SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 23, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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CA 10-01783

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

LINDA S. MILLER, AS ADMINISTRATRIX OF THE ESTATE
OF ERIC ROBERT SCOTT, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FREDERIKUS VANROON, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, ROCHESTER (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

LADUCA LAW FIRM, LLP, ROCHESTER (ANTHONY J. LADUCA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 2, 2010 in a personal injury action. The order granted plaintiff's motion for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on June 6, 2011, and filed in the Monroe County Clerk's Office on July 18, 2011,

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

896

CA 11-00397

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF ASSET PROTECTION & SECURITY SERVICES, LP, PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200 UNITED, RESPONDENT-PETITIONER-APPELLANT.

DREW BLANTON, ROCHESTER, FOR RESPONDENT-PETITIONER-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (STEVEN E. CARR OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered May 6, 2010 in a proceeding pursuant to CPLR article 75. The order granted the petition seeking to vacate an arbitration award and denied the cross petition seeking to confirm the arbitration award.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the petition in part and granting the cross petition in part and confirming the arbitration award insofar as the arbitrator found that there was no just cause to terminate petitioner-respondent's employee and as modified the order is affirmed without costs.

Memorandum: Respondent-petitioner (hereafter, Union) appeals from an order granting the petition seeking to vacate an arbitration award pursuant to CPLR 7511 (b) (1) (iii) and denying the Union's cross petition seeking to confirm the award pursuant to CPLR 7510. The arbitrator determined that petitioner-respondent, Asset Protection & Security Services, LP (APSS), did not discharge its employee, the grievant herein, upon just cause as required by the collective bargaining agreement (CBA) between the Union and APSS and reinstated the employee with back pay and benefits. We conclude that Supreme Court erred in vacating that part of the award determining that APSS lacked just cause for discharging the employee, and we therefore modify the order accordingly. We agree with the court, however, that the arbitrator exceeded his authority by reinstating the employee and awarding her back pay and benefits, and thus we affirm the order insofar as the court granted those parts of the petition seeking to vacate the award to that extent.

APSS contracted with the Bureau of Immigration and Customs

Enforcement (ICE) to provide custody officers at a federal detention center in Batavia. APSS and the Union entered into a CBA that provided, inter alia, that APSS had the right to discharge an employee "for **just cause reasons** or at the request of ICE." ICE provided APSS with a video tape depicting the employee conversing with a detainee after lockdown, and APSS thereafter terminated the employee. The termination notice provided to the employee stated that she was being discharged based on undue fraternizing with a detainee; allowing a detainee to be out of place after lockdown; and introducing contraband into the facility. We note that fraternizing with a detainee and introducing contraband into the facility are grounds for immediate discharge pursuant to article 9, section (3) (B) (6) of the CBA. APSS and the Union stipulated that the arbitrator was to determine whether APSS had "just cause to terminate the employment of [the grievant] in accordance with Article 9 of the parties' collective bargaining agreement" and that, "[i]f not, what shall the remedy be?" In rejecting the contention of APSS that it had just cause to terminate the employee because ICE had barred her from the facility, the arbitrator determined that APSS was conflating two distinct rights contemplated by the CBA: termination for just cause and termination at the request of ICE, which does not require just cause. In determining that the employee was not terminated for just cause, the arbitrator credited the employee's testimony that she was permitted to allow the detainee out of his "area" after lockdown for purposes of cleaning within the unit and that, during that time, she was provided with "intel," i.e., information regarding the activities of other detainees. The arbitrator further determined that the employee was not aware that hand sanitizer that she dispensed in the detainee's hand was considered to be a form of contraband and noted that such hand sanitizer in fact was present in dispensers in the facility. The arbitrator was unable to determine whether the employee's security clearance had been revoked following the termination of her employment.

It is axiomatic that "courts are obligated to give deference to the decision of the arbitrator" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336; *see Matter of Henneberry v ING Capital Advisors, LLC*, 10 NY3d 278, 284, *rearg denied* 10 NY3d 892). Here, however, the court improperly substituted its own findings for those of the arbitrator by determining that the employee was terminated at the request of ICE; that her security clearance was revoked; and that, because her security clearance had been revoked, she was not entitled to participate in the arbitration proceedings pursuant to the terms of the CBA. The court therefore erred in vacating that portion of the award determining that the employee was not discharged for just cause.

We agree with APSS that the arbitrator exceeded his authority by directing that the employee be reinstated and awarding her back pay and benefits, and we thus conclude that the court properly vacated those provisions of the award. Despite the fact that the arbitrator correctly recognized that, pursuant to its contract with ICE, APSS lacked the authority to reinstate the employee to her position, the arbitrator nevertheless "restore[d] her employment record and

compensate[d] her for lost wages and benefits." "An award may be vacated on the ground that an arbitrator exceeded his or her power 'only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of Communication Workers of Am., Local 1170 v Town of Greece*, 85 AD3d 1668, 1669, quoting *New York City Tr. Auth.*, 6 NY3d at 336; *see Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City School Dist. of City of Buffalo*, 50 AD3d 1503, 1505, *lv denied* 11 NY3d 708). Here, although the arbitrator found that the employee was not terminated for just cause, he was nevertheless without authority under the terms of the CBA to direct APSS to reinstate her or to compensate her with back pay and benefits. The CBA expressly provides that an employee who is on unpaid administrative leave or is suspended during an investigation mandated by ICE for an employee action is not eligible for back pay and benefits even in the event that the employee's security clearance is reinstated and the individual returns to work. If, however, an employee is on unpaid administrative leave or is suspended for a reason "not related to an ICE order to place the employee on administrative leave or suspension," the employee is entitled to back pay and benefits. Notably, the CBA further provides that "[t]he Arbitrator shall have no power to add to, subtract from, or modify the provisions of this agreement in arriving at a decision of the issue presented and shall confine his or her decision solely to the application and interpretation of this Agreement."

Here, the employee was terminated based upon the actions observed on the video tape provided to APSS by ICE, and we thus conclude that, pursuant to the express terms of the CBA, the employee is not entitled to back pay and benefits and would not be so entitled even if APSS had the authority to reinstate her to her position. We therefore conclude that the arbitrator exceeded his authority by "add[ing] to" the CBA and awarding the employee a remedy that is not permitted.

All concur except CARNI and MARTOCHE, JJ., who dissent in part and vote to reverse in accordance with the following Memorandum: We agree with our colleagues that Supreme Court erred in vacating that part of the award determining that petitioner-respondent, Asset Protection & Security Services, LP (APSS), lacked just cause for discharging the employee in question. However, we respectfully disagree with the conclusion of our colleagues that the arbitrator exceeded his authority under the collective bargaining agreement (CBA) in directing the reinstatement of the employee discharged without just cause and in awarding her back pay and benefits. Therefore, we dissent in part and would vote to reverse the order, thus denying the petition in its entirety and granting the cross petition in its entirety.

The majority's conclusion that the arbitrator exceeded his authority with respect to the remedy has, as its foundation, the proposition that the employee's discharge was the result of a request by the Bureau of Immigration and Customs Enforcement (ICE) or an investigation mandated by ICE that resulted in revocation of the employee's security clearance. The majority avoids expressly acknowledging that basis for its conclusion by characterizing the

employee's termination as being based upon "the actions observed on the video tape provided to APSS by ICE." However, the majority simultaneously concludes that the court erred when it "improperly substituted its own findings for those of the arbitrator by determining that the employee was terminated at the request of ICE." We respectfully submit that those conclusions are logically inconsistent. In any event, the record does not contain any evidence that the employee was terminated as the result of any action by ICE provided for within the terms and conditions of the CBA.

The majority concludes that "[t]he arbitrator was unable to determine whether the employee's security clearance had been revoked following the termination of her employment." Rather than place the focus on what the arbitrator did not determine, we submit that the proper approach is to focus on what the arbitrator correctly determined, i.e., that APSS failed to establish at the arbitration hearing that the employee's security clearance had been revoked. Specifically, on the first day of the arbitration hearing, APSS admitted that the employee's security clearance had not been revoked. On the second day of the hearing, more than seven months later, APSS attempted to introduce a copy of an e-mail string dated September 15, 2009, purporting to establish the revocation of the employee's security clearance. APSS terminated the employee on February 13, 2009 — seven months before the creation of the e-mails. The arbitrator correctly concluded that the e-mails were inadmissible hearsay and they were not received in evidence. Indeed, they are not contained in the record before us. Further, the employee testified on the second day of the hearing that she had not been notified of any revocation of her security clearance and that, as far as she knew, it was still in effect. Thus, the record contains no evidence that ICE requested the employee's termination, mandated an investigation or issued any form of order with respect to the employee's security clearance.

The majority further recognizes that the issue framed by the parties at the arbitration did not include whether the employee was terminated "at the request of ICE." In addition, evidence that there was no revocation of the employee's security clearance or request by ICE to terminate the employee is reflected in the procedural course followed by the parties pursuant to the CBA. Article 9, section (1) (B) of the CBA provides that "any employee whose [security] clearance is revoked by ICE may not grieve disciplinary action beyond Step 3 of the Grievance Process." Article 8 of the CBA, entitled "Grievance Procedure," contains five steps in the grievance process. Arbitration, which occurred here, is Step 5 of the procedure. The parties here proceeded well beyond Step 3 of the grievance procedure. If in fact the employee's security clearance had been revoked by ICE, the employee would have had no right to proceed to arbitration. APSS could have invoked article 9, section (1) (B) to prevent the grievance procedure from proceeding to arbitration. APSS never raised article 9, section (1) (B) as a ground for staying the arbitration, however, and willingly participated in the arbitration. In our view, such conduct by APSS is a clear concession that the employee was not terminated at the request of ICE. Further, article 9, section (1) (D) provides that, if an employee is placed on "unpaid administrative

leave or [is suspended] *for a reason not related to an ICE order* to place the employee on administrative leave or suspension, that *employee retains his/her rights under all phases of the grievance procedure* and may be entitled to lost pay and benefits should [APSS] so agree or should an arbitrator so decide" (emphasis added). APSS proceeded to arbitration — a process which included "all phases of the grievance procedure." Thus, if our choice in deciding the availability of the remedy awarded by the arbitrator is the choice between article 9, section (1) (C) or (D), the grievance procedural course in which APSS willingly participated unequivocally establishes that the employee was not terminated because her security clearance was revoked or otherwise by or at the request of ICE — and eliminates subdivision (1) (C) as a basis for denying the employee the arbitrator's remedy of back pay, benefits and reinstatement.

Nonetheless, the majority concludes, in reliance upon article 9, section (1) (C), that the employee's termination must have been " 'related to an ICE order to place [her] on administrative leave or suspension' " and that she therefore is not entitled to back pay and benefits. We further note that the employee was not "suspended" or placed on "unpaid administrative leave" and thus article 9, section (1) (C) by its express terms does not provide a basis upon which to conclude that the employee is not entitled to back pay and benefits. That provision simply does not include or apply to the disciplinary action taken here — termination. The employee was terminated, as the majority correctly concludes, without "just cause." Moreover, the record before us does not contain any evidence of what the majority refers to as an "ICE order" or an "investigation mandated by ICE," in accordance with the terms of the CBA. Instead, the majority incorrectly equates the fact that ICE merely provided a video tape to APSS that depicted the employee's actions with proof of the revocation of the employee's security clearance, as an "ICE order" or an "investigation mandated by ICE" as required by the CBA.

The CBA neither precludes nor specifically provides for back pay and benefits as a remedy in the event of the unjust or wrongful termination of an employee, which is the case here. However, article 8, section (6) provides that "[a]ny grievance resolutions that carry a back-pay award will be paid within one (1) pay period following resolution." Further, article 9, section (1) (D) specifically provides for "lost pay and benefits . . . should an arbitrator so decide" when an employee is placed on unpaid administrative leave or suspension unrelated to an ICE order. Thus, the CBA expressly contemplates the award of back pay and benefits following a grievance that leads to an arbitration award of back pay. We cannot accept the proposition that an employee who receives the lesser penalty of a wrongful suspension or unpaid administrative leave can receive back pay and benefits, while an employee subjected to the harsher penalty of a wrongful termination has no such remedies available under the CBA.

Turning to the arbitrator's remedy of reinstatement, "in the arbitration of labor grievances, it is well settled that, unless limited by the plain terms of the submission, the arbitrator is

empowered to grant any relief reasonably fitting and necessary to the final determination of the matter submitted to him [or her]; and this includes the granting of equitable relief for the direction of the reinstatement, hiring, or classification of a particular employee in a particular position" (*Matter of British Overseas Airways Corp. v International Assn. of Machinists & Aerospace Workers, AFL-CIO*, 39 AD2d 900, 901 [dissenting mem], *revd on dissenting mem* 32 NY2d 823 [upholding confirmation of reinstatement remedy based upon dissenting mem]). "[U]nless constrained by the arbitration agreement, an arbitrator might well determine that wrongful discharge of an employee is not fully compensable solely in dollars and cents, and, accordingly, an award which couples payment of lost wages with a prospective order of reinstatement is not to be disturbed on that ground alone" (*North Syracuse Cent. School Dist. v North Syracuse Educ. Assn.*, 45 NY2d 195, 201-202). We respectfully disagree with the majority's conclusion that the arbitrator recognized that "APSS lacked the authority to reinstate the employee to her position." Instead, after summarizing and rejecting APSS's claim that ICE had revoked the employee's security clearance, the arbitrator stated, "Although [APSS] may not be able to return [the employee] to her duties . . . at [her place of employment] under its contract with ICE, the remedy . . . will restore her employment record and compensate her for lost wages and benefits." In our view, that statement reflects the arbitrator's recognition of APSS's argument that the revocation of the employee's security clearance prevented her reinstatement — while simultaneously rejecting it based upon the evidence adduced at the hearing. We further reject APSS's contention that the employee has been barred from her place of employment. APSS failed to submit any admissible evidence at the arbitration hearing to establish that she was barred, and the record is otherwise devoid of any such evidentiary support. There is also nothing in the CBA that limited the arbitrator from awarding reinstatement as a remedy for the employee's termination without just cause. The majority's conclusion that reinstatement is not available under the CBA makes the contractual right of termination only upon just cause a hollow one — a result, in our view, clearly not intended by the parties to the CBA by the inclusion of the "just cause" requirement.

Entered: December 23, 2011 Frances E. Cafarell

Clerk of the Court

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

947

KA 10-01092

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID DILLON, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

JOHN H. CRANDALL, DISTRICT ATTORNEY, HERKIMER, FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered March 25, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal mischief in the third degree (Penal Law § 145.05 [2]), defendant contends that his plea was not knowing, intelligent and voluntary because he did not understand the plea proceedings or the direct consequences of his plea. Although that contention survives defendant's waiver of the right to appeal, defendant failed to preserve his contention for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Watkins*, 77 AD3d 1403, *lv denied* 15 NY3d 956; *People v Baker*, 49 AD3d 1293, *lv denied* 10 NY3d 932). In any event, defendant's contention is without merit inasmuch as the record establishes that the plea was knowingly, intelligently and voluntarily entered (*see generally People v Mullen*, 77 AD3d 686; *People v Sartori*, 8 AD3d 748, 749).

We conclude that the People established by a preponderance of the evidence that the two victims sustained out-of-pocket losses in the amounts of $28,543.50 and $9,460, respectively (*see People v Ford*, 77 AD3d 1176, 1176-1177, *lv denied* 17 NY3d 816; *People v Butler*, 70 AD3d 1509, *lv denied* 14 NY3d 886; *People v Katovich*, 238 AD2d 751). By failing to request a hearing on the issue whether he had the ability to pay the amount of restitution ordered by County Court, defendant failed to preserve for our review his further contention that the court failed to consider his ability to pay the restitution (*see* Penal Law § 65.10 [2] [g]; *see generally Ford*, 77 AD3d at 1177; *People v Passalacqua*, 43 AD3d 964, *lv denied* 9 NY3d 1037). In any event, the record establishes that the presentence report reviewed by the court

contained information with respect to defendant's education history and employment income, and thus we conclude that the court considered defendant's ability to pay the restitution pursuant to Penal Law § 65.10 (2) (g) (*see People v Christman*, 265 AD2d 856, *lv denied* 94 NY2d 878). We note that defendant may apply for resentencing pursuant to CPL 420.10 (5) and, in the event that the court determines that defendant is unable to pay the restitution "despite sufficient good faith efforts to acquire the resources to do so . . .[, it] must consider measures of punishment other than imprisonment" (*People v Amorosi*, 96 NY2d 180, 184; *see generally Tate v Short*, 401 US 395, 399).

All concur except CARNI, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully disagree with the conclusion of my colleagues that defendant failed to preserve for our review his contention that County Court failed to consider his ability to pay the restitution. I also disagree that the record establishes that the court considered defendant's ability to pay the restitution in the total amount of $39,903.68. Therefore, I dissent in part.

Upon his conviction of criminal mischief in the third degree (Penal Law § 145.05 [2]), defendant was sentenced to five years of probation and ordered to pay restitution to two victims in the total amount of $39,903.68, including the 5% surcharge. Defendant's sentence did not include an incarceration component. With respect to the issue of preservation, I note that the majority relies upon *People v Ford* (77 AD3d 1176, *lv denied* 17 NY3d 816), which did not involve a defendant who was sentenced to probation and ordered to pay restitution as a condition of such probationary sentence but, rather, the defendant was sentenced to an aggregate term of imprisonment of 2 to 4 years and ordered to pay restitution. Also, the majority relies upon *People v Passalacqua* (43 AD3d 964, *lv denied* 9 NY3d 1037), which provides no indication of the nature of the sentence imposed in conjunction with restitution. The nature of the sentence imposed is critical to the preservation analysis because Penal Law § 65.10, entitled "Conditions of probation and of conditional discharge," permits the court to impose restitution as a condition of the sentence of probation only "in an amount [defendant] can afford to pay" (§ 65.10 [2] [g]). That restitution provision applies exclusively to a sentence of probation with restitution as a condition thereof (*see id.*). It is well settled that "the 'essential nature' of the right to be sentenced as provided by law, though not formally raised at the trial level, preserves a departure therefrom for [our] review" (*People v Fuller*, 57 NY2d 152, 156, quoting *People v Craig*, 295 NY 116, 120; *see People v Aquino*, 83 AD3d 1532).

