually represented on the custodial charge" … . Here, although the [Jamestown] captain asked whether defendant was represented by counsel, based on this record, we conclude that the captain's inquiry was

not reasonable inasmuch as he failed to ask whether defendant had requested counsel. People v Young, 2020 NY Slip Op 01825, Fourth Dept 3-13-20

ATTORNEYS, RIGHT TO COUNSEL.

THE DEFENSE ATTORNEY HAD BEGUN WORKING FOR THE DISTRICT ATTORNEY'S OFFICE AT THE TIME DEFENDANT ENTERED HIS PLEA; DEFENDANT WAS THEREBY DEPRIVED OF HIS RIGHT TO COUNSEL; PLEA VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant was deprived of his right counsel because defense counsel had become employed by the district attorney's office at the time of the plea:

It is well established that a criminal defendant's right to counsel is violated when a defense attorney who actively participated in the preliminary stages of the defendant's defense becomes employed as an assistant district attorney by the office that is prosecuting the defendant's ongoing case … . In those circumstances, the defendant and the public are given "the unmistakable appearance of impropriety and [the situation] create[s] the continuing opportunity for abuse of confidences entrusted to the attorney during the [period] of his [or her] active representation of defendant" … . Disqualification is required when there is "the appearance of impropriety and the risk of prejudice attendant on abuse of confidence, however slight" … . "The rule is necessary to prevent situations in which [a] former client[] must depend on the good faith of [his or her] former [attorney] turned adversar[y] to protect and honor confidences shared during the now extinct relationship. In those situations the risk of abuse is obvious" … .

Here, we conclude that defendant's right to counsel was violated … . The People concede that the attorney who had represented defendant with respect to the misdemeanor charges was employed by the District Attorney's Office at the time defendant entered into the plea agreement that resolved those misdemeanor charges as well as the felony charges. Thus, on this record, we conclude that there is an "appearance of impropriety and . . . risk of prejudice attendant on abuse of confidence" … , and defendant should not have been required to "depend on the good faith of [his] former [attorney] turned adversar[y] to protect and honor confidences shared during the now extinct relationship" … . People v Sears, 2020 NY Slip Op 01974, Fourth Dept 3-20-20

CONVICTION, MOTION TO VACATE, ATTORNEYS.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION BY GUILTY PLEA ON INEFFECTIVE ASSISTANCE GROUNDS WAS PROPERLY DENIED WITHOUT A HEARING; THE TWO DISSENTERS ARGUED THE PRO SE MOTION WAS SUFFICIENT TO WARRANT A HEARING, DESPITE THE TECHNICAL DEFECTS (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined defendant's pro se motion to vacate his conviction by guilty plea, on ineffective assistance of counsel grounds, was properly denied without a hearing. The dissenters argued defendant raised the issue sufficiently to warrant a hearing:

Defendant contends that defense counsel was ineffective because he failed to advise defendant, prior to the guilty plea, of a potentially viable affirmative defense concerning the operability of the firearm used in the robberies … . Defendant did not submit, however, the statutorily-required "sworn allegations" of "the existence or occurrence of facts" in support of his motion to warrant such a hearing … . The rule that a CPL 440.10 motion must be predicated on sworn allegations is a fundamental statutory requirement that a defendant must satisfy to be entitled to a hearing … . Absent sworn allegations substantiating defendant's contentions, the court did not abuse its discretion in summarily denying the motion … .

Specifically, defendant did not aver in his initial motion papers that he would have rejected the favorable plea deal and insisted on proceeding to trial had he been made aware of the potentially viable affirmative defense. Inasmuch as defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" … , his failure to swear that he would have done so is fatal to his motion, and thus the court did not err in denying it without a hearing … . People v Dogan, 2020 NY Slip Op 02021, Fourth Dept 3-20-20

CONVICTION, MOTION TO VACATE, ATTORNEYS.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to vacate his conviction on ineffective assistance ground should not have been denied without a hearing:

… [D]efendant's CPL 440.10 motion was supported by a notarized but unsworn statement of a witness, dated prior to defendant's trial, who asserted that defendant had borrowed the witness's jacket minutes before defendant's arrest, that the controlled substances in the pockets of that jacket belonged to the witness, and that defendant had no prior knowledge of the controlled substances … . Defendant himself averred in an affidavit submitted in support of his motion that he informed trial counsel prior to trial of the witness's willingness to testify. Defendant's motion therefore set forth sufficient facts tending to substantiate his claim that he was denied effective assistance of counsel, and we therefore agree with defendant that Supreme Court erred in denying that claim without a hearing … .

We further agree with defendant that the court erred in rejecting his contention that trial counsel was ineffective for failing to either secure police surveillance of the traffic stop that led to defendant's arrest or seek sanctions for the prosecution's alleged failure to preserve the same. People v Fox, 2020 NY Slip Op 01809, Fourth Dept 3-13-20

CONVICTION, MOTION TO VACATE, ATTORNEYS.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a dissent, determined defendant's motion to vacate his conviction on ineffective assistance grounds should not have been denied without a hearing. The defendant submitted an affidavit from an alibi witness claiming that defendant was out-of-state at the time of the offense and further stating that she had so informed defense counsel. In denying the motion to vacate, Supreme Court

noted that defendant did not submit an affidavit from defense counsel. The Fourth Department recognized that obtaining such an affidavit is problematic where ineffective assistance is alleged:

"It is well established that the failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel' " … . Contrary to the court's determination, a "defendant's failure to submit an affidavit from trial counsel is not fatal to [a CPL 440.10] motion" … . Where, as here, the defendant's " application is adverse and hostile to his [or her] trial attorney,' it is wasteful and unnecessary' to require the defendant to secure an affidavit from counsel, or to explain his [or her] failure to do so" … . Moreover, to be entitled to a hearing, a defendant is not required to submit with his or her motion evidence corroborating the alibi witness's affidavit … . Although the lack of corroboration is a factor the court may consider at a hearing, it is not a basis for denying the motion summarily. People v Scott, 2020 NY Slip Op 01807, Fourth Dept 3-13-20

DEPORTATION, APPEALS.