Turning to the merits of defendant's contention concerning restitution, the record does not contain any evidence that the court considered defendant's ability to pay the restitution. The court's written restitution decision is silent with respect to that issue. I cannot agree that we should search the record on appeal, as the majority has done, to reach the conclusion that the court considered defendant's ability to pay. Indeed, even if it was appropriate to

search the record here, in doing so it becomes evident that the court could not have considered defendant's ability to pay the restitution. The presentence report establishes that defendant's last employment was as a laborer earning $8.00 per hour in a 25 hour work week. The court's restitution decision filed on March 29, 2010 requires defendant to pay a final payment of $39,903.68 on or before January 9, 2015. There being no rational relationship between that requirement and defendant's ability to pay it, I cannot conclude that the court considered defendant's ability to pay as required by Penal Law § 65.10 (2) (g).

Therefore, I would modify the judgment by vacating the amount of restitution ordered and remit the matter to County Court for a new hearing to determine the amount of restitution in accordance with defendant's ability to pay that amount.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

964

CA 11-00560

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF PATRICIA DEROSA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL DYSTER, MAYOR, CITY OF NIAGARA FALLS,
RESPONDENT,
AND CITY OF NIAGARA FALLS, RESPONDENT-APPELLANT.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (CHRISTOPHER M. MAZUR OF COUNSEL), FOR RESPONDENT-APPELLANT AND RESPONDENT.

W. JAMES SCHWAN, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 18, 2010 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted the petition in part.

It is hereby ORDERED that the judgment so appealed from is modified on the law by granting that part of respondents' motion seeking to dismiss the petition against respondent City of Niagara Falls insofar as petitioner sought to compel that respondent to permit her to opt out of the health insurance plan and to receive opt-out payments and by vacating the second decretal paragraph and as modified the judgment is affirmed without costs.

Memorandum: Petitioner, a retired employee of respondent City of Niagara Falls (City), commenced this CPLR article 78 proceeding seeking to compel respondent Mayor of the City and the City to provide her with either post-employment health insurance coverage or opt-out payments in lieu of such coverage, pursuant to the terms of a Memorandum of Understanding (MOU) between the City and, inter alia, the union representing petitioner (union). Respondents moved to dismiss the petition on the ground that it was legally insufficient. Supreme Court granted the petition in part by requiring only the City to provide petitioner with the relief requested, but the court did not specifically rule on the motion. Because the judgment grants the relief sought by petitioner against only the City, we conclude that the court thereby implicitly granted that part of respondents' motion seeking to dismiss the petition against the Mayor. We further conclude that the court erred in denying that part of respondents' motion seeking to dismiss the petition against the City insofar as it sought to compel the City to permit petitioner to opt out of the

health care plan and to receive opt-out payments. We therefore modify the judgment accordingly.

We reject the City's contention that petitioner failed to exhaust her administrative remedies before commencing this proceeding. Although it is well established that a petitioner cannot maintain a CPLR article 78 proceeding unless he or she has exhausted the available administrative remedies (*see e.g. Matter of Connor v Town of Niskayuna*, 82 AD3d 1329, 1330-1331; *Matter of One Niagara LLC v City of Niagara Falls*, 78 AD3d 1554, 1556), the clear and unambiguous terms of the collective bargaining agreement (CBA) between the City and the union establish that there were no administrative remedies available to petitioner at the time she first became aggrieved.[1] It is undisputed that the CBA permits grievances concerning retirement benefits, but the CBA expressly limits the availability of the grievance procedure to current employees. Pursuant to Section 4 (A) of the CBA, the first procedural stage of the grievance procedure is for an aggrieved "employee" to request "a review and determination of his [or her] grievance by the head of the appropriate department." Thus, unlike the situation in *Matter of City of Niagara Falls* ([*Niagara Falls Police Club Inc.*] 52 AD3d 1327), the grievance procedure set forth in the CBA is " 'predicated upon the status of the affected beneficiar[y . . .,] as [an] active employee or retiree' " (*id.*). Based on the record before us, we conclude that petitioner was not aggrieved until after she retired. At that time, she was no longer an "employee" pursuant to the terms of the CBA, and there was no department head with whom she could file a grievance. Thus, petitioner could not have pursued a grievance before commencing this proceeding.

With respect to the merits of petitioner's claims, we conclude that the MOU gave qualified employees a choice of either participating in the health care plan or opting out of that plan. Although the MOU permitted retirees to participate in the health care plan upon the same terms and conditions as employees, it did not contain a similar opt-out provision for retirees. We reject petitioner's contention that the opt-out provision was a term or condition of the health care plan. The opt-out paragraph specifically states that qualified employees, not retirees, could elect to opt out of the health care plan. Pursuant to the clear and unambiguous terms of the MOU, the opt-out provision was not a term or condition of the health care plan; it was an alternative to it. We therefore conclude that the court erred in determining that the City must provide petitioner with opt-out payments, as well as retroactive payments, in lieu of providing her with health insurance coverage.

We conclude, however, that the court properly determined that, as

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[1] We note that "[t]he material appended to [petitioner's] brief is not part of the record on appeal, was not before the court when it ruled on the motion, and therefore is not considered on this appeal" (*Kwiatkowski v Bertoldo*, 13 AD3d 1208, 1209; *see Werdein v Johnson*, 221 AD2d 899, 901).

a retiree, petitioner was entitled to enroll in the health care plan at no cost to her.

All concur except CARNI, J., who dissents and votes to reverse the judgment insofar as appealed from in accordance with the following Memorandum: I respectfully disagree with the conclusions of my colleagues that there were no administrative remedies available to petitioner prior to commencing this CPLR article 78 proceeding and that she was not required to utilize the grievance procedure set forth in the collective bargaining agreement (CBA) between respondent City of Niagara Falls (City) and the union representing petitioner (union). Inasmuch as petitioner did not exhaust her administrative remedies, I conclude that the petition should be dismissed in its entirety. Therefore, I dissent.

On September 30, 2009, petitioner retired from her employment position with the City. Prior to retiring, petitioner received opt-out payments in lieu of health insurance coverage pursuant to the terms of the Memorandum of Understanding (MOU) dated October 21, 2005 between the City and, inter alia, the union. After she retired, the City denied petitioner's request for either post-employment health insurance coverage or opt-out payments in lieu of such coverage.

It is well established that a petitioner cannot maintain a CPLR article 78 proceeding unless he or she has exhausted the available administrative remedies (*see e.g. Matter of Connor v Town of Niskayuna*, 82 AD3d 1329, 1330-1331; *Matter of One Niagara LLC v City of Niagara Falls*, 78 AD3d 1554, 1556). Pursuant to the terms of the MOU, all disputes pertaining thereto were to be handled through the grievance procedures of the CBA. " 'Grievance,' " as defined in the CBA, "include[s] all claimed violations of [the CBA], any other signed written agreement between the [u]nion and the City, except where that agreement specifically excludes resort to th[e] grievance procedure [contained therein], and . . . all claimed violations . . . of the existing written rules, procedures, regulations, administrative orders or work rules of the City, all of which relate to or involve employee health or safety . . ., including matters involving . . . retirement benefits . . . ." The definition of "grievance" in the CBA does not exclude retirees and is not dependent upon the status of the aggrieved individual (*see Ledain v Town of Ontario*, 192 Misc 2d 247, 252-253, *affd* 305 AD2d 1094). Thus, the subject matter of grievances in the CBA was clearly intended to include disputes originating from the terms of the CBA concerning health insurance benefits for retirees (*see Matter of Dorme v Slingerland*, 12 Misc 3d 815, 822, *affd* 41 AD3d 596). Moreover, "grievance" is not narrowly defined as a claim by any employee or group of employees (*cf. Matter of Odessa-Montour Cent. School Dist. [Odessa-Montour Teachers Assn.]*, 271 AD2d 931, 932). Nor is the definition of "grievance" limited to " 'unit members' " (*Matter of Spink [Williamson Faculty Assn.]*, 267 AD2d 972, 972).

It is well settled that there is no prohibition against using a CBA's grievance procedure to resolve retiree benefit disputes (*see Matter of Union-Endicott Cent. School Dist. [Union-Endicott Maintenance Workers' Assn.]*, 85 AD3d 1432, 1434). Indeed, this Court

has concluded that a broad grievance procedure "render[s] the issue of the union's relationship to retired employees a question for arbitration" (*City of Buffalo v A.F.S.C.M.E. Council 35, Local 264*, 107 AD2d 1049, 1050; *see Matter of Jefferson-Lewis-Hamilton-Herkimer-Oneida BOCES [Jefferson-Lewis-Hamilton-Herkimer-Oneida BOCES Professional Assn., Local 2784]*, 247 AD2d 829). Thus, by concluding that petitioner was not required to pursue her claim through the grievance procedure because she is a retiree, the majority has implicitly concluded that the union had no duty to represent retirees with respect to retirement benefits created by the terms of the CBA. Whether or not that conclusion is correct, our precedent instructs that it is for the arbitrator to decide the issue. Indeed, this Court previously concluded that it was for the arbitrator to decide whether a union could represent retirees with respect to a dispute over retiree health insurance benefits inasmuch as they were no longer "employees" under the terms of the CBA (*see Ledain*, 192 Misc 2d at 252-253). Here, the majority's conclusion simply bypasses the question whether the union has a duty to represent petitioner in the dispute at issue.

The majority further concludes that petitioner was not aggrieved until after she retired and, because she was no longer an "employee" at that time, she could not have pursued a grievance before commencing this proceeding. However, petitioner has appended a document to her responding brief that unequivocally establishes that, approximately one month before she retired, she requested that the union pursue a grievance on her behalf so that she could receive opt-out payments in retirement. Thus, it is clear that petitioner knew before she retired that the City would not pay her opt-out payments in retirement, and we therefore conclude that she was aggrieved during the time of her employment. I recognize the general rule relied upon by the majority that we may not consider matters dehors the record on appeal (*see generally Matter of Hayes*, 263 NY 219, 221, *rearg denied* 264 NY 459). Inasmuch as petitioner submitted that document, however, she clearly does not deny its existence or claim that the text is inaccurate or incomplete (*see Crawford v Merrill Lynch, Pierce, Fenner & Smith*, 35 NY2d 291, 299). "The Court of Appeals has . . . recognized a narrow exception [to the general rule], which allows the consideration, on appeal, of reliable documents, the existence and accuracy of which are not disputed, even for the purposes of modifying or reversing the [judgment] under review" (*Brandes Meat Corp. v Cromer*, 146 AD2d 666, 667; *see Crawford*, 35 NY2d at 299). Thus, in my view, we should not delay the resolution of this litigation by ignoring incontrovertible facts advanced by petitioner. Petitioner's claim accrued while she was still an "employee," and thus her status as a retiree does not excuse her failure to utilize the CBA grievance procedure (*see Dorme*, 12 Misc 3d at 822).

Even if we were to ignore the undisputed facts establishing that petitioner was aggrieved during her employment, I respectfully disagree with my colleagues that, because petitioner is retired, she was not required to utilize the grievance procedure set forth in the CBA to resolve her claim for benefits under that agreement. "[W]here a [CBA] requires that a particular dispute be resolved pursuant to a

grievance procedure, an employee's failure to grieve will constitute a failure to exhaust, thereby precluding relief under CPLR article 78" (*Matter of Barrera v Frontier Cent. School Dist.*, 227 AD2d 890, 891; *see Matter of Plummer v Klepak*, 48 NY2d 486, 489-490, *cert denied* 445 US 952; *Matter of Julicher v Town of Tonawanda*, 61 AD3d 1384). Petitioner was bound by the CBA grievance procedures as a retired employee seeking to enforce her entitlement to retirement benefits (*see Dorme*, 41 AD3d 596; *Matter of O'Connor v Police Commn. of Town of Clarkstown*, 301 AD2d 654). Because petitioner failed to exhaust her available administrative remedies, Supreme Court should have dismissed the petition in its entirety. I would therefore reverse the judgment insofar as appealed from, grant that part of respondents' motion to dismiss the petition against the City and dismiss the petition in its entirety.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1067

KA 08-01544

PRESENT: SCUDDER, P.J., SMITH, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD ANDERSON, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR DEFENDANT-APPELLANT.

GERALD ANDERSON, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 18, 2007. 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, his waiver of the right to appeal was knowingly, intelligently, and voluntarily entered (*see People v Graham*, 77 AD3d 1439, *lv denied* 15 NY3d 920; *see generally People v Lopez*, 6 NY3d 248, 256). We agree with defendant, however, that the waiver does not encompass his further contention concerning the denial of his request for youthful offender status. No mention of youthful offender status was made before defendant waived his right to appeal during the plea colloquy. Under those circumstances, we conclude that defendant did not knowingly waive his right to appeal with respect to Supreme Court's denial of the request by defendant for youthful offender status at sentencing (*see generally People v McCarthy*, 83 AD3d 1533, *lv denied* 17 NY3d 819; *People v Fehr*, 303 AD2d 1039, *lv denied* 100 NY2d 538; *People v Hendricks*, 270 AD2d 944). We reject defendant's contention that the court abused its discretion in denying his request for youthful offender status, however, and we decline to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Jock*, 68 AD3d 1816, *lv denied* 14 NY3d 801).

Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71

NY2d 662, 665; *People v Moorer*, 63 AD3d 1590, *lv denied* 13 NY3d 837), and this case does not fall within the rare exception to the preservation requirement (*see Lopez*, 71 NY2d at 666). Defendant "waived his right to appeal before [the court] advised him of the potential periods of imprisonment that could be imposed," and thus his challenge to the severity of the sentence also is not encompassed by the waiver of the right to appeal (*People v Mingo*, 38 AD3d 1270, 1271; *see People v Martinez*, 55 AD3d 1334, *lv denied* 11 NY3d 927). We conclude, however, that the sentence is not unduly harsh or severe.

The remainder of defendant's contentions are raised in his pro se supplemental brief. He contends that his statement to the police should have been suppressed because there was no *Miranda* waiver and no probable cause for the arrest, and because he requested but was not afforded counsel before making the statement. There is no showing in the record, however, that defendant moved to suppress his statement and, even if he had so moved, the valid waiver of the right to appeal would have encompassed any suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *People v Schenk*, 77 AD3d 1417, *lv denied* 15 NY3d 924, 16 NY3d 836). In addition, by pleading guilty, defendant forfeited his contention that he was denied a fair trial by preindictment prosecutorial misconduct, i.e., the prosecutor's failure to notify him of the grand jury proceeding and the prosecutor's defective grand jury instructions (*see People v Oliveri*, 49 AD3d 1208, 1209).

Next, we reject defendant's contention that the felony complaint was defective. The felony complaint was superseded by the indictment to which defendant pleaded guilty, and he therefore may not challenge the felony complaint (*see People v Black*, 270 AD2d 563, 564-565). Although defendant also contends that the evidence before the grand jury was legally insufficient, we note that defendant's contention is foreclosed by virtue of his guilty plea (*see People v Hansen*, 95 NY2d 227, 233). Finally, to the extent that defendant's contention that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal (*see People v Jackson*, 85 AD3d 1697, 1699), that contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404). We have reviewed the remaining contentions in defendant's pro se supplemental brief and conclude that they are without merit.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1073

CA 11-00957

PRESENT: SCUDDER, P.J., SMITH, CENTRA, GREEN, AND GORSKI, JJ.

CHRISTOPHER M. CHARNEY AND TRINA M. CHARNEY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LECHASE CONSTRUCTION, FREDERICO WRECKING CO., INC., AND FRIENDS OF FINGER LAKES PERFORMING ARTS CENTER, INC., DEFENDANTS-RESPONDENTS.

FREDERICO WRECKING CO., INC., THIRD-PARTY PLAINTIFF-APPELLANT,

V

CONTOUR ERECTION AND SIDING SYSTEMS, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

LECHASE CONSTRUCTION SERVICES, LLC AND FRIENDS OF FINGER LAKES PERFORMING ARTS CENTER, INC., THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

CONTOUR ERECTION AND SIDING SYSTEMS, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

MACKENZIE HUGHES LLP, SYRACUSE (JENNIFER P. WILLIAMS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 24, 2010 in a personal injury action. The order, inter alia, denied the motion of plaintiffs for partial summary judgment on liability pursuant to Labor Law § 240 (1), granted those parts of the motions of defendants-third-party plaintiffs and third-party defendant seeking summary judgment dismissing the complaint, and granted that part of the motion of third-party

defendant seeking summary judgment dismissing the third-party complaints.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motions of defendants-third-party plaintiffs and third-party defendant with respect to the Labor Law § 240 (1) claim as well as the Labor Law § 241 (6) claim to the extent that it is premised on a violation of 12 NYCRR 23-3.3 (h), reinstating those claims and denying that part of the motion of third-party defendant seeking summary judgment dismissing the third-party complaints and reinstating the third-party complaints, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Christopher M. Charney (plaintiff) during the demolition of the Finger Lakes Performing Arts Center (Center). Plaintiff, an ironworker employed by third-party defendant, was part of a crew that was demolishing the structural steel canopy of the Center in a step-by-step process. Plaintiff and a coworker were assigned to cut a portion of a steel beam, place a cable around the beam, attach the cable to a crane and cut the remaining portion of the beam. The steel beam would then be lifted away from the structure by the crane and deposited in an area near the stage. At the time of the accident, plaintiff and his coworker had partially cut a beam and secured the cable to it, but the crane was not in position to enable them to attach the cable to the crane. Plaintiff was lowered to the stage of the Center, approximately four feet above the ground, where he retrieved additional hose for his cutting torch and waited for the crane to be repositioned. He heard a noise, realized that the structural steel canopy was collapsing, and ran to the edge of the stage, and he was injured when he jumped into a pile of debris.