BECAUSE THE DEFENDANT WAS MADE AWARE OF THE POSSIBILITY OF DEPORTATION MONTHS BEFORE HE PLED GUILTY, HIS ARGUMENT THAT THE TRIAL JUDGE DID NOT INFORM HIM OF THE IMMIGRATION CONSEQUENCES OF HIS PLEA WAS SUBJECT TO THE PRESERVATION REQUIREMENT; THE FAILURE TO PRESERVE THE ERROR PRECLUDED APPEAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a three-judge concurrence, determined defendant's argument that the trial judge failed to inform him of the deportation consequences of his plea to a felony was subject to the preservation requirement. The defendant's failure to preserve the error precluded appeal:

"[D]ue process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony" … . However, before we may consider whether a trial court fulfilled that obligation, we must determine whether a defendant preserved the claim as a matter of law for our review or whether an exception to the preservation doctrine applies … . Here, service on defendant, in open court and months before the plea proceedings, of a "Notice of Immigration Consequences" form provided him with a reasonable opportunity to object to the plea court's failure to advise him of the potential deportation consequences of his plea, making the narrow exception to the preservation doctrine unavailable to him … . * * *

"Generally, in order to preserve a claim that a guilty plea is invalid, a defendant must move to withdraw the plea on the same grounds subsequently alleged on appeal or else file a motion to vacate the judgment of conviction pursuant to CPL 440.10" (Peque, 22 NY3d at 182). While reiterating this rule in Peque, we also acknowledged that "where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record, preservation is not required" (id.). This exception to the preservation requirement, however, remains narrow … . * * *

The very first sentence of the Notice explicitly told defendant that "a plea of guilty to any offense" could "subject[] [him] to a risk that adverse consequences w[ould] be imposed on [him] by the United States immigration authorities, including, but not limited to, removal from the United States . . . ." It further noted that, among other things, a conviction for "burglary . . . or any other theft-related offense . . . for which a sentence of one year or more is imposed" would be deportable.

Those unambiguous statements provided defendant with sufficient notice of possible immigration consequences, including deportation, of his conviction, giving him "a reasonable opportunity" to express concerns to the court — during either his plea or at sentencing — regarding those consequences … . People v Delorbe, 2020 NY Slip Op 02126, CtApp 3-31-20

DISCLOSURE.

PROTECTIVE ORDER PRECLUDING DISCLOSURE OF EVIDENCE TO THE DEFENSE REVERSED (SECOND DEPT).

The Second Department, in a decision by Justice Scheinkman, reversing Supreme Court, vacated a protective order concerning the disclosure of certain evidence to the defense:

I agree with the defendant that the People should have been required to disclose to defense counsel the general nature of the information that the People sought to be protected (see CPL 245.10[1][a] ["Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under 245.70 of this article; but the defendant shall be notified in writing that information has not been disclosed under a particular subdivision of (CPL 245.20)"]).

The defendant and his counsel were not informed as to whether what was sought to be protected were only witness names and personal information as opposed to witness statements, police reports, grand jury testimony, video or audio recordings, or other evidence.

I also agree with the defendant that, under the circumstances of this case, the People should have been required to disclose information about the reasons for the application that would not reveal the existence of the information sought to be protected. As I stated in People v Bonifacio (179 AD3d 977, 979), "proceedings on applications for a protective order should be entirely ex parte only where the applicant has demonstrated the clear necessity for the entirety of the application, and the submissions in support of it, to be shielded from the opposing party" and that it may be that "even where some aspects of the application should be considered by the court ex parte, other portions of the application may be appropriately disclosable." Here, much of the written application could have been disclosed to defense counsel in redacted form without any danger of revealing the information sought to be protected … . People v Belfon, 2020 NY Slip Op 01630, Second Dept 3-11-20

DNA.

TESTIMONY SUPPORTING THE ADMISSION OF DNA PROFILES WAS HEARSAY WHICH VIOLATED THE CONFRONTATION CLAUSE (CT APP).

The Court of Appeals, reversing defendant's conviction, over a concurrence, determined the testimony which formed the basis for the admission in evidence of DNA profiles was hearsay which violated the Confrontation Clause:

In People v John, we held that, when confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine "an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data" (27 NY3d 294, 315 [2016]). In People v Austin, we reiterated that a testifying analyst who did not participate in the generation of a testimonial DNA profile satisfies the Confrontation Clause's requirements only if the analyst "used his or her independent analysis on the raw data to arrive at his or her own conclusions" (30 NY3d 98, 105 [2017] …). The records before us do not establish that the testifying analyst had such a role in either case. Accordingly, because the analyst's hearsay testimony as to the DNA profiles developed from the post-arrest buccal swabs "easily satisfies the primary purpose test" for determining whether evidence is testimonial … , we conclude that her testimony and the admission of those DNA profiles into evidence, over defendants' objections, violated defendants' confrontation rights. People v Tsintzelis, 2020 NY Slip Op 02026, CtApp 3-24-20

IDENTIFICATION.

IT WAS (HARMLESS) ERROR TO ALLOW A POLICE OFFICER TO IDENTIFY DEFENDANT IN SECURITY CAMERA FOOTAGE (FOURTH DEPT).