We note at the outset that plaintiffs do not contend in their brief that Supreme Court erred in granting those parts of the motions of defendants-third-party plaintiffs (defendants) and third-party defendant seeking summary judgment dismissing the Labor Law § 200 claim and the common-law negligence cause of action, and we thus deem any issues with respect thereto abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

With respect to the Labor Law § 240 (1) claim, we conclude that the court properly denied plaintiffs' motion seeking partial summary judgment on liability, but erred in granting those parts of the motions of defendants and third-party defendant seeking summary judgment dismissing that claim. We agree with defendants and third-party defendant that, insofar as plaintiff "was working on a large and stable surface only four feet from the ground [at the time of the accident, this] is not a situation that calls for the use of a device like those listed in section 240 (1) to prevent a worker from falling" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 408). Nevertheless, defendants' alleged liability under the statute also is premised on the collapse of the structural steel canopy, and the section 240 (1) claim may be viable to the extent that the accident causing plaintiff's injuries

was elevation-related (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, ___ NY3d ___ [Oct. 25, 2011]). We are unable to discern on the record before us, however, whether it is in fact the type of elevation-related accident to which the protective devices in section 240 (1) apply (*see id.* at ___). None of the parties submitted evidence establishing the cause of the collapse of the canopy. Thus, the record fails to establish as a matter of law whether the cause of the collapse was the failure to use appropriate safety devices to secure the partially cut beam (*see Portillo v Roby Anne Dev., LLC*, 32 AD3d 421), or whether the cause was unrelated to such failure. Because triable issues of fact remain with respect to the cause of the accident, we modify the order by denying those parts of the motions of defendants and third-party defendant with respect to the Labor Law § 240 (1) claim.

With respect to the Labor Law § 241 (6) claim, we conclude that the court erred in granting those parts of the motions of defendants and third-party defendant seeking summary judgment dismissing that claim to the extent that it is premised on a violation of 12 NYCRR 23-3.3 (h). That regulation is sufficiently specific to support the claim under section 241 (6) (*see generally Misicki v Caradonna*, 12 NY3d 511, 520-521), and triable issues of fact remain whether it was violated (*see McGovern v Gleason Bldrs., Inc.*, 41 AD3d 1295) and, if so, whether such violation was a proximate cause of the accident (*see Calderon v Walgreen Co.*, 72 AD3d 1532, *appeal dismissed* 15 NY3d 900). We further conclude that the court properly granted those parts of the motions of defendants and third-party defendant seeking summary judgment dismissing the remainder of the section 241 (6) claim.

Finally, the court properly concluded that, to the extent that the indemnification provision in the subcontract of third-party defendant obligates it to indemnify defendants for their own acts of negligence, it is void and unenforceable under General Obligations Law § 5-322.1 (1) (*see Agostinelli v Stein*, 17 AD3d 982, 986, *lv dismissed* 5 NY3d 824). Insofar as it requires indemnification "[t]o the fullest extent permitted by law," however, it does not run afoul of the statute (*see Bink v F.C. Queens Place Assoc., LLC*, 27 AD3d 408, 409). Because issues of fact remain with respect to the cause of the accident and the respective fault, if any, of defendants and third-party defendant, we conclude that any determination whether third-party defendant must provide contractual indemnification to defendants would be premature (*see Stranz v New York State Energy Research & Dev. Auth. [NYSERDA]*, 87 AD3d 1279, 1283; *Niagara Frontier Transp. Auth. v City of Buffalo Sewer Auth.*, 1 AD3d 893, 895). We therefore further modify the order by denying that part of third-party defendant's motion seeking summary judgment dismissing the third-party complaints.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1078

CA 11-00958

PRESENT: SCUDDER, P.J., SMITH, CENTRA, GREEN, AND GORSKI, JJ.

EDWARD CUNNINGHAM, III, PLAINTIFF-APPELLANT,

V ORDER

LECHASE CONSTRUCTION, FREDERICO WRECKING CO., INC., AND FRIENDS OF FINGER LAKES PERFORMING ARTS CENTER, INC., DEFENDANTS-RESPONDENTS.

FREDERICO WRECKING CO., INC., THIRD-PARTY PLAINTIFF-APPELLANT,

V

CONTOUR ERECTION AND SIDING SYSTEMS, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

LECHASE CONSTRUCTION SERVICES, LLC AND FRIENDS OF FINGER LAKES PERFORMING ARTS CENTER, INC., THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

CONTOUR ERECTION AND SIDING SYSTEMS, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

MACKENZIE HUGHES LLP, SYRACUSE (JENNIFER P. WILLIAMS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 24, 2010 in a personal injury action. The order, inter alia, denied the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1), granted those parts of the motions of defendants-third-party plaintiffs and third-party defendant seeking summary judgment dismissing the complaint, and granted that part of the motion of third-party defendant seeking summary judgment dismissing the third-party

complaints.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motions of defendants-third-party plaintiffs and third-party defendant seeking summary judgment dismissing the Labor Law § 240 (1) claim and the Labor Law § 241 (6) claim to the extent that it is premised on a violation of 12 NYCRR 23-3.3 (h), reinstating those claims and denying that part of the motion of third-party defendant seeking summary judgment dismissing the third-party complaints and reinstating the third-party complaints, and as modified the order is affirmed without costs (*see Charney v LeChase Constr.*, ___ AD3d ___ [Dec. 23, 2011]).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1093

CA 11-00089

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

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

JILL CERMAK AND BRUCE HENRY, APPELLANTS,

V

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR APPELLANTS.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF OF COUNSEL), FOR RESPONDENT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR NEW YORK STATE COALITION OF PROPERTY OWNERS & BUSINESSES, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 8, 2010. The order, inter alia, denied the challenge to Local Law No. 3 of the City of Rochester and ordered a hearing on the application for a judicial warrant for inspection.

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

Memorandum: The first proceeding at issue in these appeals pertains to property at 449-451 Cedarwood Terrace in respondent City of Rochester (City). Jill Cermak is the tenant residing on the second floor of that property, and Bruce Henry is the owner. The second proceeding at issue pertains to property at 187 Clifton Street in the City, and Florine Nelson and Walter Nelson are the tenants residing in that single-family dwelling. The City requires that such rental properties have a valid certificate of occupancy (CO), which must be renewed every six years (*see* Rochester City Code § 90-16 [G] [1] [a]). The City must inspect a rental property to issue or renew a CO and, for several years, Cermak, Henry and the Nelsons (collectively, appellants) have refused to allow the City's inspectors to access the properties in order to determine if there are any code violations. In

March 2009, the City enacted Local Law No. 3, which amended the Charter of the City of Rochester (City Charter) to establish a procedure for issuing judicial warrants for inspections of premises (inspection warrants) in cases where the City has failed to obtain the cooperation of the homeowners or tenants (*see* City Charter § 1-9). After the City again made unsuccessful attempts to obtain permission to inspect the subject properties, it applied to Supreme Court to obtain an inspection warrant with respect to each property.

In appeal No. 1 in the first proceeding, Cermak and Henry appeal from the order that, inter alia, denied their challenge to Local Law No. 3. In appeal No. 2, Cermak and Henry appeal from an order, entitled "judicial warrant for inspection," authorizing the City to inspect the property at 449-451 Cedarwood Terrace. In appeal No. 1 in the second proceeding, the Nelsons appeal from the order that, inter alia, denied their challenge to Local Law No. 3. In appeal No. 2, they appeal from an order, entitled "judicial warrant for inspection," authorizing the City to inspect the property at 187 Clifton Street. The issues raised by appellants in each of the appeals are, with one exception, identical.

Appellants contend that the inspection warrants are invalid because they did not comply with article 690 of the Criminal Procedure Law and that article 690 preempts the law of search and seizure, thereby precluding the City from enacting the inspection warrant procedures contained in Local Law No. 3. We reject that contention. "A local law may be ruled invalid as inconsistent with State law not only where an express conflict exists between the State and local laws, but also where the State has clearly evinced a desire to preempt an entire field[,] thereby precluding any further local regulation" (*Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 96-97). There is nothing in article 690 expressly governing administrative search warrants, nor is there anything suggesting that article 690 was intended to preempt local governments from enacting laws governing such warrants.[1]

Appellants further contend that the inspection warrants violate their rights under the Fourth Amendment of the United States Constitution. In *Camara v Municipal Ct. of City & County of San Francisco* (387 US 523, 537-538), the Supreme Court determined that an area inspection of private property conducted pursuant to an administrative search warrant for purposes of determining compliance with rules governing public health and safety, e.g. building codes, could be accomplished in a manner that was consistent with the rights protected by the Fourth Amendment. Notably, appellants do not contend that the subject inspection warrants are inconsistent with the principles enunciated in *Camara*. Instead, they contend that the Supreme Court's discussion of the standards for administrative warrants is merely dictum because *Camara* involved a local law that

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[1] Our decision herein should not be construed as determining whether a local government could enact laws governing search and seizure by police conducting criminal investigations.

made it unlawful to refuse a warrantless inspection (*see id.* at 526-527). We reject that contention. Based on the record before us, we cannot conclude that the City violated the Fourth Amendment with respect to either the procedures involved in issuing inspection warrants in general or the scope of the subject inspection warrants in particular. Moreover, we see no basis for imposing a higher standard with respect to the rights in question under the New York State Constitution (*see generally* NY Const, art I, § 12; *Sokolov v Village of Freeport*, 52 NY2d 341, 348 n 2).

Appellants contend that Local Law No. 3 deprives tenants of their right to equal protection of the law because only tenants and not homeowners are subject to inspections of their homes. We reject that contention. State and local governments are given "a wide scope of discretion in enacting laws [that] affect some groups differently than others, and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it" (*Lighthouse Shores v Town of Islip*, 41 NY2d 7, 13). Here, there is a valid public policy basis for treating residential property differently based on whether the occupants are renters or homeowners.

With respect to appeal No. 1 in the first proceeding, we conclude that the court properly denied the motion of Cermak and Henry to suppress the results of a May 2009 inspection of the first-floor apartment at 449-451 Cedarwood Terrace, which was occupied by a tenant who is not a party to the proceeding and who apparently consented to the inspection. Both Cermak and Henry lack standing to challenge that inspection (*see generally People v Shire*, 77 AD3d 1358, 1359-1360, *lv denied* 15 NY3d 955).

We have reviewed appellants' remaining contentions in each appeal and conclude that they are without merit.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1094

CA 11-00362

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449-451 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

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

JILL CERMAK AND BRUCE HENRY, APPELLANTS,

V

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 2.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR APPELLANTS.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF OF COUNSEL), FOR RESPONDENT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR NEW YORK STATE COALITION OF PROPERTY OWNERS & BUSINESSES, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 18, 2011. The order authorized the inspection of certain real property.

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

Same Memorandum as in *Matter of City of Rochester* (*Cermak*) ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2011]).

Entered: December 23, 2011 Frances E. Cafarell

Clerk of the Court

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

1095

CA 11-00834

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

HEATHER BERMINGHAM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE PETER, SR. & MARY L. LIBERATORE FAMILY LIMITED PARTNERSHIP, DOING BUSINESS AS LINCOLN SQUARE APARTMENTS, DEFENDANT-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered December 7, 2010 in a personal injury action. The order granted the motion of plaintiff to set aside a jury verdict on damages for pain and suffering and denied the cross motion of defendant to set aside the jury verdict on the issue of comparative negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of $100,000 for past pain and suffering in the fourth ordering paragraph and substituting therefor the amount of $50,000, by vacating the amount of $200,000 for future pain and suffering in the sixth ordering paragraph and substituting therefor the amount of $100,000, and by providing in the seventh ordering paragraph that a new trial will be conducted on those two elements of damages unless defendant, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages accordingly, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly slipped and fell on black ice in a parking lot owned by defendant. Following a trial, the jury found that plaintiff and defendant were negligent but that only defendant’s negligence was a substantial factor in causing the injuries sustained by plaintiff. The jury awarded plaintiff, inter alia, a total of $25,000 for past and future pain and suffering. Defendant appeals from an order granting plaintiff’s post-trial motion to set aside the jury verdict on damages for past and future pain and suffering and denying defendant’s post-trial cross motion to set aside the verdict on the issue of comparative negligence. Supreme Court

determined that reasonable compensation for past pain and suffering was $100,000 and that reasonable compensation for future pain and suffering was $200,000. The court granted a new trial on those elements of damages unless the parties stipulated to damages in those amounts.

Defendant contends that the court erred in allowing plaintiff to proceed under a theory that defendant had not properly maintained the parking lot. That contention is not properly before us inasmuch as defendant appeals from the order granting plaintiff's post-trial motion to set aside the verdict and denying defendant's post-trial cross motion to set aside the verdict, which does not bring up for review the court's pretrial ruling with regard to the issue of improper maintenance (*cf.* CPLR 5501 [a]). In any event, plaintiff's bill of particulars provides enough information to put defendant on notice with respect to plaintiff's allegation that the condition and grade of the parking lot and defendant's improper maintenance thereof caused or contributed to the accumulation of ice.

We reject defendant's further contention that the court erred in denying its post-trial cross motion on the ground that the jury verdict was inconsistent with respect to the issue of comparative negligence. "A jury finding that a party was negligent but that such negligence was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Skowronski v Mordino*, 4 AD3d 782, 783 [internal quotation marks omitted]). Where, as here, " 'an apparently inconsistent . . . verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view' " (*Mascia v Olivia*, 299 AD2d 883). Indeed, the jury was entitled to conclude that plaintiff acted in a negligent manner but that, because the ultimate cause of the accident was the black ice, plaintiff's negligence in either wearing worn sneakers or failing to take proper care while walking was not a substantial factor in causing the accident.

Contrary to defendant's contention, we conclude that the jury award for past and future pain and suffering deviated materially from what would be reasonable compensation (*see* CPLR 5501 [c]). We agree with defendant, however, that the court's additur was excessive. We therefore modify the order by vacating the amount of $100,000 for past pain and suffering in the fourth ordering paragraph and substituting therefor the amount of $50,000, and by vacating the amount of $200,000 for future pain and suffering in the sixth ordering paragraph and substituting therefor the amount of $100,000. We further modify the order by providing in the seventh ordering paragraph that a new trial will be conducted on those two elements of damages only unless defendant, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages

accordingly.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1099

CA 11-00181

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 187 CLIFTON STREET, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

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

FLORINE NELSON AND WALTER NELSON, APPELLANTS,

V

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR APPELLANTS.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF OF COUNSEL), FOR RESPONDENT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR NEW YORK STATE COALITION OF PROPERTY OWNERS & BUSINESSES, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 8, 2010. The order denied the challenge to Local Law No. 3 of the City of Rochester and ordered a hearing on the application for a judicial warrant for inspection.

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

Same Memorandum as in *Matter of City of Rochester* (*Cermak*) ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2011]).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1100

CA 11-00363

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 187 CLIFTON STREET, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

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

FLORINE NELSON AND WALTER NELSON, APPELLANTS,

V

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 2.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR APPELLANTS.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF OF COUNSEL), FOR RESPONDENT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR NEW YORK STATE COALITION OF PROPERTY OWNERS & BUSINESSES, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 18, 2011. The order authorized the inspection of certain real property.

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

Same Memorandum as in *Matter of City of Rochester* (*Cermak*) ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2011]).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1110

KA 11-00536

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY L. JERGE, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered March 14, 2011. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the second degree, course of sexual conduct against a child in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, sexual abuse in the second degree (Penal Law § 130.60 [2]) and course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]). We agree with defendant that County Court erred in denying his motion to set aside the verdict based on juror misconduct.

CPL 330.30 provides in relevant part that a court may, upon motion of the defendant, set aside a verdict on the ground that "during the trial there occurred, out of the presence of the court, improper conduct by a juror . . ., which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (CPL 330.30 [2]). As a general rule, "a jury verdict may not be impeached by probes into the jury's deliberative process; however, a showing of improper influence provides a necessary and narrow exception to the general proposition" (*People v Maragh*, 94 NY2d 569, 573; *see People v Brown*, 48 NY2d 388, 393; *People v Scerbo*, 59 AD3d 1066, 1068, *lv denied* 12 NY3d 821). Improper influence encompasses "even well-intentioned jury conduct which tends to put the jury in possession of evidence not introduced at trial" (*Brown*, 48 NY2d at 393).

"Of course, not every misstep by a juror rises to the inherently prejudicial level at which reversal is required automatically" (*id.* at 394). Rather, "[e]ach case must be examined on its unique facts to

determine the nature of the misconduct and the likelihood that prejudice was engendered" (*People v Clark*, 81 NY2d 913, 914; *see Scerbo*, 59 AD3d at 1068). Juror misconduct constitutes reversible error where "(1) jurors conduct[ ] personal specialized assessments not within the common ken of juror experience and knowledge (2) concerning a material issue in the case, and (3) communicat[e] that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence" (*Maragh*, 94 NY2d at 574; *see People v Santi*, 3 NY3d 234, 249).

Here, the evidence at the post-trial hearing on defendant's CPL 330.30 motion established that two jurors interjected their professional knowledge into the jury deliberations by voicing professional opinions that were not the subject of expert testimony at trial (*see Maragh*, 94 NY2d at 575-576). The subject jurors -- a caseworker employed by a county department of social services (DSS) with a bachelor's degree in social work and a licensed substance abuse counselor with a bachelor's degree in human services -- conveyed to the rest of the jury panel that they had professional experience working with or counseling child victims of sexual abuse. According to the two jurors who testified at the hearing concerning the subject jurors, the DSS caseworker advised the jury that she worked in a child protective capacity. One of the testifying jurors recalled that, when members of the jury voiced concerns about the victim's credibility based upon, inter alia, her inability to recall dates or details about the sexual abuse, the delay in reporting, and the victim's failure to avoid defendant, the subject jurors made statements to the effect that "we deal with this every day," and "this is the pattern of how these things normally take place." That juror explained that "it was a lot like [the subject jurors] were testifying in the jury room," and he expressly testified that he was swayed by the opinions of the subject jurors in voting to convict defendant. The other testifying juror similarly recalled that, when members of the jury questioned the victim's credibility, the subject jurors responded, "that is how a sexually abused victim would act and that's normal behavior." She testified that the subject jurors said that it was "normal" for sexual abuse victims to "block . . . out" the abuse and that, as a result, "they wouldn't be able to remember" specific dates, times and places. According to that juror, one of the subject jurors went so far as to tell the jury that, when he had worked with child victims of sexual abuse, "this is how they would act." The juror testified that she changed her vote from acquittal to conviction based on the opinions of the subject jurors.

In denying defendant's CPL 330.30 motion, the court erred in concluding that it was "common knowledge" that victims of sexual abuse may both delay reporting and be unable to recall specifics of the abuse. The behavior and response of a victim of sexual abuse is "not within the common ken of juror experience and knowledge" (*Maragh*, 94 NY2d at 574; *see People v Taylor*, 75 NY2d 277, 289). Indeed, it is not uncommon for courts to permit expert testimony on precisely the subject at issue here, i.e., the behavior of a victim of sexual abuse (*see e.g. People v Carroll*, 95 NY2d 375, 387; *Taylor*, 75 NY2d at 289; *People v Torres*, 78 AD3d 866; *People v Gregory*, 78 AD3d 1246, 1247, *lv*

denied 16 NY3d 831; *People v Wellman*, 166 AD2d 302, *lv denied* 78 NY2d 958).

We thus agree with defendant that the subject jurors offered improper professional opinions that were not the subject of expert testimony and were not subject to cross-examination, thereby depriving defendant of a fair trial (*see Maragh*, 94 NY2d at 575-576; *People v Stanley*, 87 NY2d 1000, 1001-1002). Indeed, the subject juror comments in this case are particularly problematic because they stated not only that sexual abuse victims may delay reporting or be unable to recall specifics of the abuse, which may be the proper subject of expert testimony (*see Gregory*, 78 AD3d at 1247), but they also went a step further and opined that, "based upon their professional experience, [the victim] acted like a victim of sexual abuse." That was improper (*see Carroll*, 95 NY2d at 387).

In light of our determination that reversal is required, we need not address defendant's remaining contentions.

All concur except FAHEY, J., who dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent because I do not agree with the majority that County Court erred in denying defendant's post-trial motion pursuant to CPL 330.30 (2) seeking to set aside the verdict based on juror misconduct. I dissent insofar as the majority concludes that reversal is required on that ground. Nevertheless, I would vote to modify the judgment as a matter of discretion in the interest of justice, and on the law, by reversing that part convicting defendant of sexual abuse in the second degree under count two of the indictment inasmuch as that count was rendered duplicitous by the testimony at trial, as I shall discuss herein. I would dismiss that count without prejudice to the People to re-present any appropriate charge under that count to another grand jury.

"Generally, a jury verdict may not be impeached by probes into the jury's deliberative process," but CPL 330.30 embodies the "narrow exception to [that] general proposition" (*People v Maragh*, 94 NY2d 569, 573). That statute provides, in relevant part, that the court may, upon motion of the defendant, set aside the verdict on the ground "[t]hat during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (CPL 330.30 [2]).

Here, at the hearing on his CPL 330.30 motion, defendant presented the testimony of two jurors. The first testifying juror stated on direct examination that three other jurors, i.e., juror Nos. 27, 68 and 98 (collectively, subject jurors), said "we deal with this every day" and "this is the pattern of how these things normally take place." Based on the context of the first juror's testimony, the testimony appears to indicate that the subject jurors were familiar with victims of sexual abuse. Juror No. 27 worked as the head strength and conditioning coach in a university athletic department, juror No. 68 was a caseworker with the Cattaraugus County Department

of Social Services, and juror No. 98 worked as a "substance abuse, mental health counselor." The first testifying juror did not state that the subject jurors had indicated that they counseled victims of sexual abuse, but maintained that the subject jurors said that their knowledge was based upon their professional backgrounds in dealing with such issues. The first testifying juror also indicated that his vote was influenced by the comments of the subject jurors during deliberations, and that he was the last juror to vote to convict defendant.

The cross-examination of the first testifying juror confirmed that he was influenced by the comments of the subject jurors, and explained the basis, or lack thereof, for his reliance on those jurors. The first testifying juror acknowledged that he learned of the backgrounds of the subject jurors during voir dire, and indicated that he "just assumed" that one of the opinions expressed by juror No. 68 during deliberations "was because of her professional experience." Indeed, the first testifying juror agreed that the subject jurors never indicated during deliberations that they worked with or counseled sexual abuse victims, and he concluded his testimony on cross-examination with an expression of remorse over having been the last of the jurors to change his mind and vote to convict defendant.

For her part, the second testifying juror stated at the hearing that juror Nos. 68 and 98 had indicated during deliberations that they had a specialized background in sexual abuse issues and had worked with sexually abused children. The second testifying juror indicated that assurances of juror Nos. 68 and 98 assuaged her concerns with parts of the victim's testimony, and that she eventually relied on the knowledge and opinions of juror Nos. 68 and 98 in changing her vote from acquittal to conviction.

On cross-examination, however, the second testifying juror, who was not a holdout juror, was equivocal as to whether juror Nos. 68 and 98 influenced her vote. The second testifying juror denied "saying that [she] gave somebody's opinion more credibility than somebody else's," and contended that she "ha[s] [her] own mind," "listened" during deliberations and "took [the opinion in question] into [her] own mind and processed it."

Subsequent to the testimony of defendant's witnesses at the CPL 330.30 hearing, and at the People's request, the court denied the motion on the ground that defendant failed to meet his burden of proof even in the absence of testimony from witnesses yet to be presented by the People. The court later issued a written decision in which it determined "that the complained of conduct . . . does not rise to the level of juror misconduct." That conclusion was based, at least in part, on the court's finding that the first testifying juror "admitted that he regretted his verdict and conceded that he did not hear specific reference to any one juror's professional experience." In view of its citations to, inter alia, *People v Rodriguez* (100 NY2d 30), *People v Robinson* (1 AD3d 985, *lv denied* 1 NY3d 633, 2 NY3d 805) and *People v Stevens* (275 AD2d 902, *lv denied* 96 NY2d 807), and its finding that the second testifying juror "adamantly said she made up

her own mind on the verdict," the court also appeared to conclude that the conduct at issue did not prejudice defendant (*cf. People v Concepcion*, 17 NY3d 192, 195).

"In order to prevail on [his] motion, defendant was required to establish 'by a preponderance of the evidence that improper conduct by a juror prejudiced a substantial right of' defendant" (*People v Carmichael*, 68 AD3d 1704, 1705, *lv denied* 14 NY3d 798; *see* CPL 330.40 [2] [g]). "The trial court is invested with discretion and post[-]trial fact-finding powers to ascertain and determine whether the activity during deliberations constituted misconduct and whether the verdict should be set aside and a new trial ordered" (*Maragh*, 94 NY2d at 574; *see Rodriguez*, 100 NY2d at 35), and, under these circumstances, I cannot agree with the majority that the disputed activity during deliberations warrants impeachment of the verdict.

Put simply, the testimony of the first testifying juror, who seemed to have second thoughts about the verdict and who could not state that any of the subject jurors had indicated during deliberations that they worked with or counseled sexual abuse victims, does not support a finding of juror misconduct (*see generally People v Santi*, 3 NY3d 234, 249-250). "The court's determination that there was no misconduct . . . must be afforded great weight" (*People v Brown*, 278 AD2d 920, *lv denied* 96 NY2d 781), and there is no reason to disturb it on the basis of the testimony of the first testifying juror.

Even assuming, arguendo, that the testimony of the second testifying juror establishes juror misconduct (*see generally Santi*, 3 NY3d at 249; *Maragh*, 94 NY2d at 574), I conclude under these circumstances there was no showing of prejudice to a "substantial right" of defendant as a result of that misconduct (CPL 330.30 [2]; *see Carmichael*, 68 AD3d at 1705-1706). Inasmuch as the second testifying juror, who was not a holdout juror, admitted on cross-examination that she had an independent mind and thought process with respect to the verdict, I cannot conclude that defendant established that the second testifying juror based her verdict on something other than the evidence presented at trial (*cf. Carmichael*, 68 AD3d at 1705-1706; *see generally Robinson*, 1 AD3d at 986). Thus, in my view, defendant did not meet his burden of showing "by a preponderance of the evidence" that the conduct at issue prejudiced a substantial right of defendant (CPL 330.40 [2] [g]; *see Rodriguez*, 100 NY2d at 35; *Carmichael*, 68 AD3d at 1705-1706), and there is no reason to disturb the court's determination on that basis (*see Brown*, 278 AD2d 920).

I turn now to the remaining issues not addressed by the majority in light of its determination with respect to defendant's post-trial motion pursuant to CPL 330.30 (2). Defendant challenges the procedure employed by the court in responding to a jury note, specifically contending that the court erred in issuing supplemental instructions to the jury in his absence. Inasmuch as defense counsel was given notice of the note, its contents and the court's intended response thereto, "[d]efendant therefore was required to register an objection

in order to preserve for our review his challenge to the procedure employed by the court in responding to the jury note[], 'at a time when any error by the court could have been obviated by timely objection' " (*People v Rivera*, 83 AD3d 1370, 1370-1371, quoting *People v Starling*, 85 NY2d 509, 516; *see People v Kadarko*, 14 NY3d 426, 429). I would not exercise my power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, defense counsel was not ineffective in failing to object to the procedure employed by the court in responding to the note. Defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712, quoting *People v Rivera*, 71 NY2d 705, 709; *see generally People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention that the court's *Allen* charge was coercive, having failed to object to the charge on that ground (*Allen v United States*, 164 US 492; *see People v Vassar*, 30 AD3d 1051, *lv denied* 7 NY3d 796). In any event, that contention lacks merit (*see People v Roman*, 85 AD3d 1630, 1631, *lv denied* 17 NY3d 821). "Furthermore, '[b]ecause the *Allen* charge was not improper, the defendant's ineffective assistance of counsel claim, [insofar as it is] based . . . on his attorney's failure to object to the charge, is without merit' " (*id.*).

Defendant also failed to preserve for our review his contention that the indictment is duplicitous (*see People v Becoats*, 17 NY3d 643, ___; *People v Heard*, 72 AD3d 1630, *lv denied* 15 NY3d 852). In any event, that contention is moot with respect to counts one and four of the indictment inasmuch as defendant was acquitted of those counts (*see People v Haberer*, 24 AD3d 1283, *lv denied* 7 NY3d 756, 848). I would, however, exercise my power to review defendant's contention with respect to count two of the indictment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), because I agree with defendant that count two, charging him with sexual abuse in the second degree (Penal Law § 130.60 [2]), was rendered duplicitous by the testimony at trial (*see People v Bennett*, 52 AD3d 1185, 1186, *lv denied* 11 NY3d 734). I would therefore modify the judgment accordingly, as set forth herein (*see id.*; *People v Bracewell*, 34 AD3d 1197, 1198-1199).

Finally, I have reviewed defendant's remaining contentions and conclude that none requires reversal or further modification of the judgment.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1111

KA 09-00151

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN L. MCKOY, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 17, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), criminal possession of a weapon 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 him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [2]) for killing two individuals who were mere bystanders during a gang-related shooting spree in the City of Buffalo. We reject defendant's contention that the testimony of the accomplice who drove the getaway vehicle and detailed defendant's involvement in the crime was not adequately corroborated, as required by CPL 60.22 (1). Indeed, the testimony of the accomplice was amply corroborated by evidence that, inter alia, defendant was seen cleaning the gun used in the shooting shortly after it occurred, the same gun was recovered the day after the shooting from a shed in the back yard of a home owned by defendant's grandparents, and defendant made admissions to three jailhouse informants implicating himself in the shootings. In addition, although the accomplice's testimony with respect to the manner in which the shooting occurred did not directly link defendant to the shooting, the testimony nevertheless was consistent with the testimony of disinterested witnesses such that the jury could be reasonably satisfied that the accomplice was telling the truth (*see People v Reome*, 15 NY3d 188, 191-192). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, we conclude that

Supreme Court's ruling pursuant to *People v Cardona* (41 NY2d 333, 335) was proper, pursuant to which the court allowed the jailhouse informants to testify concerning defendant's inculpatory statements. There was no evidence that the informants were acting as agents of the government when defendant made the statements (*see People v McCray*, 66 AD3d 1338, 1339, *lv denied* 13 NY3d 908, 14 NY3d 803; *People v Davis*, 38 AD3d 1170, 1171, *lv denied* 9 NY3d 842, *cert denied* 552 US 1065).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1119

CA 11-00887

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND LINDLEY, JJ.

MARK DZIELSKI AND COLLEEN DZIELSKI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ESSEX INSURANCE COMPANY, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (KATHLEEN M. REILLY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 17, 2010. The judgment, among other things, awarded plaintiffs the sum of $950,000 against defendant Essex Insurance Company.

It is hereby ORDERED that the judgment so appealed from is modified on the law by reducing the award of $950,000 to $499,500, plus interest, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking judgment declaring that defendant is obligated to indemnify its insured in the underlying personal injury action commenced by plaintiffs, in which defendant's insured had defaulted. The underlying action arose from injuries sustained by Mark Dzielski (plaintiff) when he fell from the loading dock after exiting the rear door of a nightclub owned and operated by defendant's insured. On the evening in question, plaintiff had provided sound equipment for a band that performed at the nightclub, and the accident occurred while plaintiff was carrying equipment from the nightclub to his truck after the concert had concluded. According to plaintiffs, the accident was caused by defects in the loading dock. In this action, Supreme Court granted plaintiffs' motion for summary judgment and denied defendant's cross motion for summary judgment, awarding judgment to plaintiffs in the amount of the default judgment entered against defendant's insured in the underlying action, i.e., $950,000, together with interest and costs.

Defendant disclaimed coverage to its insured based on a "stage hand" exclusion in the policy's "Restaurant, Bar, Tavern, Night Clubs, Fraternal and Social Clubs Endorsement." That exclusion provides in

relevant part that "[t]he coverage under this policy does not apply to 'bodily injury,' . . . or any injury, loss or damage arising out of . . . [i]njury to any entertainer, stage hand, crew, independent contractor, or spectator, patron or customer who participates in or is a part of any athletic event, demonstration, show, competition or contest . . . ." It is axiomatic that, "to 'negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case' " (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383). We agree with plaintiffs that the language "participates in or is a part of any . . . show" is ambiguous, and that the court properly resolved that ambiguity against the insurer, "particularly [because it is] an exclusionary clause" (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398). Although, as defendant suggests, the policy language may be read broadly to encompass all persons who performed any tasks in connection with the show, including loading and unloading sound equipment, it may also reasonably be read narrowly to encompass only those persons who actually performed in the show or were injured as a result of activities occurring during the show. It is undisputed that the accident occurred after the show had ended, and we note in particular that the accident was caused by a defect in the premises that was wholly unrelated to the show itself. We thus conclude that the court properly determined that the exclusion does not apply in this case.

We reject defendant's contention that the inclusion of the phrase "arising out of" in the exclusion mandates the broader interpretation espoused by defendant. Even assuming, arguendo, that the phrase "arising out of" is interpreted as "originating from, incident to, or having connection with" (*Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 470 [internal quotation marks omitted]), we note that coverage is excluded only if an accident originates from, is incident to or has connection with a person's "participat[ion]" in a "show." Here, it cannot be said that there is no ambiguity concerning whether the accident arose out of plaintiff's participation in a show, which in fact had ended before the accident occurred.

We further conclude, however, that, pursuant to the insurance policy in question, coverage for plaintiff's accident is limited to $500,000 per occurrence, with a $500 deductible. We therefore modify the judgment by reducing the award from $950,000 to $499,500, plus interest and costs.

All concur except FAHEY and PERADOTTO, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent because, in our view, the exclusionary language in the applicable insurance policy is " 'clear and unmistakable . . ., is subject to no other reasonable interpretation, and applies in th[is] particular case' " (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383). We would therefore deny plaintiffs' motion for summary judgment, grant defendant's cross motion for summary judgment, and declare that defendant has no obligation to indemnify its insured in the underlying personal injury action commenced by plaintiffs.