The Fourth Department determined it was (harmless) error to allow a police officer to identify defendant in security camera footage:

Defendant … contends that the court erred in permitting a police detective to give testimony identifying defendant as the shooter in the security camera footage and drawing certain inferences from that footage … . To the extent that defendant's contention is preserved for our review (see CPL 470.05 [2]), we conclude that any error in the admission of that testimony is harmless … . We note that the court sustained at least one objection from defense counsel after a nonresponsive answer from the police detective and issued a curative instruction with respect to that answer, which the jury is presumed to have followed … . We also note that the court's final instructions to the jury alleviated much of the prejudice of the police detective's testimony of which defendant now complains. The court instructed the jury that they were the sole and exclusive judges of the facts, that the testimony of police officers should not automatically be accepted, and that defendant's identity was a disputed issue in the case. The court also instructed the jury how it should evaluate the accuracy of identification testimony. Again, the jury is presumed to have followed those instructions … . People v Jordan, 2020 NY Slip Op 01817, Fourth Dept 3-13-20

IDENTIFICATION.

LINEUP IDENTIFICATION WAS UNDULY SUGGESTIVE, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the lineup identification procedure was unduly suggestive:

… [W]e agree with the defendant's contention that the hearing court erred in finding that the pretrial identification procedure, a lineup, was not unduly suggestive. The defendant was the only person in the lineup with dreadlocks, and dreadlocks featured prominently in the description of one of the assailants that the complainant gave to the police. In addition, the dreadlocks were distinctive and visible despite the fact that the defendant and the fillers all wore hats … . Accordingly, the lineup identification should have been suppressed.

The error was not harmless as it cannot be said that there is no reasonable possibility that the error might have contributed to the defendant's conviction … . Therefore, we reverse the judgment of conviction and order a new trial. People v Colsen, 2020 NY Slip Op 01514, Second Dept 3-4-20

INCLUSORY CONCURRENT COUNTS, IMPEACHMENT, POLICE OFFICERS.

SECOND DEGREE MURDER COUNTS DISMISSED AS INCLUSORY CONCURRENT COUNTS RE FIRST DEGREE MURDER; CROSS EXAMINATION OF A POLICE OFFICER RE EXCESSIVE FORCE PROPERLY PRECLUDED BECAUSE THE ALLEGATIONS WERE NOT RELEVANT TO CREDIBILITY (SECOND DEPT).

The Second Department determined the second degree murder counts must be dismissed as inclusory concurrent counts of the convictions of first degree murder. The court noted that the trial court properly precluded cross examination of a police officer about allegations of the officer's use of excessive force because the allegations were not relevant to credibility:

While specific and relevant allegations of misconduct in a civil action filed against a law enforcement officer may be used for the limited purpose of impeaching that law enforcement witness at trial … , such impeachment is subject to the court's broad discretion in controlling the permissible scope of cross-examination … . Here, the defendant failed to demonstrate that specific allegations of excessive force in a federal action pending against the detective and a finding in 2010 by the Civilian Complaint Review Board that the detective used excessive force were relevant to the detective's credibility … . People v Brown, 2020 NY Slip Op 01632, Second Dept 3-11-20

JUDGES, DISQUALIFICATION.

JUDGE WHO WAS THE DISTRICT ATTORNEY WHEN DEFENDANT WAS INDICTED WAS DISQUALIFIED FROM HEARING DEFENDANT'S MOTION TO VACATE HIS CONVICTION (FOURTH DEPT).

The Fourth Department, reversing County Court's summary denial of defendant's motion to vacate his conviction, determined the judge, who was the District Attorney when defendant was indicted, was disqualified from handling the motion:

The Judge who denied defendant's motion had been the Niagara County District Attorney when defendant was indicted in 2007 on the charges that resulted in the judgment now sought to be vacated and, in fact, had signed the indictment. Thus, we conclude that the Judge was disqualified from entertaining the motion pursuant to Judiciary Law § 14, which provides in relevant part that "[a] judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he [or she] is a party, or in which he [or she] has been attorney or counsel" (emphasis added). Inasmuch as "this statutory disqualification deprived the court of jurisdiction," the order on appeal is void … . We therefore reverse the order and remit the matter to County Court for further proceedings on the motion before a different judge … . People v Simcoe, 2020 NY Slip Op 01729, Fourth Dept 3-13-20

JURY INSTRUCTIONS, JUSTIFICATION DEFENSE.

THE JURY WAS NOT PROPERLY INSTRUCTED ON THE JUSTIFICATION DEFENSE, INDICTMENT COUNT DISMISSED (SECOND DEPT).

The Second Department determined the jury was not properly instructed on the justification defense:

… [T]he Supreme Court instructed the jurors to consider justification as an element of each count submitted for their consideration. The court also instructed the jurors that they must find the defendant not guilty of all counts if they found that the People failed to disprove the defendant's justification defense. However, the verdict sheet did not mention justification, and the court did not instruct the jurors that if they were to find the defendant not guilty of the greater counts of assault in the second degree on the basis of justification, they were not to consider the lesser count of obstructing governmental administration in the second degree. We cannot say with any

certainty, and there is no way of knowing, whether the jurors acquitted the defendant of the greater counts on the ground of justification so as to mandate acquittal on the lesser count … .

The evidence at trial of lack of justification was not overwhelming … . Although, ordinarily, a new trial would be ordered, since the defendant was acquitted of the assault in the second degree counts and the only remaining count of the indictment concerns the offense for which the defendant has already completed his sentence, dismissal of the count of the indictment charging obstructing governmental administration in the second degree, rather than a new trial on that count, is appropriate … . People v Gunther, 2020 NY Slip Op 01638, Second Dept 3-11-20

JURY NOTES.