As noted by the majority, the underlying personal injury action arose from injuries sustained by Mark Dzielski (plaintiff) when he fell from a loading dock after exiting the rear door of a nightclub owned and operated by defendant's insured. On the night in question, plaintiff, an independent contractor, had provided sound reinforcement services, which included setting up sound equipment, for a band that had performed at the nightclub. The accident occurred while plaintiff was in the process of removing his sound equipment from the nightclub at the conclusion of the show. According to plaintiffs, the accident was caused by the defective nature of the loading dock. Plaintiffs commenced the underlying personal injury action against defendant's insured, and the insured defaulted. Thereafter, plaintiffs commenced this action seeking judgment declaring that defendant is obligated to indemnify its insured in the underlying action. Supreme Court granted plaintiffs' motion for summary judgment and denied defendant's cross motion for summary judgment, awarding judgment to plaintiffs in the amount of the default judgment entered against defendant's insured in the underlying action, i.e., $950,000, together with interest and costs.

"Where the provisions of an insurance contract are clear and unambiguous, the courts should not strain to superimpose an unnatural or unreasonable construction" (*Maurice Goldman & Sons v Hanover Ins. Co.*, 80 NY2d 986, 987). Here, defendant disclaimed coverage to its insured based on an exclusion in the policy's "Restaurant, Bar, Tavern, Night Clubs, Fraternal and Social Clubs Endorsement." That exclusion provides in relevant part that "[t]he coverage under this policy does not apply to 'bodily injury,' . . . or any injury, loss or damage *arising out of . . . [i]njury to any* entertainer, *stage hand, crew, independent contractor*, or spectator, patron or customer *who participates in or is a part of any* athletic event, demonstration, *show*, competition or contest" (emphasis added). The exclusion thus applies where two conditions are met: (1) the injured party is an entertainer, stage hand, crew member, independent contractor, spectator, patron or customer who "participates in or is a part of" an athletic event, demonstration, show, competition or contest; and (2) the injury "arises out of" such participation.

Contrary to the conclusion of the majority, we conclude that the language "participates in or is a part of any . . . show" is not ambiguous, and that plaintiff falls squarely within that language. As noted above, plaintiff was hired by the band to provide sound reinforcement services for the show, and thus there is no question that he "participate[d] in or [wa]s a part of" the show on the night of his accident. The majority's conclusion that such clause may "reasonably be read narrowly to encompass only those persons who actually performed in the show or were injured as a result of activities occurring during the show" is not supported by the plain language of the exclusion. First, if the exclusion was intended to apply only to those persons who "actually performed" in a show, then the language "spectator, patron or customer" in the exclusion would be superfluous. Second, such an interpretation imposes a temporal limitation on the exclusion where no such limitation appears therein. Indeed, if defendant had intended to limit the exclusion in that

manner, it could have done so explicitly as it did in other provisions of the policy (*see Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 473). For example, the policy's medical payments coverage provision specifically excludes expenses for bodily injury "[t]o a person injured *while taking part in* athletics" (emphasis added). Similarly, the policy's "combination endorsement" excludes expenses for bodily injury or personal injury to any person "*while practicing for or participating in* any event or function of a sporting or athletic nature" (emphasis added). Here, by contrast, the absence of such limiting language in the exclusion in question reflects an intent to provide a broad exclusion for all injuries arising from participation in shows or other special events (*see Maroney*, 5 NY3d at 473).

We further conclude that plaintiff's injury "ar[o]se[] out of" his participation in the show within the meaning of the exclusion. In the insurance context, the phrase "arising out of" has been broadly interpreted to mean "originating from, incident to, or having connection with" (*Maroney*, 5 NY3d at 472 [internal quotation marks omitted]; *see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38). Here, plaintiff's accident occurred while he was in the process of removing his sound equipment from the nightclub. The process of packing up and removing sound equipment at the conclusion of a show necessarily "originat[es] from, [is] incident to, or ha[s] connection with" the show (*Maroney*, 5 NY3d at 472 [internal quotation marks omitted]). The fact that plaintiff's accident was allegedly caused by the defective nature of the loading dock rather than any condition of the show itself does not remove plaintiff's injury from the policy exclusion. "[T]he focus of the inquiry 'is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained' " (*Regal Constr. Corp.*, 15 NY3d at 38). Indeed, "the phrase 'arising out of' . . . requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*Maroney*, 5 NY3d at 472), and such a causal relationship clearly exists here.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1144

CA 11-00880

PRESENT: FAHEY, J.P., CARNI, SCONIERS, GORSKI, AND MARTOCHE, JJ.

RIFENBURG CONSTRUCTION, INC.,
CLAIMANT-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK,
DEFENDANT-APPELLANT-RESPONDENT.
(CLAIM NO. 111868.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

FOX & KOWALEWSKI, LLP, CLIFTON PARK (LAURENCE I. FOX OF COUNSEL), FOR CLAIMANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered June 22, 2010. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is modified on the law by granting those parts of the motion for summary judgment dismissing the third and fourth causes of action and as modified the order is affirmed without costs.

Memorandum: The New York State Department of Transportation (DOT) entered into a contract with claimant for the reconstruction of 6.9 miles of Route 332 in Farmington (hereafter, project). The project involved expanding the road from two to four lanes and building two new bridges at a cost of over $26 million. Following completion of the project, claimant commenced this action seeking compensation for extra work under the terms of the contract. As limited by its brief, defendant appeals from an order insofar as it denied those parts of defendant's motion for summary judgment dismissing the first through fourth and seventh causes of action.

With respect to the first through fourth causes of action, defendant contends that it is entitled to judgment as a matter of law based on the strict notice and reporting requirements contained in the construction contract. Those contract provisions require claimant, inter alia, to provide prompt notice to DOT of any request for payment for "extra work" that it performs and to submit "a daily summary of FORCE ACCOUNT WORK done on the contract." The contract requires "[s]trict compliance" with the notice provisions and "compliance" with the record-keeping provisions. Contract clauses that "require the

contractor to promptly notice and document its claims made under the provisions of the contract governing the substantive rights and liabilities of the parties . . . are . . . conditions precedent to suit or recovery" (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 30-31, *rearg denied* 92 NY2d 920; *see Sicoli & Massaro v Niagara Falls Hous. Auth.*, 281 AD2d 966; *Tug Hill Constr. v County of Broome*, 270 AD2d 755, 756). "[A] condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises' " (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645, quoting *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690). "Express conditions must be literally performed; substantial performance will not suffice" (*MHR Capital Partners LP*, 12 NY3d at 645). "Failure to strictly comply with such provisions generally constitutes waiver of a claim for additional compensation" (*Fahs Rolston Paving Corp. v County of Chemung*, 43 AD3d 1192, 1194; *see also Bat-Jac Contr. v New York City Hous. Auth.*, 1 AD3d 128).

We agree with defendant that the Court of Claims erred in denying those parts of its motion with respect to the third and fourth causes of action. We therefore modify the order accordingly. Those causes of action seek compensation for extra work performed for controlling and protecting traffic during the project and for performing survey work, respectively. According to claimant, the extra work was necessitated by the numerous changes made by DOT during the project. The traffic control and survey work were fixed cost items under the contract for which claimant was entitled to extra compensation only where additions to the project exceeded 25% of the original bid price. In support of its motion, defendant established that claimant did not comply with the notice and reporting requirements of the contract, and claimant failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Claimant's assertion that the numerous changes made by DOT during the project made it extremely difficult to calculate the extra traffic control and survey costs does not justify claimant's failure to comply with the notice and reporting requirements of the contract. Those requirements are expressly designed to alert defendant to cost over-runs at the earliest possible time in order to allow it to take steps to avoid such extra expenses in the interest of protecting the public fisc (*see A.H.A. Gen. Constr.*, 92 NY2d at 33-34).

We further conclude, however, that the court properly denied the motion with respect to the first and second causes of action. The first cause of action seeks compensation for the extra costs involved in construction of the bridges, which claimant alleges were necessitated by design errors on the part of DOT. Defendant met its initial burden on the motion with respect to that cause of action by establishing that claimant breached the contract notice provisions inasmuch as it failed to make a timely claim for additional compensation. In opposition to the motion, however, claimant submitted evidence demonstrating not only that DOT was aware of the design errors but that DOT prepared documents during the project suggesting that claimant would be compensated for the extra work in question.

The second cause of action seeks compensation "for significant changes to and under[-]runs in the quantity of work" estimated by DOT in the project specifications. Defendant met its initial burden on the motion with respect to that cause of action by establishing when such under-runs occurred and that, by failing to provide timely notice of its request for additional compensation, defendant did not satisfy a condition precedent for such request. We conclude, however, that claimant raised triable issues of fact whether it knew or should have known of those under-runs given the numerous additions and deletions to the quantity of work in the project, including the additional construction of three-quarters of a mile of water line.

Further, the court properly denied that part of defendant's motion with respect to the seventh cause of action, seeking payment of interest pursuant to State Finance Law § 179-f on the ground that DOT's final payment under the contract was untimely. Defendant contends that it is entitled to summary judgment dismissing that cause of action because its final payment was timely in light of claimant's delay in submitting all of the documentation necessary for that payment to be issued. We reject that contention. Defendant accepted the work of the project on November 24, 2003 but did not provide written notice to claimant of the missing documentation until August 3, 2005. We conclude that the 18-month period in question is not excluded for purposes of calculating the timeliness of defendant's final payment (*see* 2 NYCRR 18.13).

Finally, claimant is not aggrieved by the order denying defendant's motion, and thus its cross appeal must be dismissed (*see Weichert v Shea*, 186 AD2d 992; *see generally* CPLR 5511).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1153

KA 08-00330

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENLEY PECK, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered January 8, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). Pursuant to the terms of the plea agreement, entered into in January 2007, defendant pleaded guilty to the charge of burglary, a class D felony, and was promised that, if he successfully completed a drug treatment program, he would be permitted to withdraw his plea to the felony and instead plead guilty to a misdemeanor with a promised sentence of a one-year conditional discharge. If defendant was unsuccessful in the drug treatment program, however, under the plea agreement he would be sentenced to a term of incarceration of one to three years. The record establishes that the drug treatment contract included a provision that, in order to remain enrolled in the program, defendant could not be arrested. In January 2008, defendant appeared in County Court for sentencing on the felony based upon his termination from the drug treatment program for, inter alia, his postplea arrests for other crimes. Defendant denied having been criminally involved in the crimes giving rise to his arrests and requested an opportunity to prove his innocence. Relying heavily upon the “mere fact” of defendant’s arrests (*People v Outley*, 80 NY2d 702, 713), the court summarily sentenced defendant to one to three years.

Initially, we agree with defendant that, even if valid, his waiver of the right to appeal does not encompass his contention that the court erred in failing to conduct an inquiry to determine whether there was a legitimate basis for defendant’s termination from the drug

treatment program (*see People v Huggins*, 45 AD3d 1380, *lv denied* 9 NY3d 1006; *see also People v Fiammegta*, 14 NY3d 90). We further agree with defendant that the court erred in failing to "carry out an inquiry of sufficient depth to satisfy itself that there was a legitimate basis" for defendant's termination from the drug treatment program (*Fiammegta*, 14 NY3d at 98), including whether the postplea arrests were "without foundation" (*Outley*, 80 NY2d at 713). Because defendant served his sentence of incarceration, the only remedy available to him is to be permitted to withdraw his plea of guilty to a felony and to plead guilty to a misdemeanor. We therefore hold the case, reserve decision, and remit the matter to County Court to conduct an inquiry to determine whether there was a legitimate basis for defendant's termination from the drug treatment program, including whether defendant's postplea arrests were without foundation.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1187

CA 11-00337

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, GORSKI, AND MARTOCHE, JJ.

HERBERT SHAPIRO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TONY'S CULVER ATLANTIC, INC., DEFENDANT,
MICHAEL FLORIO AND ANTHONY FLORIO,
DEFENDANTS-RESPONDENTS.

HERBERT SHAPIRO, PLAINTIFF-APPELLANT PRO SE.

MICHAEL FLORIO, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Monroe County Court (Patricia D. Marks, J.), entered June 16, 2010. The order affirmed a decision of the Rochester City Court (John E. Elliott, J.), dated December 11, 2008, dismissing plaintiff's claim.

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

Memorandum: Plaintiff commenced this action in City Court seeking damages for defendants' negligent repair of the air conditioning system in plaintiff's vehicle. After trial, City Court dismissed the claim in a decision recorded on a form entitled "Civil Trial Record of Court Activity." Plaintiff appeals from an order entered in County Court affirming the decision of City Court. An appeal as of right to this Court may be taken from an order of a county court that "determines an appeal from a judgment of a lower court" (CPLR 5703 [b]), or that determines an appeal from an order of a lower court that is dispositive of the rights of the parties and is thus tantamount to a judgment (*see Pigler v Adam, Meldrum & Anderson Co.*, 195 AD2d 1011; *see also* CPLR 5011). Here, however, the record on appeal contains neither a judgment nor a final order that was entered in City Court, and there is nothing in the record establishing that a judgment or final order was ever filed in the City Court Clerk's Office. Thus, plaintiff's appeal to this Court must be dismissed (*see generally* CPLR 5703 [b]; *Kuhn v Kuhn*, 129 AD2d 967).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1221

KA 10-00590

PRESENT: SCUDDER, P.J., CARNI, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUDD A. FAREWELL, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SETH AZRIA, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered December 7, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (§ 140.20). Defendant's contention in each appeal that County Court abused its discretion in denying his request for youthful offender status is encompassed by his valid waiver of the right to appeal (*see People v Elshabazz*, 81 AD3d 1429, *lv denied* 16 NY3d 858; *People v Capps*, 63 AD3d 1632, *lv denied* 13 NY3d 795). Defendant's challenge to the severity of the sentence in each appeal is also encompassed by that valid waiver (*see People v Lopez*, 6 NY3d 248, 255-256; *People v VanDeViver*, 56 AD3d 1118, 1119, *lv denied* 11 NY3d 931, 12 NY3d 788).

Defendant further contends in each appeal that the court should have conducted a hearing before ordering him to pay restitution. Inasmuch as defendant expressly waived his right to a hearing and agreed to the amount of restitution at sentencing, that contention is without merit (*see People v McElrath*, 241 AD2d 932).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1222

KA 10-00648

PRESENT: SCUDDER, P.J., CARNI, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUDD A. FAREWELL, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SETH AZRIA, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered December 7, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Same Memorandum as in *People v Farewell* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2011]).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1260

KA 10-00723

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NOAH SCHAPIRO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 22, 2010. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the second degree and scheme to defraud in the first degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1261

KA 11-01114

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NOAH SCHAPIRO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 22, 2010. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1262

KA 10-00053

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES PERRY, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 17, 2009. The judgment convicted defendant, upon a jury verdict, of petit larceny and criminal contempt in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of petit larceny (Penal Law § 155.25) and criminal contempt in the second degree (§ 215.50 [3]), as lesser included offenses of the two crimes charged in the indictment. Contrary to defendant's contention, the imposition of concurrent sentences was not required pursuant to Penal Law § 70.25 (2). Although the underlying acts of theft and criminal contempt "took place over a continuous course of activity, they constituted separate and distinct acts, and [neither] of the completed offenses was a material element of [the other]" (*People v Boyce*, 133 AD2d 164; *see People v Bailey*, 17 AD3d 1022, *lv denied* 5 NY3d 803; *see generally People v Laureano*, 87 NY2d 640, 643).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1263

KA 08-01671

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT MURTHA, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered February 26, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree, assault in the second degree (two counts), endangering the welfare of a child (three counts), attempted assault in the first degree, attempted assault in the second degree, criminal contempt in the first degree, criminal possession of a weapon in the third degree, and leaving the scene of an incident without reporting.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1265

KA 10-01411

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMIE L. CRAWFORD, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered April 12, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1266

KA 11-00483

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON SAVERY, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered February 15, 2011. Defendant was resentenced upon his conviction of burglary in the second degree.

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

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), and he appeals from the resentence on that conviction. County Court (Corning, J.) sentenced defendant to various concurrent and consecutive terms of imprisonment, but it failed to impose a period of postrelease supervision with respect to count 15, convicting defendant of burglary in the second degree, as required by Penal Law § 70.45 (1). Pursuant to Correction Law § 601-d, County Court (Fandrich, A.J.) resentenced defendant to add the requisite period of postrelease supervision.

Contrary to defendant's contention, the resentence does not violate the Double Jeopardy Clause of the U.S. Constitution (*see People v Lingle*, 16 NY3d 621, 630-631; *cf. People v Williams*, 14 NY3d 198, 217, *cert denied* ___ US ___, 131 S Ct 125). Contrary to defendant's further contentions, the court did not lose jurisdiction to resentence him pursuant to CPL 380.80 (*see Williams*, 14 NY3d at 213), and the failure to comply with the time limits set forth in Correction Law § 601-d (4) (c) or (d) does not require reversal (*see People v Thomas*, 68 AD3d 514, 515). " 'New York courts have the inherent authority to correct illegal sentences' . . ., regardless of the time limits set forth in [that statute]" (*People v Becker*, 72 AD3d 1290, 1291, *lv denied* 15 NY3d 747).

At the resentencing hearing, the court added a five-year period of postrelease supervision to count 15, but it stated that "[a]ll

other terms and conditions of [defendant's] sentenc[e] as imposed by the initial sentencing [c]ourt [would] remain the same." Defendant contends that, because the court did not specifically direct that the sentence on count 15 be served consecutively to the sentences imposed on counts 1 through 12, the sentence on count 15 must run concurrently with those sentences. We reject that contention. The original sentence imposed on count 15 was to run consecutively to the sentences imposed on counts 1 through 12. A court resentencing a defendant pursuant to Correction Law § 601-d is not "supposed to do anything at resentencing other than correct the discrete error prompting the resentencing in the first place" (*Lingle*, 16 NY3d at 634). The court therefore was bound to reimpose the original sentence, aside from the addition of any required period of postrelease supervision. By stating that all other terms and conditions of the original sentence would remain the same, the court effectively ordered the sentence imposed on count 15 to run consecutively to the sentences imposed on counts 1 through 12, as directed in the original sentence.

Contrary to defendant's remaining contention, the resentence is not illegal, and it is not unduly harsh or severe. We note, however, that the certificate of conviction fails to state that defendant was sentenced as a second felony offender and incorrectly reflects the nature of the consecutive sentencing. The sentences originally imposed on counts 1 through 6 were to run concurrently to each other; the sentences originally imposed on counts 7 through 12 were to run concurrently to each other and consecutively to the sentences imposed on counts 1 through 6; and the sentences originally imposed on counts 15 and 16 were to run concurrently to each other and consecutively to the other sentences. The certificate of conviction, however, states that the sentences imposed on only counts 1, 7 and 15 are to run consecutively to each other. The certificate of conviction must therefore be amended accordingly (*see e.g. People v Carrasquillo*, 85 AD3d 1618, 1620, *lv denied* 17 NY3d 814; *People v Afrika*, 79 AD3d 1678, 1680, *lv denied* 17 NY3d 791).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1267

KA 09-01350

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES ROGERS, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Niagara County Court (Sara S. Sperrazza, J.), rendered March 18, 2009. Defendant was resentenced upon his conviction of robbery in the first degree.

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

Memorandum: Defendant appeals from a resentence imposed upon remittal of this matter to County Court. On defendant's first appeal in this matter, we reversed the judgment convicting him after a jury trial of murder in the second degree (Penal Law § 125.25 [3]) and robbery in the first degree (§ 160.15 [1]), and we granted him a new trial on the counts of the indictment charging him with those crimes (*People v Rogers*, 16 AD3d 1101). On appeal from the judgment convicting defendant of robbery in the first degree following the retrial, we vacated the sentence on the ground that it was presumptively vindictive, and we remitted the matter to County Court for resentencing (*People v Rogers*, 56 AD3d 1173, *lv denied* 12 NY3d 787). Upon remittal, the court resentenced defendant to a determinate term of imprisonment of 20 years and to five years of postrelease supervision.

Contrary to defendant's contention, the resentence is not vindictive. As we stated in our decision with respect to defendant's second appeal in this matter, " '[t]he threshold issue in evaluating whether a resentence is vindictive is whether the resentence is more severe than that originally imposed' " (*id.* at 1174; *see generally People v Young*, 94 NY2d 171, 176-177, *rearg denied* 94 NY2d 876; *People v Van Pelt*, 76 NY2d 156, 159-161). Here, defendant's resentence is identical to the sentence originally imposed, and thus the presumption of vindictiveness does not arise.

We reject the further contention of defendant that the court erred in resentencing him without ordering an updated presentence report. "[T]he decision whether to obtain an updated [presentence] report at resentencing is a matter resting in the sound discretion of the sentencing [court]" (*People v Kuey*, 83 NY2d 278, 282). Here, the court did not abuse its discretion in failing to order an updated report inasmuch as defendant had been incarcerated since the original sentence was imposed (*see People v Brinson*, 298 AD2d 870, *lv denied* 99 NY2d 533), and defendant presented favorable information concerning his behavior while incarcerated. Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1268

KA 07-02652

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUCIOUS PETERS, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered January 10, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3] [felony murder]). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see People v Roberts*, 64 AD3d 796, 797; *see generally People v Bleakley*, 69 NY2d 490, 495). Further, "inasmuch as our independent review of the evidence reveals that a different verdict would have been unreasonable," we conclude that the verdict is not against the weight of the evidence (*People v Johnson*, 24 AD3d 803, 804; *see generally Bleakley*, 69 NY2d at 495). We reject defendant's contention that County Court erred in refusing to suppress the statements that he made to police investigators. "The deception used by the police was not so fundamentally unfair as to deny [defendant] due process . . ., nor did it create a substantial risk that defendant might falsely incriminate himself" (*People v Kithcart*, 85 AD3d 1558, 1559, *lv denied* 17 NY3d 818 [internal quotation marks omitted]). By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his further contention that such ruling constituted an abuse of discretion (*see People v Walker*, 66 AD3d 1331, *lv denied* 13 NY3d 942), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Insofar as the contention of defendant that he was denied effective assistance of counsel involves matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL article

440 (*see People v McKnight*, 55 AD3d 1315, 1317, *lv denied* 11 NY3d 927). To the extent that defendant's contention is properly before us, we conclude that it is lacking in merit (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1269

KA 04-02509

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES L. ADAMS, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KELLEY PROVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered September 8, 2004. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). Defendant contends that Supreme Court erred in refusing to suppress his statements to the police as the fruit of an allegedly unlawful arrest. Even assuming, arguendo, that defendant preserved that contention for our review by moving to suppress the statements on that ground, we conclude that he abandoned his contention by failing to seek a ruling on that part of his omnibus motion and by failing to object to the admission in evidence of his statements at trial on that ground (*see People v Anderson*, 52 AD3d 1320, *lv denied* 11 NY3d 733; *see also People v Bigelow*, 68 AD3d 1127, *lv denied* 14 NY3d 797). We reject the further contention of defendant that the court erred in refusing to suppress his written statement on the ground that it was involuntarily made. The 17-year-old defendant was afforded, at his request, several opportunities to speak with his mother prior to making the statement, and "[t]he fact that defendant[’s mother] gave testimony [at the suppression hearing] that conflicted with that of the police officers presented an issue of credibility for the court, which had the opportunity to observe and assess the witnesses" (*People v Towndrow*, 236 AD2d 821, 822, *lv denied* 89 NY2d 1016; *see generally People v Lewis*, 277 AD2d 1010, 1011, *lv denied* 96 NY2d 736).

We reject defendant's contention that the court abused its discretion in allowing the People to present the limited testimony of a witness who observed defendant the morning after the murder (*see generally People v Odom*, 53 AD3d 1084, 1087, *lv denied* 11 NY3d 792). Further, defendant's contention with respect to the allegedly improper comment of the prosecutor on summation concerning that testimony is not preserved for our review because defendant failed either to object to the court's curative instruction following that comment or to request a mistrial, and thus "the curative instruction[] must be deemed to have corrected [any] error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his further contention that the court erred in failing to charge the jury on the defense of temporary lawful possession of a weapon (*see People v Lawrence*, 28 AD3d 1123, *lv denied* 6 NY3d 896). Contrary to defendant's contention, he was not denied effective assistance of counsel based on defense counsel's failure to request that charge, inasmuch as the conduct of defendant was inconsistent with his claim of temporary lawful possession (*see People v Banks*, 76 NY2d 799, 801; *People v Smith*, 63 AD3d 1655, *lv denied* 13 NY3d 839; *see generally People v Caban*, 5 NY3d 143, 152).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1271

CAF 10-01733

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF DARIUS B., DILLON B.,
AND CHERISH B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT;

THERESA B., RESPONDENT-APPELLANT.

BERNADETTE M. HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR DARIUS B., DILLON B., AND CHERISH B.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 9, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred custody and guardianship of the subject children to petitioner.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to the three children who are the subject of this proceeding on the ground of mental illness. Contrary to the contention of the mother, we conclude that petitioner met its burden of demonstrating by clear and convincing evidence that she is "presently and for the foreseeable future unable, by reason of mental illness . . ., to provide proper and adequate care for [the] child[ren]" (Social Services Law § 384-b [4] [c]; *see* § 384-b [6] [a]; *Matter of Vincent E.D.G.*, 81 AD3d 1285, *lv denied* 17 NY3d 703). " 'The clear and convincing evidence standard is satisfied when the party bearing the burden of proof has established that it is highly probable that what [it] has claimed is actually what happened' " (*Matter of Cella* [appeal No. 1], 261 AD2d 870, *lv denied* 93 NY2d 814). "Clear and convincing evidence is 'a higher, more demanding standard' than the preponderance standard . . ., and it is evidence 'that is neither equivocal nor open to opposing presumptions' " (*Matter of Gail R.*, 67 AD3d 808, 811-812). Although the psychiatrist who testified on behalf of petitioner had, at one point, recommended that the mother be given one last chance to parent the children, that recommendation was

based on the assumption that the mother's statements to the psychiatrist had been reliable. Once the psychiatrist learned of various misstatements made by the mother, his recommendation changed. Contrary to the contention of the mother, we conclude that the psychiatrist's ultimate recommendation that her parental rights with respect to the subject children be terminated was not equivocal.

We further conclude that Family Court was entitled to draw an adverse inference from the mother's failure to testify on her own behalf, and the mother failed to present any contradictory expert evidence (*see Matter of Darren HH.*, 72 AD3d 1147, 1149, *lv denied* 15 NY3d 703; *Matter of Jenna KK.*, 50 AD3d 1216, 1217, *lv denied* 11 NY3d 703). Generally, "the determination of [the c]ourt should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record" (*Matter of Imelda R.*, 32 AD3d 519, 520). Here, there is support in the record for the court's determination, and we therefore will not disturb it (*cf. Matter of Dochingozi B.*, 57 NY2d 641, 642-643).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1272

CAF 11-00221

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF ERIC DIEDRICH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHELLE VANDERMALLIE, RESPONDENT-RESPONDENT.

CONVERSE & MORELL, LLP, PALMYRA (BRUCE A. ROSEKRANS OF COUNSEL), FOR PETITIONER-APPELLANT.

ELIZABETH A. SAMMONS, WILLIAMSON, FOR RESPONDENT-RESPONDENT.

DENISE R. MUNSON, ATTORNEY FOR THE CHILD, WALWORTH, FOR AMBER L.V.

Appeal from an order of the Family Court, Wayne County (Maurice E. Strobridge, J.H.O.), entered December 22, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Wayne County, for further proceedings in accordance with the following Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order dismissing his petition seeking visitation with the parties' child. We agree with the father that Family Court erred in granting the motion of respondent mother to dismiss the petition (*see generally Matter of Crowell v Livziey*, 20 AD3d 923). "It is well settled that visitation with a noncustodial parent is generally presumed to be in a child's best interests" (*Matter of Mark C. v Patricia B.*, 41 AD3d 1317, 1318; *see generally Weiss v Weiss*, 52 NY2d 170, 175), and denial of such visitation " 'is a drastic remedy to be employed only where there are compelling reasons for doing so and substantial evidence that visitation will be harmful to the child[ ]'s welfare' " (*Matter of Chapman v Tucker*, 74 AD3d 1905, 1906). Here, we conclude that "the court abused its discretion by denying [the father] visitation with [the] child[ ] because no evidence was presented to support a conclusion that visitation with [the father] is detrimental to the child[ ]'s welfare" (*Vasile v Vasile*, 116 AD2d 1021, 1021). We therefore reverse the order, reinstate the petition and remit the matter to Family Court for

further proceedings on the petition.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1273

CAF 10-01890

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF CLEOPHUS M.B.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER;

MEMORANDUM AND ORDER

ERIKA B., RESPONDENT,
AND TORRENCE B., RESPONDENT-RESPONDENT.

JOHN G. KOSLOSKY, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA, APPELLANT PRO SE.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered August 31, 2010 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 affirmed without costs.

Memorandum: As limited by his brief, the Attorney for the Child appeals from that part of an order entered following a fact-finding hearing that dismissed the petition insofar as it alleged that the child who is the subject of this proceeding was derivatively neglected by respondent father. We affirm. Although Family Court Act § 1046 (a) (i) permits evidence of the father's neglect of siblings of the child to be considered in determining whether the child was neglected, "the statute does not mandate a finding of derivative neglect" (*Matter of Jocelyne J.*, 8 AD3d 978, 979), and "such evidence typically may not serve as the sole basis of a finding of neglect" (*Matter of Evelyn B.*, 30 AD3d 913, 914, *lv denied* 7 NY3d 713). Family Court properly concluded under the circumstances of this case that the evidence was insufficient to sustain a finding of derivative neglect (*see Matter of Ronald M.*, 254 AD2d 838, 839).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1277

CA 11-01351

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

A.M. KAWSKI, ON BEHALF OF HERSELF AND ALL
OTHER EMPLOYEES SIMILARLY SITUATED,
PLAINTIFF-APPELLANT,

V ORDER

JOHNSON & JOHNSON AND ORTHO-CLINICAL
DIAGNOSTICS, INC., DEFENDANTS-RESPONDENTS.

THOMAS & SOLOMON LLP, ROCHESTER (J. NELSON THOMAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PATTERSON BELKNAP WEBB & TYLER LLP, NEW YORK CITY (ELLEN M. MARTIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), dated September 9, 2010 in a breach of contract action. The order granted the motion of defendants to dismiss and dismissed the amended complaint.

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: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1278

CA 09-02578

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

ALBERT ORGANEK, AS ADMINISTRATOR OF THE ESTATE
OF MICHAEL ORGANEK, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO HARRIS, DEFENDANT-APPELLANT.

ANTONIO HARRIS, DEFENDANT-APPELLANT PRO SE.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 29, 2009. The order and judgment, insofar as appealed from, granted that part of plaintiff's amended motion seeking partial summary judgment on liability and awarded plaintiff $748,000 in damages following an inquest.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, that part of plaintiff's amended motion seeking partial summary judgment on liability is denied, the award of damages is vacated and defendant is granted 20 days after service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Plaintiff, as administrator of the estate of his son (decedent), commenced this action seeking damages for decedent's wrongful death and conscious pain and suffering. Defendant was convicted of two counts of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) in connection with decedent's death. Plaintiff moved for partial summary judgment on liability, and defendant cross-moved for summary judgment dismissing the complaint. Before Supreme Court ruled on the motion or the cross motion, plaintiff sought to serve an amended complaint, which defendant rejected on the ground that the time period for amending the complaint without leave of court had expired. Plaintiff thereafter moved simultaneously for leave to amend the complaint and for partial summary judgment on liability. The court granted the amended motion and denied the cross motion and, following an inquest on damages, awarded plaintiff $748,000.

Contrary to plaintiff's contention, the order granting plaintiff's amended motion for leave to amend the complaint and

partial summary judgment on liability is brought up for review on defendant's appeal from the order and judgment awarding damages (*see* CPLR 5501 [a] [1]; *Stride Contr. Corp. v Board of Contract & Supply of City of Yonkers*, 181 AD2d 876, 877). Defendant does not contend on appeal that the court erred in granting that part of plaintiff's amended motion seeking leave to amend the complaint, and thus he is deemed to have abandoned any such contention (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We agree with defendant, however, that the court erred in granting that part of the amended motion seeking partial summary judgment on liability. "It was premature . . . to grant plaintiff summary judgment at the same time that he was allowed to amend his complaint [inasmuch as] defendant had not yet had an opportunity to serve an answer to the amended complaint and, thus, issue had not been joined" (*Greene v Hayes*, 30 AD3d 808, 810; *see Gold Medal Packing v Rubin*, 6 AD3d 1084). We therefore reverse the order and judgment insofar as appealed from, deny that part of plaintiff's amended motion for partial summary judgment on liability and vacate the award of damages, and we grant defendant 20 days from service of the order of this Court to serve and file an answer.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1279

CA 11-01339

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

PARTNERS TRUST BANK, FORMERLY KNOWN AS SBU BANK, FORMERLY KNOWN AS SAVINGS BANK OF UTICA, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 107502.)
(APPEAL NO. 1.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (KEVIN G. ROE OF COUNSEL), AND SIDNEY DEVORSETZ, PLLC, FOR CLAIMANT-RESPONDENT.

Appeal from a decision of the Court of Claims (Diane L. Fitzpatrick, J.), entered June 8, 2010. The decision awarded claimant money damages after a nonjury trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Kuhn v Kuhn*, 129 AD2d 967).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1280

CA 11-01349

PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ.

PARTNERS TRUST BANK, FORMERLY KNOWN AS SBU BANK, FORMERLY KNOWN AS SAVINGS BANK OF UTICA, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 107502.)
(APPEAL NO. 2.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (KEVIN G. ROE OF COUNSEL), AND SIDNEY DEVORSETZ, PLLC, FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered September 7, 2010. The judgment awarded claimant money damages after a nonjury trial.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1282

KA 08-01438

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SEMRAU L. HARRIS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 20, 2008. 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1283

KA 11-00014

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES WILLIAMS, ALSO KNOWN AS CASH,
DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, 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 November 18, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that the indictment should be dismissed because he appeared before the grand jury in shackles and handcuffs. Although that contention survives the guilty plea (*see People v Crumpler*, 70 AD3d 1396, *lv denied* 14 NY3d 839; *People v Gilmore*, 12 AD3d 1155, 1155-1156), it "is not preserved for our review because defendant did not object to appearing before the grand jury in that manner or request cautionary instructions with respect to that appearance" (*People v Abron*, 37 AD3d 1163, *lv denied* 8 NY3d 980; *see People v Robinson*, 49 AD3d 1269, 1270, *lv denied* 10 NY3d 869; *see generally People v Johnston*, 43 AD3d 1273, 1274, *lv denied* 9 NY3d 1007). Further, defendant abandoned that contention by pleading guilty before County Court decided that part of his motion seeking to dismiss the indictment on the ground that he appeared before the grand jury in shackles and handcuffs (*see People v Barker* [appeal No. 1], 254 AD2d 730, *lv denied* 93 NY2d 870; *see generally People v Fortin*, 289 AD2d 590, 591, *lv denied* 97 NY2d 754). By pleading guilty, defendant forfeited his further contention that he was denied his right to testify before the grand jury based on the prosecutor's refusal to provide him with notice of all charges the grand jury would consider (*see People v Gray*, 62 AD3d 1256; *People v Hoeft*, 42 AD3d 968, 969, *lv denied* 9 NY3d 962; *People v Winchester*, 38 AD3d 1336, 1337, *lv denied*

9 NY3d 853). In any event, that contention is without merit.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1284

KA 08-02025

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT RICHARDSON, ALSO KNOWN AS HANIF RICHARDSON,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 7, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and assault in the first degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1285

KA 08-01133

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDUARDO BARROT, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered March 27, 2008. 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: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1287

KA 10-00522

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL VERBITSKY, DEFENDANT-APPELLANT.