REVERSAL IS NOT REQUIRED WHEN A JURY NOTE WHICH WAS NOT ADDRESSED BY THE COURT HAD NO DIRECT RELEVANCE TO THE CHARGED OFFENSE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined, after a reconstruction hearing, the trial judge was not made aware of a jury note which requested a trial exhibit and a chronology of events relating to the defendant's dating the victim's relative. The judge's clerk provided the trial exhibit to the jury. No such chronology existed and the judge was not informed of the request for it. Because the chronology did not have anything to do with the charged offense, the failure to address that aspect of the jury note was not a mode of proceedings error:

… [T]he chronology requested by the jury involved background factual information regarding a former relationship between defendant and a relative of the victim that had no relevance to any of the elements of the charged crime or to the jury's process of reaching a verdict … . … [I]n Silva, the Court of Appeals found that a trial court's O'Rama [78 NY2d 270] error did not require reversal of the defendant's drug-related convictions because the jury inquiry did not pertain to those convictions, but only to a conviction for weapon possession (People v Silva, 24 NY3d at 301 n 2). Likewise, in People v Walston (23 NY3d 986, 990 [2014]), the defendant's manslaughter conviction was reversed because of a trial court's mode of proceedings error, but the Court of Appeals held that reversal of a separate conviction on another charge was not required because the note did not address that offense.

Thus, reversal of a conviction is not required when a trial court fails to address a jury inquiry that has no direct relevance to that conviction … . People v Johnson, 2020 NY Slip Op 01668, Third Dept 3-12-20

LEGALLY SUFFICIENT EVIDENCE, JURY INSTRUCTIONS, APPEALS.

ALTHOUGH THE ASSAULT JURY INSTRUCTION DID NOT TRACK THE INDICTMENT, THE PEOPLE DID NOT OBJECT TO IT AND THE APPELLATE COURT MUST ASSESS THE SUFFICIENCY OF THE EVIDENCE ACCORDING TO THE INSTRUCTION; ASSESSED IN THE LIGHT OF THE JURY INSTRUCTION, THE ASSAULT COUNTS WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE; THE CRIMINAL USE OF A FIREARM JURY INSTRUCTION DID NOT TRACK THE INDICTMENT, VIOLATING DEFENDANT'S RIGHT TO BE TRIED ONLY ON THE CRIMES CHARGED (FOURTH DEPT).

The Fourth Department, over a dissent, reversed the assault convictions, while affirming the murder conviction. The codefendant, intending to kill the decedent, also shot the two assault victims. Defendant was charged with murder and assault as an accomplice. Although the indictment charged assault under a transferred intent theory, the jury was instructed to find the defendant guilty of assault only if he intended injure the assault victims. Because, on appeal, the sufficiency of the evidence must be measured by the what the jury was instructed to consider, and because there was no evidence the defendant intended to injure the assault victims (as opposed to the decedent), the assault convictions were not supported by legally sufficient evidence. Although the defendant did not preserve the error by objecting to another inaccurate jury instruction which did not track the indictment, the criminal use of a firearm count was also dismissed because defendant's right to the tried only on the crimes charged was violated:

"The doctrine of transferred intent' serves to ensure that a person will be prosecuted for the crime he or she intended to commit even when, because of bad aim or some other lucky mistake,' the intended target was not the actual victim" … . Although that theory may be applied to assault charges … , County Court's jury instruction in this case mandated that the jury could convict defendant of the counts of assault in the first degree only if they found that he acted "with the intent to cause serious physical injury to" each assault victim, rather than instructing the jury that they could convict defendant of those crimes if they concluded that he intended to cause such injury to the deceased victim but the codefendant actually caused injury to the assault victims. The prosecution did not object to that charge, and it is well settled that, when reviewing a "jury's guilty verdict, our review is limited to whether there was legally sufficient evidence . . . based on the court's charge as given without exception" … .

Inasmuch as there is insufficient evidence that defendant knew that either of the assault victims was present or that he intended any harm to either of them … , we conclude that the evidence is not legally sufficient with respect to the assault counts as charged to the jury. * * *

Although the court's jury instructions did not specify assault in the first degree as the underlying crime for the criminal use of a firearm in the first degree count, and defendant did not object to the court's instructions and thus did not preserve this issue for our review, we conclude that "preservation is not required" … , inasmuch as "defendant has a fundamental and nonwaivable right to be tried only on the crimes charged" in the indictment … . Therefore, based on the indictment, defendant could only be convicted of that charge if he committed assault in the first degree … . Thus, we conclude that, because "the conviction[s] of assault in the first degree cannot stand, the conviction of criminal use of a firearm in the first degree, which requires commission of [the] class B violent felony offense[of assault in the first degree] while possessing a deadly weapon, also cannot stand" … . People v Spencer, 2020 NY Slip Op 01823, Fourth Dept 3-13-20

PLEA AGREEMENTS.

DEFENDANT WAS ENTITLED TO SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT; COUNTY COURT SHOULD NOT HAVE ORDERED RESTITUTION WHICH WAS NOT ADDRESSED IN THE AGREEMENT (FOURTH DEPT).

The Fourth Department, amending defendant's sentence, determined restitution should not have been ordered because it was not addressed in the plea agreement:

Restitution was not part of the plea bargain, and thus the amended sentence exceeded the sentence promised in the plea bargain … . Defendant objected to County Court imposing restitution … , but the court rejected defendant's request for specific performance of the plea agreement and instead offered defendant the opportunity to withdraw his plea, which defendant declined. As defendant contends and the People correctly concede, defendant was entitled to specific performance of the plea agreement because he "placed himself in a no-return' position by carrying out his obligations under" the agreement here, and there was "no significant additional information bearing upon the appropriateness of the plea bargain" … . People v Rosa, 2020 NY Slip Op 01793, Fourth Dept 3-13-20

SENTENCING, ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING; DEFENSE COUNSEL WAS NOT FAMILIAR WITH THE CASE OR THE DEFENDANT'S BACKGROUND (SECOND DEPT).

The Second Department, reversing the conviction, determined defendant did not receive effective assistance of counsel at sentencing. Counsel was not familiar with the case of the defendant's background:

… [T]he defendant was deprived of the effective assistance of counsel at sentencing. A defendant is " entitled to an opportunity to be represented by counsel sufficiently familiar with the case and the defendant's background to make an effective presentation on the question of sentence'" … . Here, the defendant's counsel at sentencing made no substantive arguments on the defendant's behalf, and the record demonstrates that counsel had no meaningful knowledge of the case or of the defendant's background. People v Jones, 2020 NY Slip Op 01640, Second Dept 3-11-20

SENTENCING.