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

JOHN H. CRANDALL, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered August 4, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted 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 a plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We reject defendant's contention that County Court erred in imposing an enhanced term of incarceration based on postplea acts committed by defendant. "[T]o satisfy due process, a sentencing court must, prior to imposing the prison alternative pursuant to a plea agreement, conduct an inquiry sufficient to conclude that a violation of the plea agreement occurred" (*People v Valencia*, 3 NY3d 714, 715; *see People v Outley*, 80 NY2d 702, 713), and the court made the requisite inquiry here (*see Valencia*, 3 NY3d at 715; *People v McGrath*, 67 AD3d 1475, 1476, *lv denied* 14 NY3d 803). We reject defendant's further contention that the sentence is unduly harsh or severe. Finally, defendant failed to preserve for our review his contention that the sentence imposed constituted cruel and unusual punishment (*see People v Rogers*, 63 AD3d 1631, *lv denied* 13 NY3d 745, 749; *People v Clark*, 61 AD3d 1426, 1427, *lv denied* 12 NY3d 913) and, in any event, that contention lacks merit (*see People v Holmquist*, 5 AD3d 1041, *lv denied* 2 NY3d 800).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1288

KA 11-00710

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY JONES, DEFENDANT-APPELLANT.

DANIEL P. GRASSO, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 7, 2011. The judgment convicted defendant, upon a nonjury verdict, of robbery in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]). On a prior appeal by the People, we reversed the order that, inter alia, granted defendant's motion to set aside the verdict pursuant to CPL 330.30 (1), and we reinstated the verdict and remitted the matter to Supreme Court for sentencing with respect to defendant and his codefendant, Jonathan Benton (*People v Benton*, 78 AD3d 1545, *lv denied* 16 NY3d 828). As noted in our prior reversal, defendant's contention that the People committed a *Brady* violation by failing to disclose a report containing the results of DNA analysis of a broken beer bottle allegedly used in the robbery (hereafter, DNA report) is unpreserved for our review inasmuch as defendant did not "object[] to the lack of disclosure or otherwise alert[] the court to the basis for reversal set forth in the CPL 330.30 motions" at the time of trial (*Benton*, 78 AD3d at 1546; *see People v Caswell*, 56 AD3d 1300, 1303, *lv denied* 11 NY3d 923, 12 NY3d 781, *cert denied* ___ US ___, 129 S Ct 2775; *People v Thomas*, 8 AD3d 303, *lv denied* 3 NY3d 671, 682). Defendant again raises that contention on this appeal, despite the lack of preservation, and we conclude in any event that his contention is without merit. As we noted on the appeal of the codefendant, the DNA report was not exculpatory in nature (*People v Benton*, 87 AD3d 1304), and we thus conclude that it did not constitute *Brady* material (*see People v Zaker*, 305 AD2d 978, *lv denied* 100 NY2d 601, 2 NY3d 809; *People v*

Martinez, 298 AD2d 897, 898, *lv denied* 98 NY2d 769, *cert denied* 538 US 963, *reh denied* 539 US 911). Defendant also failed to preserve for our review his contention that the prosecutor violated his right to discovery pursuant to CPL 240.20 inasmuch as he did not object to the prosecutor's failure to disclose the DNA report when defendant was made aware of its existence during the trial (*see People v Delatorres*, 34 AD3d 1343, 1344, *lv denied* 8 NY3d 921). In any event, reversal based on that violation would not be required inasmuch as "defendant failed to establish that he was 'substantially prejudice[d]' " by the belated disclosure of the DNA report (*id.*; *see generally People v Davis*, 52 AD3d 1205, 1206-1207).

Finally, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1289

KA 08-00652

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHASE SINCLAIR, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered March 14, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that he was denied effective assistance of counsel due to the failure of defense counsel to request the form jury instruction regarding the voluntariness of statements (*see* CJI2d[NY] Statements—Expanded Charge on Traditional Voluntariness). We reject that contention. Upon our review of the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, we conclude that defense counsel afforded defendant "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). The single error alleged by defendant was not "sufficiently egregious and prejudicial as to compromise . . . [his] right to a fair trial" (*People v Caban*, 5 NY3d 143, 152), and there is no "reasonable likelihood that the [alleged] error, standing alone, changed the outcome of the case" (*People v Douglas*, 296 AD2d 656, 657, *lv denied* 99 NY2d 535). Indeed, we conclude that defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcoming[]" (*People v Benevento*, 91 NY2d 708, 712, quoting *People v Rivera*, 71 NY2d 705, 709). In light of the evidence presented at trial, defense counsel reasonably could have decided that the expanded charge on the voluntariness of defendant's confession would be futile or even counterproductive, and instead reasonably could have decided that a more successful strategy was likely to be attacking defendant's

confession on the ground that it was not sufficiently corroborated (*see* CJI2d[NY] Corroboration of Statements; *People v Parrotte*, 34 AD3d 921, 922).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1290

KA 09-02656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS MILLS, ALSO KNOWN AS DENNIS J. MILLS,
DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 2, 2009. The judgment convicted defendant, upon his plea of guilty, of misdemeanor driving while intoxicated, aggravated unlicensed operation of a motor vehicle in the first degree and driving while ability impaired.

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, inter alia, aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a]) and driving while intoxicated (§ 1192 [3]), defendant contends that County Court erred in imposing an enhanced sentence based upon his arrest for a new offense following the entry of his plea and prior to sentencing. By failing to object to the enhanced sentence or to move to withdraw the plea or to vacate the judgment of conviction, however, defendant failed to preserve that contention for our review (*see People v Sprague*, 82 AD3d 1649, *lv denied* 17 NY3d 801; *People v Magliocco*, 78 AD3d 1648, *lv denied* 16 NY3d 798). In any event, because defendant did not deny that he committed the new offense or otherwise challenge the validity of his postplea arrest, the court was not obligated to conduct an inquiry to determine whether there was a lawful basis for the new arrest before imposing an enhanced sentence (*see People v Hendrix*, 62 AD3d 1261, *lv denied* 12 NY3d 925; *People v Huggins*, 45 AD3d 1380, *lv denied* 9 NY3d 1006; *see generally People v Outley*, 80 NY2d 702, 713).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1294

CA 11-01374

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

RAY ROBINSON, INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF RAYSHAWN ROBINSON,
PLAINTIFF-APPELLANT,

V ORDER

RODNEY JOHNSON, JR., DEFENDANT-RESPONDENT.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (ANDREW J. CONNELLY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THOMAS P. DURKIN, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered October 8, 2010 in a personal injury action. The order granted defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1298

CA 11-00926

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

LMIII REALTY, LLC, EDWARD JOY COMPANY, AND
JOY PROCESS MECHANICAL SYSTEMS,
PLAINTIFFS-RESPONDENTS,

V ORDER

GEMINI INSURANCE COMPANY, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

COUGHLIN DUFFY LLP, NEW YORK CITY (JUSTIN N. KINNEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (TIMOTHY J. PERRY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 26, 2010. The order denied the motion of defendant Gemini Insurance Company to dismiss and for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1299

CA 11-00928

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

LMIII REALTY, LLC, EDWARD JOY COMPANY, AND
JOY PROCESS MECHANICAL SYSTEMS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GEMINI INSURANCE COMPANY, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

COUGHLIN DUFFY LLP, NEW YORK CITY (JUSTIN N. KINNEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (TIMOTHY J. PERRY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered February 10, 2011. The judgment granted the motion of plaintiffs for leave to reargue and, upon reargument, granted summary judgment to plaintiffs and declared that defendant Gemini Insurance Company is obligated to defend and indemnify plaintiff LMIII Realty, LLC as an additional insured in the underlying personal injury action.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying summary judgment to plaintiffs in part, vacating the declaration and granting judgment in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that plaintiff LMIII Realty, LLC is an additional insured under the policy issued by defendant Gemini Insurance Company,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking a declaration that Gemini Insurance Company (defendant) is obligated to defend and indemnify plaintiff LMIII Realty, LLC (LMIII) as an additional insured in the underlying personal injury action. Defendant made a pre-answer motion to dismiss the complaint and, in the alternative, sought summary judgment declaring that it has no obligation to defend or indemnify plaintiffs because they do not qualify as additional insureds under the policy. Plaintiffs opposed the motion and in addition sought a declaration that plaintiffs

qualify as additional insureds under the policy. Supreme Court denied defendant's motion. Plaintiffs subsequently moved for leave to reargue defendant's motion and sought summary judgment declaring that they are entitled to coverage from defendant as additional insureds. The court granted plaintiffs' motion for leave to reargue on the ground that plaintiffs established that the court had "overlooked controlling law on this issue" and, upon reargument, searched the record pursuant to CPLR 3212 (b) notwithstanding the absence of a cross motion by plaintiffs that preceded their motion for leave to reargue defendant's motion. The court granted summary judgment to plaintiffs, i.e., relief "predicated upon a motion for the same relief" sought by defendant in its motion, by declaring that defendant is obligated to defend and indemnify LMIII as an additional insured in the underlying action.

In the underlying action, a roofer employed by defendant Shaffer Building Services, Inc. (Shaffer) seeks damages for injuries he sustained during the course of his employment. LMIII hired Shaffer to replace a roof on its property, and Shaffer was insured under a commercial general liability policy issued by defendant. The policy's additional insured endorsement provided that a third party may constitute an additional insured "when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy."

We agree with defendant that, contrary to the court's determination, the endorsement is not ambiguous on the issue whether an agreement to add an additional insured was required to be in writing. The term "in writing" refers to the entire phrase "in a contract or agreement," not merely to the phrase "in a contract" (*see Erin Constr. & Dev. Co., Inc. v Gulf Ins. Co.*, 2008 NY Slip Op 32046[U]; *see also Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 1477, *lv dismissed in part and denied in part* 17 NY3d 843). We reject defendant's contention, however, that there was no written agreement in this case. Indeed, the purchase order constituted a written agreement obligating Shaffer to add LMIII as an additional insured to the policy (*see Timmons*, 83 AD3d at 1477; *see generally BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 712). The purchase order was an enforceable agreement despite the fact that it was unsigned because the evidence in the record establishes that the parties intended to be bound by it (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369, *rearg denied* 5 NY3d 746; *Kay-Bee Toys Corp. v Winston Sports Corp.*, 214 AD2d 457, 458, *lv denied* 86 NY2d 705).

Nevertheless, we conclude that defendant is correct that the court erred in granting summary judgment to plaintiffs on all issues and in issuing the subject declaration, i.e., that defendant is obligated to defend and indemnify LMIII as an additional insured in the underlying action. Inasmuch as the record establishes that the parties deliberately charted a summary judgment course, the court properly granted summary judgment to plaintiffs on the issue of LMIII's general status as an additional insured under the policy (*see*

Nowacki v Becker, 71 AD3d 1496, 1497; *see generally Mihlovan v Grozavu*, 72 NY2d 506, 508). The court erred, however, in declaring at this stage of the litigation that defendant is obligated to defend and indemnify LMIII, before defendant answered the complaint (*see City of Rochester v Chiarella*, 65 NY2d 92, 101-102). We therefore modify the judgment accordingly.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1301

CA 11-01373

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

KEI SHING YEUNG, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA A. BENNICE, DEFENDANT-RESPONDENT,
KEI PING YEUNG AND KEI HING YEUNG,
DEFENDANTS-APPELLANTS.

ADAMS, HANSON, FINDER, HUGHES, REGO, KAPLAN & FISHBEIN, WILLIAMSVILLE (NICOLE B. PALMERTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN FEROLETO - ATTORNEYS AT LAW, BUFFALO (PAUL BECKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANN M. ALEXANDER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered March 9, 2011. The order, insofar as appealed from, denied the motion of defendants Kei Ping Yeung and Kei Hing Yeung for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle in which he was a passenger collided at an intersection with a vehicle operated by defendant Patricia A. Bennice. The vehicle in which plaintiff was traveling was owned by Kei Hing Yeung and operated by Kei Ping Yeung (collectively, Yeung defendants). Supreme Court properly denied the Yeung defendants' motion for summary judgment dismissing the complaint and any cross claims against them. In support of their motion, the Yeung defendants submitted a police report and deposition transcripts establishing that the collision occurred when Bennice disregarded a red light and struck the Yeung vehicle as it entered the intersection with the green light. The Yeung defendants, however, also submitted the deposition testimony of Kei Ping Yeung, who testified that his ability to see vehicles approaching the intersection from Bennice's direction was impaired both by a building situated on one of the corners of the intersection and by the fact that the road on which Bennice was driving proceeded uphill toward the intersection. Generally, a driver "who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require

them to yield" (*Namisnak v Martin*, 244 AD2d 258, 260; *see Zadins v Pommerville*, 300 AD2d 1111, 1112; *Barile v Carroll*, 280 AD2d 988). Nevertheless, "[i]t is well settled that, even where a vehicle enters an intersection with a green light, the driver may nevertheless be found negligent if he or she fails to use 'reasonable care when proceeding into the intersection' " (*Strasburg v Campbell*, 28 AD3d 1131, 1132; *see Dorr v Farnham*, 57 AD3d 1404, 1405-1406). Here, the Yeung defendants failed to establish in support of their motion that Kei Ping Yeung "used the requisite reasonable care when proceeding into the intersection," given his impaired ability to see traffic entering the intersection from the direction in which the other driver approached, and thus summary judgment is inappropriate (*Dorr*, 57 AD3d at 1406 [internal quotation marks omitted]; *see Pabon v Scott*, 77 AD3d 1467, 1468; *Testerman v Zielinski*, 68 AD3d 1751, 1752-1753).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1304

CA 11-00396

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

THOMAS JOHNSON, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

THE STATE INSURANCE FUND,
DEFENDANT-RESPONDENT-APPELLANT.

SLIWA & LANE, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HERZFELD & RUBIN, P.C., NEW YORK CITY (DAVID B. HAMM OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM D. CHRIST OF COUNSEL), FOR NON-PARTY MOVANTS SEVENSON ENVIRONMENTAL SERVICES, INC. AND PHILLIPS LYTLE, LLP.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered April 20, 2010. The order, inter alia, granted the motion of defendant for summary judgment and denied the cross motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation discontinuing appeals signed by the attorneys for the parties on September 13, 2011,

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1305

KA 09-00403

PRESENT: CENTRA, J.P., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD J. WASHINGTON, III, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ROBERT R. REITTINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered December 13, 2006. The appeal was held by this Court by order entered March 25, 2011, decision was reserved and the matter was remitted to Oneida County Court for further proceedings (82 AD3d 1675). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court "to conduct a hearing on defendant's motion" to dismiss the indictment on the ground that the integrity of the grand jury proceedings was impaired pursuant to CPL 210.20 (1) (c) because a specified grand juror was incapable of performing his duties based on bias or prejudice (*People v Washington*, 82 AD3d 1675, 1677; *see* CPL 190.20 [2] [b]). Upon remittal, the court conducted the hearing on defendant's motion. Defendant concedes that the court has now complied with CPL 210.45 in connection with his motion, and we conclude from the hearing transcript that defendant failed to prove "by a preponderance of the evidence every fact essential to support the motion" (CPL 210.45 [7]). Thus, we affirm the judgment.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1306

KA 10-01796

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOANN RUSBY, ALSO KNOWN AS JOANN M. RUSBY, ALSO KNOWN AS JOANN VANWUYCKHUYSE, ALSO KNOWN AS JOANN SPICER, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered October 6, 2009. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree and criminally negligent homicide.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1307

KA 10-01959

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LINDSEY M. FULGE, ALSO KNOWN AS LINDSEY FULGE,
DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered June 24, 2010. The judgment convicted defendant, upon her plea of guilty, of burglary in the third degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1308

KA 11-00593

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA D. MAHLEY, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered December 20, 2010. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree and sexual abuse in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection issued in favor of the victim of sexual abuse in the second degree to expire on November 22, 2016 and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the second degree (Penal Law § 130.30 [1]) and sexual abuse in the second degree (§ 130.60 [2]). Defendant failed to preserve for our review his contention that County Court relied on inaccurate information in sentencing him with respect to the rape conviction (*see People v Lord*, 59 AD3d 1010, *lv denied* 12 NY3d 855), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The sentence imposed upon the rape conviction is not unduly harsh or severe.