DEFENDANT WAS THREATENED WITH A HARSHER SENTENCE SHOULD SHE DECIDE TO GO TO TRIAL; PLEA VACATED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction by guilty plea, determined defendant was improperly threatened with a heavier sentence should she decide to go to trial:

At an appearance prior to the plea proceeding, the court stated that, if defendant decided to reject the plea offer and was convicted after trial, it intended to impose the maximum sentence on the top count and consecutive time on an unnamed additional count. At that same appearance, the court said that defendant and her codefendants, who were her sister and brother-in-law, would also be federally prosecuted and that "the evidence is overwhelming here." It is well settled that "[a] defendant may not be induced to plead guilty by the threat of a heavier sentence if he [or she] decides to proceed to trial" … . Here, we agree with defendant that "the court's statements do not amount to a description of the range of the potential sentences but, rather, they constitute

impermissible coercion, rendering the plea involuntary and requiring its vacatur' " … . People v Shields, 2020 NY Slip Op 01767, Fourth Dept 3-13-20

SENTENCING, POST-RELEASE SUPERVISION.

FAILURE TO INFORM DEFENDANT OF THE PERIOD OF POST RELEASE SUPERVISION REQUIRED VACATION OF THE SENTENCE; PRESERVATION OF THE ERROR NOT NECESSARY (FIRST DEPT).

The First Department, vacating defendant's guilty plea, determined defendant should have been informed his sentence would include a period of post release supervision (PRS). Because defendant was not put on notice, there was not need to preserve the issue for appeal:

At the plea proceeding, the court advised defendant that under the plea agreement, he would plead guilty to third-degree possession, a class B felony, and fifth-degree possession, a class D felony, with the understanding that if he complied with the terms of the plea agreement, he would be allowed to withdraw his plea to the B felony, and be sentenced, solely on the D felony, to 3½ years in prison, followed by two years of postrelease supervision. The court stated that if defendant violated the terms of the plea agreement, he could be sentenced to up to 15 years in prison on the B felony, but it neglected to state that any enhanced sentence would include a period of PRS. Defendant violated the plea agreement by, among other things, failing to appear for sentencing, and the court imposed an enhanced sentence that included two years of post release supervision concurrent on the B and D felonies.

The court was required to advise defendant that his potential sentence in the event he violated the plea conditions would include PRS, and it was also required to specify the length of the term of PRS … . The prosecutor's brief reference to PRS immediately before sentencing was not the type of notice under People v Murray (15 NY3d 725 [2010]) that would require defendant to preserve the issue … . People v Jamison, 2020 NY Slip Op 01955, First Dept 3-19-20

SENTENCING, SECOND FELONY OFFENDERS.

PENNSYLVANIA CRIME IS NOT THE EQUIVALENT OF A NEW YORK FELONY; DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER (FOURTH DEPT).

The Fourth Department, vacating the sentence, determined the Pennsylvania crime of receiving stolen property (a firearm) was not the equivalent of a New York felony. Therefore defendant should not have been sentenced as a second felony offender:

We agree with defendant and the People correctly concede that defendant was improperly sentenced as a second felony offender inasmuch as the predicate conviction, i.e., the Pennsylvania crime of receiving stolen property (a firearm) (18 Pa Cons Stat §§ 3903 [a] [3]; 3925) is not the equivalent of the New York felony of criminal possession of stolen property in the fourth degree … . Upon our review of Pennsylvania statutory and case law, the operability of a firearm is not an element of the Pennsylvania offense, whereas it is a required element of the New York offense … . People v Huntress, 2020 NY Slip Op 01778, Fourth Dept 3-13-20

SENTENCING, YOUTHFUL OFFENDER.

ALTHOUGH COUNTY COURT DID NOT ABUSE ITS DISCRETION, THE APPELLATE COURT EXERCISED ITS INTEREST OF JUSTICE JURISDICTION TO ADJUDICATE DEFENDANT A YOUTHFUL OFFENDER (FOURTH DEPT).

The Fourth Department, exercising its own interest of justice authority, determined defendant should be adjudicated a youthful offender, noting that County Court did not abuse its discretion:

… [D]efendant was 17 years old at the time of the crimes and had no prior criminal record, history of violence, or history of sex offending. Moreover, defendant has substantial cognitive limitations, learning disabilities, and other mental health issues, and he has accepted responsibility for his actions and expressed genuine remorse. Both the Probation Department and the reviewing psychologist recommended youthful offender treatment, and the record suggests that defendant might have the capacity for a productive and law-abiding future. The only factor weighing against affording defendant youthful offender treatment is the seriousness of the crimes.

On balance, although County Court did not abuse its discretion in denying defendant youthful offender status, we will exercise our discretion in the interest of justice to reverse the judgment, vacate the conviction, and adjudicate defendant a youthful offender … . People v Nicholas G., 2020 NY Slip Op 01828, Fourth Dept 3-13-20

SEVERANCE.

DEFENDANT DEMONSTRATED THE NEED TO TESTIFY ABOUT ONE OF THE ROBBERIES AND THE NEED TO REFRAIN FROM TESTIFYING ABOUT THE OTHER ROBBERY; THE MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the conviction and ordering a new trial, determined defendant's motion the sever the trials of two distinct robberies should have been granted. Defendant demonstrated the need to testify about his defense of duress re: one of the robberies, and his need to refrain from testifying re: the other robbery due to the Sandoval ruling:

The affirmative defense of duress requires the defendant to establish coercion by the use or threatened imminent use of unlawful physical force (Penal Law § 40.00[1]). Since the defendant's written statement did not explain why the defendant did not abandon the Lopez robbery once he was given a gun, the written statement was insufficient to establish that there was a threat of imminent use of physical force … . Indeed, the People argued to the jury that the defendant's duress defense should be rejected since, once the defendant was given the gun, he could have left the scene without committing the robbery. Thus, the record convincingly established that the defendant had important testimony to give about his duress defense in order to, inter alia, rebut the People's argument that the defendant was not under duress … . …

… [T]he defendant convincingly showed that he had a genuine need to refrain from testifying in regards to the Pratt robbery. In the event that the defendant testified, the Supreme Court's Sandoval ruling permitted the People to introduce evidence of the underlying facts of two prior youthful offender adjudications involving robberies that were similar to the Pratt robbery … . Thus, if the defendant elected to testify, he would expose himself to the "risk of serious impeachment" with the underlying facts of two robberies bearing similarities to the Pratt robbery … . However, if he refrained from testifying, he was prejudiced in his ability to present his duress defense to the Lopez robbery counts. People v Moore, 2020 NY Slip Op 01645, Second Dept 3-11-20

SEX OFFENDER REGISTRATION ACT (SORA), JUDGES, SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, ASSESSED POINTS ON A THEORY NOT RAISED BY THE BOARD OF EXAMINERS OF SEX OFFENDERS OR THE PEOPLE; DEFENDANT WAS THEREBY DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the judge should not have, sua sponte, assessed points on a theory not raised by the Board of Examiners of Sex Offenders or the People:

… [D]efendant contends, and the People correctly concede, that County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners of Sex Offenders or the People … . The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment … . Here, no allegations were made either in the risk assessment instrument (RAI) or by the People at the SORA hearing that defendant should be assessed 30 points under risk factor 3, and defendant learned of the assessment of the additional points under that risk factor for the first time when the court issued its decision … . …

The court stated that, if defendant were a presumptive level one risk, an upward departure to level two would be warranted based on certain aggravating factors stemming from the nature of the crimes. Because those factors were not presented as bases for departure in the RAI or by the People at the hearing, defendant was not afforded notice and a meaningful opportunity to respond to them … . People v Wilke, 2020 NY Slip Op 02002, Fourth Dept 3-20-20

SEX OFFENDER REGISTRATION ACT (SORA).

AN ENTRY IN THE CASE SUMMARY ALONE IS NOT A SUFFICIENT BASIS FOR AN ASSESSMENT OF POINTS (FOURTH DEPT).

The Fourth Department, reducing defendant's risk level, determined that an entry in the case summary alone is not sufficient to justify an assessment of points:

We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that he had committed a continuing course of sexual misconduct, i.e., risk factor 4 on the risk assessment instrument (RAI) … . The sole evidence presented by the People in support of that risk factor was the case summary prepared by the Board of Examiners of Sex Offenders. At the SORA hearing, however, defendant specifically denied the allegation within the case summary that he engaged in a continuing course of sexual misconduct, and instead testified that he engaged in one instance only. Indeed, it is undisputed that defendant was charged with and pleaded guilty to one count of rape in the third degree … stemming from a specific instance of intercourse that occurred on one specified day. We conclude that "the case summary alone is not sufficient to satisfy the People's burden of proving the risk level assessment by clear and convincing evidence where, as here, defendant contested the factual allegations related to [the] risk factor" … . People v Maund, 2020 NY Slip Op 02011, Fourth Dept 3-20-20

SEX OFFENDER REGISTRATION ACT (SORA).

NEW JERSEY CONVICTION FOR LEWDNESS, ALTHOUGH NOT A REGISTRABLE OFFENSE IN NEW JERSEY, IS THE EQUIVALENT OF ENDANGERING THE WELFARE OF A CHILD; IT IS APPROPRIATE TO CONSIDER THE CONDUCT UNDERLYING THE FOREIGN OFFENSE IN ADDITION TO THE ELEMENTS OF THE OFFENSE; 30 POINT ASSESSMENT BASED ON THE NEW JERSEY CONVICTION WAS CORRECT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurrence and a two-judge dissent, determined defendant was properly assessed 30 points based upon his prior New Jersey conviction for lewdness. The New Jersey offense, based upon defendant's repeatedly exposing himself to the 12-year-old victim, was deemed the equivalent of New York's endangering the welfare of a child:

At the SORA court hearing, defendant challenged the assessment of 30 points under risk factor 9, asserting that his New Jersey lewdness conviction was neither a registrable offense in New Jersey nor did the comparable offense under New York law—public lewdness (a misdemeanor)—subject defendant to SORA registration in New York … . * * *

At the outset, we must resolve whether reliance on the underlying conduct of a prior foreign conviction is appropriate as a matter of law for purposes of assessing points under risk factor 9 when conducting a SORA risk-level determination. Under these circumstances, we hold that it is. * * *

Our analysis of the New Jersey conviction starts with North v Board of Examiners of Sex Offenders of State of New York, wherein we considered whether the defendant was required to register as a sex offender as a result of his federal conviction for possession of child pornography (8 NY3d 745 [2007]). That question turned on the "essential elements" provision in SORA, which defines "sex offense," in relevant part, as "a conviction of an offense in any other jurisdiction which includes all of the essential elements of any [registrable sex offense in New York listed in section 168-a (2) of the Correction Law]" … . We concluded that, with respect to registrable offenses, the "essential elements" provision "requires registration whenever an individual is convicted of criminal conduct in a foreign jurisdiction that, if committed in New York, would have amounted to a registrable New York offense" … . …

In the SORA registration context … we [have held] that the strict equivalency standard was "not the optimal vehicle to effectuate SORA's remedial purposes" and it was thus appropriate to utilize a more flexible approach that allowed consideration of the underlying conduct of a foreign conviction in addition to comparing the essential elements of the foreign and New York offense … . People v Perez, 2020 NY Slip Op 02096, CtApp 3-26-20

STREET STOPS.

DEFENDANT WAS ALONE IN HIS CAR ARGUING WITH SOMEONE ON HIS PHONE WHEN THE POLICE APPROACHED; THE POLICE DID NOT HAVE AN OBJECTIVE, CREDIBLE REASON FOR THE APPROACH; THE HANDGUN FOUND IN AN INVENTORY SEARCH SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, reversing County Court and dismissing the indictment, determined the police officers did not have an objective credible reason for approaching defendant, who was in his car outside a nightclub just after the club closed. The defendant was arrested after a check on his license revealed it had been suspended. The handgun found in an inventory search of the car should have been suppressed:

… [D]efendant's engagement in an argument on his cell phone while alone in his private vehicle — did not provide any apparent nexus to the drug and weapons crimes that police said were typically committed in the area, or give rise to any other objective reason to question his presence. Nothing about a driver's conduct in arguing on a cell phone, without more, suggests criminal activity related to weapons or drugs … . A sole occupant

of a private vehicle arguing with someone who is not present gives rise to no apparent reason for police to intervene, such as potential safety concerns … .

Thus, we find that police did not have the requisite objective, credible reason for approaching defendant's vehicle in the first instance. The encounter was further invalid because police had no objective, credible reason to extend the initial conversation by running defendant's driver's license after he responded to their initial inquiry and provided the information they requested … . The officer gave no explanation for his decision to intrude further at that point, nor does the record reveal such an explanation. Nothing about the exchange with defendant gave rise to any reason to suspect that he was not telling the truth … . Defendant's driver's license did not appear to belong to someone else … or reveal anything unusual on its face … . Lacking an objective, credible reason that justified police in approaching defendant's vehicle and making inquiries, the encounter was invalid at its inception … . People v Stover, 020 NY Slip Op 01676, Third Dept 3-12-20

STREET STOPS.

THE POLICE OFFICER DID NOT HAVE A FOUNDED SUSPICION OF CRIMINAL ACTIVITY WHEN HE ASKED THE DEFENDANT POINTED QUESTIONS IN THIS STREET STOP SCENARIO; THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the police officer did not have a founded suspicion of criminal activity at the time defendant was asked about the contents of a bag he was carrying. The defendant answered "weed," was frisked, and a firearm was seized. The evidence should have been suppressed:

The evidence at the suppression hearing establishes that the arresting officer was on routine patrol in what he described as a high-crime area known to be an "open air drug market," where there had also been numerous burglaries and robberies. That officer had been a member of the police force for only a few months, and he was under the supervision of a training officer. The arresting officer testified that he observed defendant walking on a sidewalk shortly after midnight on a chilly night, with temperatures near 40 degrees, and that defendant was wearing a mask that covered the lower part of his face. The officer had not received any reports of recent crimes in the area, was not responding to any call, and did not observe defendant engage in any illegal activity. The officer pulled his patrol vehicle in front of defendant's path of travel, exited the patrol vehicle along with the training officer, approached defendant, and asked defendant why he was wearing a mask. Defendant replied that

he was walking his dog, and the unchallenged evidence at the hearing establishes that he was indeed walking a dog. * * *

Based on the evidence at the suppression hearing, the People failed to meet their burden of establishing that the training officer had the requisite founded suspicion … . Thus, we conclude that the training officer's inquiry and the subsequent frisk of defendant by the arresting officer was not a proper escalation of the level one encounter. …

We further conclude that the frisk of defendant and seizure of the gun was not justified "as having been in the interests of the officer['s] safety, since there was no testimony that the [arresting] officer[ ] believed defendant to be carrying a weapon . . . , and the People presented no other evidence establishing that the [arresting] officer had reason to fear for his safety" … . People v Wallace, 2020 NY Slip Op 01796, Fourth Dept 3-13-20

SUPERIOR COURT INFORMATIONS.

FAILURE TO INCLUDE THE APPROXIMATE TIME OF THE COMMISSION OF THE OFFENSE IN THE SUPERIOR COURT INFORMATION (SCI) IS NOT A JURISDICTIONAL DEFECT (THIRD DEPT).

The Third Department determined that the Superior Court Information (SCI) was not jurisdictionally defective and therefore any attack on the validity of the SCI was precluded by the waiver of appeal:

Pursuant to our recent decisions in People v Elric YY. (179 AD3d 1304 [2020]) and People v Shindler (179 AD3d 1306 [2020]), defendant's further contention that her 2015 waiver of indictment was jurisdictionally defective because the SCI did not set forth the approximate time of the commission of the charged crimes as required by CPL 195.20 is also without merit … . The omission of the approximate time of the charged crimes in the SCI, to which defendant did not object, is a nonjurisdictional defect to which any objection was forfeited by her guilty plea. Notably, no claim has been made that defendant lacked notice of the specific crimes for which she agreed to waive prosecution by indictment. People v Edwards, 2020 NY Slip Op 01671, Third Dept 3-12-20

VICTIM.

THE USE OF THE TERM "VICTIM" TO REFER TO THE COMPLAINING WITNESS AT TRIAL WHERE THE WITNESS'S CREDIBILITY IS IN ISSUE SHOULD BE AVOIDED (THIRD DEPT).

The Third Department noted that referring to the complaining witness using the term "victim" should be avoided at trial where the witness's credibility is in issue, but found no error in the way the trial judge handled the matter in this sexual-offense case:

In [a] motion in limine, defense counsel sought to preclude references to the "victim," arguing that they would dilute the presumption of innocence and deprive defendant of a fair trial. Several New York courts have examined this issue in the specific context of jury instructions and have held that it is improper for a trial court to refer to a complainant as the "victim" in a jury charge, but that reversal is not required unless, taken as a whole, the charge does not otherwise convey the proper standards to the jury … . It does not appear that any New York court has analyzed the issue outside the context of jury instructions, but several courts in other jurisdictions have held that the use of the term "victim" by the prosecution or its witnesses should be avoided where, as here, the credibility of the complaining witness is in issue, and that facts such as the context and frequency of the references and the strength of other evidence should be taken into account in determining whether use of the term is reversible error … . Here, although Supreme Court denied defendant's application, it also agreed that his concern was "well-grounded" and warned counsel to use caution, stating that "[i]t might call the attorneys over" if a witness repeatedly used terms like "victim" or "assailant," and that police witnesses should not use such terms in such a way as to have an emotional impact on the jury. While we agree with defendant that references to the complaining witness as the "victim" at trial should be avoided when his or her credibility is in issue, we find no error in the court's treatment of the issue under the circumstances presented here. People v Horton, 2020 NY Slip Op 01530, Third Dept 3-5-20

WEAPONS.

A REVOLVER WHICH COULD NOT BE CONNECTED TO THE SHOOTING SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; ERROR HARMLESS HOWEVER (THIRD DEPT).

The Third Department determined the admission into evidence of a revolver which could not be connected to the shooting at issue was (harmless) error:

Defendant next argues that County Court erred in admitting into evidence an operable .38-caliber revolver, containing five spent rounds, that was recovered from a nearby rooftop a few days after the shooting. Testing could not conclusively show that the revolver was used in the shooting or that it had been handled by defendant, but it remained relevant given the circumstances of its recovery and the fact that it could not be ruled out as the one used by the shooter … . The revolver was accordingly admissible unless its probative value was "substantially outweighed by the danger that it [would] unfairly prejudice the other side or mislead the jury," and County Court attempted to reduce that danger by telling the jury why the revolver was being admitted into evidence and urging it to give the revolver whatever weight it deemed appropriate … . County Court's ameliorative efforts arguably fell short but, in our view, any resulting error was harmless "in light of the overwhelming testimony identifying defendant as [the] assailant" … . People v Banks, 2020 NY Slip Op 01525, Third Dept 3-5-20

WEIGHT OF THE EVIDENCE, APPEALS.

CRIMINALLY NEGLIGENT HOMICIDE CONVICTION ARISING FROM A TRAFFIC ACCIDENT WAS AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, reversing defendant's conviction, over a two-justice dissent, determined the conviction for criminally negligence homicide was against the weight of the evidence. The passenger in defendant's car was killed when defendant's car went off the road, apparently after colliding with other cars defendant was attempting to pass. The decision described all of the witness's testimony in detail and concluded the conflicting testimony was not a sufficient basis for a conviction:

"A person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of another person" (Penal Law § 125.10). A person acts with criminal negligence when "he [or she] fails to

perceive a substantial and unjustifiable risk that such result will occur or that such [a] circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation" (Penal Law § 15.05[4]).

The defendant's conduct must rise to a level of carelessness where its "seriousness would be apparent to anyone who shares the community's . . . sense of right and wrong" … . Moreover, the conduct must create the risk, rather than simply not perceive the risk … .

In cases concerning charges of criminally negligent homicide arising out of automobile accidents involving excess rates of speed, "it takes some additional affirmative act by the defendant to transform speeding into dangerous speeding" … .

Here, the People failed to establish, beyond a reasonable doubt, that the defendant "fail[ed] to perceive a substantial and unjustifiable risk" (Penal Law § 15.05[4]) which caused the death of his passenger. People v Derival, 2020 NY Slip Op 02072, Second Dept 3-25-20

WEIGHT OF THE EVIDENCE, APPEALS.

RECKLESS ENDANGERMENT CONVICTION NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; BECAUSE THE LEGAL SUFFICIENCY OF THE CONVICTION WAS NOT CHALLENGED IT MUST BE REVERSED NOT REDUCED BY THE APPELLATE COURT; GRAND LARCENY AND POSSESSION OF STOLEN PROPERTY CONVICTIONS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; INADEQUATE PROOF OF VALUE (FOURTH DEPT).

The Fourth Department reversed the reckless endangerment, grand larceny, possession of stolen property, and arson third degree convictions, and affirmed the murder, assault and arson second degree convictions. With respect to reckless endangerment first degree, the conviction was against the weight of the evidence and the appellate court could not reduce the conviction to a lesser included because defendant did not argue the evidence was legally insufficient. So the reckless endangerment conviction was reversed. The grand larceny/possession of stolen property convictions were not supported by adequate proof that the value of the stolen vehicle was more than $100. Arson third degree was dismissed as an inclusory concurrent count of arson in the second degree:

We agree with defendant … that the verdict finding him guilty of reckless endangerment in the first degree is against the weight of the evidence. "A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person" … . Count five of the indictment alleged that defendant recklessly engaged in conduct creating a grave risk of death to emergency responders when he intentionally started the fire. We agree with defendant that the verdict on that count is against the weight of the evidence because the People did not prove beyond a reasonable doubt that defendant acted with depraved indifference to human life when he set the fire … . Inasmuch as defendant is challenging only the weight of the evidence with respect to that count and does not challenge the legal sufficiency of the evidence with respect to that count, we cannot reduce the conviction to the lesser included offense of reckless endangerment in the second degree … . * * *

We further agree with defendant that the verdict finding him guilty of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree is against the weight of the evidence. With respect to each of those counts, the People were required to establish that the value of the stolen motor vehicle exceeded $100 … . It is well settled that a witness "must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value" … . "Conclusory statements and rough estimates of value are not sufficient" … . Although the monetary element of each crime is quite low, the People did not attempt to meet that threshold through the testimony of any witness. The testimony of a detective that the vehicle was "[d]efinitely worth over probably 10,000" did not satisfy the monetary element of either crime inasmuch as he provided no basis of knowledge for his statement of value. We therefore further modify the judgment by reversing those parts convicting defendant of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree and dismissing counts eight and nine of the indictment. People v Box, 2020 NY Slip Op 01813, Fourth Dept 3-13-20

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