Defendant further contends that the court erred in fixing the duration of the orders of protection. Although defendant also failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 317-318), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The order of protection issued in favor of the victim of rape does not exceed the maximum legal duration, but the order of protection issued in favor of the victim of sexual abuse in the second degree exceeds the maximum legal duration. The version of CPL 530.13 (4) (B) in effect at the time the judgment was rendered provided that

the duration of an order of protection entered with respect to a class A misdemeanor conviction shall not exceed "five years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed." Further, "the duration may not be applied to the aggregate sentence but, rather, must be added to the maximum term of the sentence imposed for the count upon which the order of protection was based" (*People v Jackson*, 85 AD3d 1697, 1699, *lv denied* 17 NY3d 817 [internal quotation marks omitted]). Thus, the order of protection at issue may not exceed five years from the expiration of the one-year definite sentence imposed upon the conviction of sexual abuse in the second degree (*see* CPL 530.13 [former (4) (B)]). Taking into account the applicable jail time credit, we therefore modify the judgment by amending the order of protection issued in favor of the victim of sexual abuse in the second degree to expire on November 22, 2016.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1311

KA 09-02295

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHANNON DAVIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Erie County Court (Thomas P. Franczyk, J.), rendered October 8, 2009. Defendant was resentenced upon his conviction of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1312

KA 10-01636

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. CARMODY, DEFENDANT-APPELLANT.

O'CONNOR & KRUMAN, P.C., CORTLAND (A.L. BETH O'CONNOR OF COUNSEL), 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 June 10, 2010. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree and 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 him, upon his plea of guilty, of rape in the third degree (Penal Law § 130.25 [2]) and criminal sexual act in the third degree (§ 130.40 [2]). To the extent that defendant's contention that he was denied effective assistance of counsel survives his guilty plea (*see People v Bethune*, 21 AD3d 1316, *lv denied* 6 NY3d 752), that contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404). Defendant received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*id.*). The sentence is not unduly harsh or severe.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1313

KA 07-00049

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFFORD K. PICKETT, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 6, 2006. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Jefferson County Court for further proceedings in accordance with the following Memorandum: On a prior appeal, we affirmed the judgment convicting defendant upon his plea of guilty of manslaughter in the second degree under Penal Law § 125.15 (1) (*People v Pickett*, 49 AD3d 1207, *lv denied* 10 NY3d 963). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise an issue on appeal that may have merit, i.e., that County Court erred in ordering restitution inasmuch as it was not part of the plea bargain (*People v Pickett*, 67 AD3d 1458), and we vacated our prior order. We now consider the appeal de novo.

We agree with defendant that the court erred in enhancing the sentence by imposing restitution inasmuch as restitution was not included in the plea bargain (*see People v Pett*, 74 AD3d 1891; *People v Hunter*, 72 AD3d 1536; *People v Cooke*, 21 AD3d 1339). Although defendant failed to preserve his contention for our review (*see Hunter*, 72 AD3d 1536; *Cooke*, 21 AD3d 1339), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea (*see Pett*, 74 AD3d 1891; *Hunter*, 72 AD3d 1536). In view of our determination, we need not address defendant's remaining

contention.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1314

KA 09-02624

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACQUELINE WORTHY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered December 3, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, following a jury trial, of assault in the first degree (Penal Law § 120.10 [1]). The victim was at a convenience store with a friend when defendant and a passenger drove into the parking lot of the store. When the victim attempted to stop the fight that occurred between her friend and the passenger, defendant ran over the victim with defendant's car, put the car in reverse and ran her over again. Defendant attempted to run over the victim a third time, but two other vehicles blocked defendant's path. The victim sustained a fractured left ankle and a fractured left hip, among other injuries.

Contrary to defendant's contention, we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that County Court erred in allowing a police officer to testify that the victim suffered a serious physical injury, which is a material element of assault in the first degree (*see* Penal Law § 120.10 [1]). We reject that contention because the officer's testimony did not invade "the jury's exclusive province as the ultimate finder of fact" (*People v Bogar*, 84 AD3d 1750, 1750, *lv denied* 17 NY3d 813). Even assuming, arguendo, that the court erred in

allowing that testimony in evidence, we conclude that the error is harmless because the evidence of defendant's guilt was overwhelming and there was no significant probability that she would have been acquitted but for the error (*see id.* at 1751; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1319

CA 10-01954

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

REBECCA OSTERHOUT, PLAINTIFF-APPELLANT,

V ORDER

TAMMY BANKER AND LUCAS SHULLA,
DEFENDANTS-RESPONDENTS.

CHRISTOPHER G. JOHNSON, ROCHESTER (THOMAS J. RZEPKA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON M. K. LEE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered August 5, 2010 in a personal injury action. The order granted the motion of defendants for summary judgment, denied the cross motion of plaintiff for summary judgment and dismissed the complaint.

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: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1320

CA 11-00676

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

PHILIP ARNO AND MARY ARNO,
PLAINTIFFS-RESPONDENTS,

V ORDER

MARIA CIMATO AND CARMELO CIMATO,
DEFENDANTS-APPELLANTS.

HOPKINS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BORINS, HALPERN & PASKOWITZ, BUFFALO (MICHAEL PASKOWITZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Gerald J. Whalen, J.), dated September 23, 2010. The order and judgment awarded plaintiffs money damages after a nonjury trial.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1322

CA 11-00784

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF THE APPLICATION OF MICHAEL ZIOLKOWSKI AND THOMAS BENNETT, PETITIONERS-APPELLANTS,

V ORDER

TOWN BOARD OF TOWN OF GRAND ISLAND, UPSTATE CELLULAR NETWORK, DOING BUSINESS AS VERIZON WIRELESS, RUSSELL COLOSI AND PATRICIA COLOSI, RESPONDENTS-RESPONDENTS.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (GREGG S. MAXWELL OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN BOARD OF TOWN OF GRAND ISLAND.

NIXON PEABODY LLP, BUFFALO (LAURIE S. BLOOM OF COUNSEL), FOR RESPONDENT-RESPONDENT UPSTATE CELLULAR NETWORK, DOING BUSINESS AS VERIZON WIRELESS.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 5, 2011 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition and confirmed the determinations of respondent Town Board of Town of Grand Island.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1323

CA 11-01151

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF LIGHTHOUSE POINTE PROPERTY ASSOCIATES LLC, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, ALEXANDER B. GRANNIS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND DALE A. DESNOYERS, DIRECTOR, DIVISION OF ENVIRONMENTAL REMEDIATION, RESPONDENTS-RESPONDENTS, TOWN OF IRONDEQUOIT AND CITY OF ROCHESTER, INTERESTED OR NECESSARY PARTIES.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 18, 2010 in a proceeding pursuant to CPLR article 78. The amended order, inter alia, denied the application of petitioner for counsel fees.

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

Memorandum: Petitioner appeals from an amended order that denied its application for an award of counsel fees pursuant to the New York State Equal Access to Justice Act ([EAJA] CPLR art. 86) and its motion pursuant to CPLR 2001 to supplement the application with information concerning petitioner's eligibility as a "party" pursuant to the EAJA. Petitioner sought an award of counsel fees with respect to litigation following an administrative determination in which respondent New York State Department of Environmental Conservation denied petitioner's applications for acceptance into the Brownfield Cleanup Program set forth in Environmental Conservation Law article 27, title 14. Petitioner submitted those applications with respect to its proposal to develop contiguous 22-acre and 25.4-acre parcels in the Town of Irondequoit and the City of Rochester, respectively, at a cost that petitioner estimated would range between $150 and $250 million (*Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Envtl. Conservation*, 61 AD3d 88, *revd* 14 NY3d 161).

The EAJA was designed to "improv[e] access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification," and it was intended to be "limited to helping those who need assistance" (Governor's Mem approving L 1989, ch 770, 1989 McKinney's Session Laws of NY, at 2436; *see Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346, 351). We note that the issue whether petitioner's application is consistent with the policy underlying the EAJA is not before us.

On the merits, we affirm. Even assuming, arguendo, that Supreme Court erred in denying petitioner's motion to supplement its application for counsel fees, we conclude that petitioner did not meet its burden of establishing that it is a " '[p]arty' " eligible to receive an award pursuant to the EAJA (CPLR 8602 [d]; *see* CPLR 8602 [b]). In any event, petitioner would not be entitled to such an award inasmuch as respondents' position was "substantially justified" (CPLR 8601 [a]), i.e., it was " 'justified to a degree that could satisfy a reasonable person' " (*New York State Clinical Lab. Assn.*, 85 NY2d at 356, quoting *Pierce v Underwood*, 487 US 552, 565).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1326

TP 11-01443

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF PATRICK L. CAPRI, AS ADMINISTRATOR OF THE ESTATE OF MARY CAPRI, DECEASED, PETITIONER,

V MEMORANDUM AND ORDER

RICHARD F. DAINES, M.D., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, LUCILLE A. SOLDATO, COMMISSIONER, ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, AND ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

KOWALCZYK, DEERY, HILTON & BROADBENT, LLP, UTICA (ROBERT K. HILTON, III, OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT RICHARD F. DAINES, M.D., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH.

JOHN A. HERBOWY, UTICA, FOR RESPONDENTS LUCILLE A. SOLDATO, COMMISSIONER, ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, AND ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES.

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, Oneida County [Anthony F. Shaheen, J.], entered June 6, 2011) to review a determination of respondent Richard F. Daines, M.D., Commissioner, New York State Department of Health. The determination found after a fair hearing that petitioner was currently ineligible for medical assistance benefits.

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

Memorandum: In this CPLR article 78 proceeding, petitioner contends, as administrator of the estate of his mother (decedent), that the determination of Richard F. Daines, M.D., Commissioner, New York State Department of Health (respondent) is not supported by substantial evidence. Respondent upheld the determination of respondents Lucille A. Soldato, Commissioner, Oneida County Department of Social Services, and Oneida County Department of Social Services (hereafter, DSS respondents) that decedent made certain uncompensated transfers prior to her admission in a skilled nursing facility. We

reject petitioner's contention.

"In reviewing a Medicaid eligibility determination made after a fair hearing, 'the court must review the record, as a whole, to determine if the [respondent's] decisions are supported by substantial evidence and are not affected by an error of law' " (*Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 822-823, *lv denied* 13 NY3d 712). Decedent presented evidence at the fair hearing that she and petitioner had a joint checking account and that certain expenditures, primarily for home improvement and repair of petitioner's home, where decedent also lived, were paid from that account. In addition, decedent alleged that cash withdrawals used for food, clothing and medicine were made from the joint account. Respondent determined that the transfers related to petitioner's home were not for the benefit of decedent inasmuch as she did not have an interest in the home. He further determined that the DSS respondents were unable to verify how cash withdrawals were expended. With respect to two transfers from the joint account to decedent's granddaughters, respondent determined that the lack of a history of gift giving, as well as decedent's advanced age and poor health, supported a determination that the transfers were not made "exclusively for a purpose other than to qualify for medical assistance" (Social Services Law § 366 [5] [d] [3] [iii] [B]; *see Matter of Gabrynowicz v New York State Dept. of Health*, 37 AD3d 464, 465-466). We conclude that respondent's determination that the transfers from the joint account were made for less than fair market value is supported by substantial evidence (*see Gabrynowicz*, 37 AD3d at 465; *see generally Barbato*, 65 AD3d at 822-823), i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1327

KA 10-01979

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICHARD A. ORTIZ, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered August 12, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1328

KA 08-00900

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYON BADGER, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 20, 2008. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree and attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of murder in the second degree (Penal Law § 125.25 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), defendant contends that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Addressing first the crime of attempted murder in the second degree, we note that such crime "is committed when, with the intent to cause the death of another person, one engages in conduct which tends to effect commission of that crime . . . Where those elements converge, an attempted murder has occurred, regardless of whether the defendant has killed or even injured his or her intended target" (*People v Fernandez*, 88 NY2d 777, 783; *see* §§ 110.00, 125.25 [1]; *People v Molina*, 79 AD3d 1371, 1375, *lv denied* 16 NY3d 861). It is well established that "[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231, *lv denied* 8 NY3d 919, 926; *see People v Geddes*, 49 AD3d 1255, 1256, *lv denied* 10 NY3d 863). Here, the trial testimony and defendant's post-arrest statement to the police established that, after a physical altercation with a bouncer at a restaurant, defendant retrieved a shotgun from his apartment,

loaded the shotgun, and approached the bouncer outside the restaurant with the shotgun drawn and pointed at the bouncer. Although defendant asserted in his statement that he intended only to injure but not to kill the bouncer, several eyewitnesses testified that defendant approached the bouncer with the shotgun trained on the bouncer, that he cocked the shotgun while standing directly in front of the bouncer, and that he attempted to fire the shotgun at close range. The shotgun misfired, however, and a shell struck a bystander in the arm. The bouncer fled inside the restaurant.

With respect to the crime of murder in the second degree of which defendant was convicted, "[a]lthough a finding that defendant did not intend to kill the victim[] would not have been unreasonable . . ., it cannot be said that County Court, which saw and heard the witnesses and thus was able to assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record, failed to give the evidence the weight it should be accorded" (*People v Simcoe*, 75 AD3d 1107, 1108, *lv denied* 15 NY3d 924 [internal quotation marks omitted]; *see generally Molina*, 79 AD3d at 1375-1376; *People v Wallace*, 8 AD3d 753, 755-756, *lv denied* 3 NY3d 682). The trial testimony established that after the bouncer fled, defendant "turned and shot at the first person that he saw." Specifically, the record reflects that, after the bouncer had retreated into the restaurant, defendant again cocked the shotgun, turned to his left, pointed the shotgun at a bystander and shot him at relatively close range, striking him in the torso. Then, according to one witness, defendant spun around and yelled, "[a]nybody else want to get shot?"

Finally, contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe in light of the circumstances of the crimes and defendant's criminal history, which includes several violent offenses.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1329

KA 08-01384

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRED KING, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., CONFLICT DEFENDERS, WARSAW (ANNA JOST OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered May 6, 2008. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of grand larceny in the fourth degree (Penal Law § 155.30 [4]), defendant contends that the evidence is legally insufficient to establish that he stole the victim's wallet that contained, inter alia, a debit card. We reject that contention. According to the evidence presented at trial, the wallet was stolen from the victim at a convenience store, where she was working as a cashier. There was overwhelming evidence presented at trial that defendant entered the store shortly before the victim discovered that her wallet was missing from her purse, and surveillance videos from inside the store showed defendant walking to the side counter where the purse was located and reaching inside the purse. Although the wallet is not visible from the surveillance videos, we conclude that the evidence, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), provides "a valid line of reasoning and permissible inferences from which a rational jury" could have concluded that defendant took the wallet and thus committed the crime charged (*People v Steinberg*, 79 NY2d 673, 682; *see generally People v Bleakley*, 69 NY2d 490, 495). 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), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant's contention that he was deprived of effective assistance of counsel by defense counsel's failure to call certain

persons as alibi witnesses at trial is based on matters outside the record on appeal, and thus the proper procedural vehicle for raising that contention is by way of a motion pursuant to CPL 440.10 (*see People v Green*, 277 AD2d 970, *lv denied* 96 NY2d 759). Given defendant's lengthy criminal record and his failure to accept responsibility for his criminal conduct, we conclude that the sentence is neither unduly harsh nor severe. Finally, defendant failed to preserve for our review his contention that County Court erred in failing to obtain an updated presentence report before imposing sentence (*see People v Carey*, 86 AD3d 925, *lv denied* 17 NY3d 814; *People v Obbagy*, 56 AD3d 1223, *lv denied* 11 NY3d 928), and in any event that contention is moot inasmuch as defendant has already served his sentence.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1330

KA 10-00977

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUCAS LANGE, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (CHRISTOPHER BOKELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered November 4, 2009. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree, aggravated unlicensed operation of a motor vehicle in the first degree and driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, reckless endangerment in the first degree (Penal Law § 120.25). By pleading guilty, defendant forfeited his challenge to the evidence of his guilt supporting the reckless endangerment charge, i.e., his guilty plea "signal[ed] defendant's 'intention not to litigate the question of his guilt' " with respect to that charge (*People v Taylor*, 65 NY2d 1, 5; *see People v Dewitt*, 295 AD2d 937, 938, *lv denied* 98 NY2d 709, 767). In any event, that challenge "rests on speculation as to what the evidence might have been had there been a trial" (*People v Washington*, 262 AD2d 209, *lv denied* 93 NY2d 1006). The sentence is not unduly harsh or severe.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1332

KA 09-02416

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY M. NEUNER, DEFENDANT-APPELLANT.

LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 7, 2009. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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 driving while intoxicated as a class E felony (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, and he therefore failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665). Contrary to defendant's contention, "[t]he plea allocution does not 'clearly cast[ ] significant doubt upon the defendant's guilt or otherwise call[ ] into question the voluntariness of the plea,' and thus defendant's contention does not fall within the rare case exception to the preservation doctrine" (*People v Loper*, 38 AD3d 1178, 1179, quoting *Lopez*, 71 NY2d at 666; *see People v Farnsworth*, 32 AD3d 1176, *lv denied* 7 NY3d 867).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1333

KA 08-01367

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNIE M. EDGESTON, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered May 8, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant contends that Supreme Court erred in failing to dismiss the indictment based upon a variance in dates between the indictment and the grand jury testimony. That contention arose in the context of defendant's motion to dismiss the indictment based on the legal insufficiency of the evidence before the grand jury, however, and thus is not reviewable on this appeal from the ensuing judgment based upon legally sufficient trial evidence (*see People v Smith*, 4 NY3d 806, 807-808, *affg* 6 AD3d 1188; *see generally* CPL 210.30 [6]; *People v Cobb*, 72 AD3d 1565, 1565-1566, *lv denied* 15 NY3d 803; *People v Lee*, 56 AD3d 1250, 1251, *lv denied* 12 NY3d 818). Contrary to defendant's further contention, we conclude that the court properly refused to suppress the weapon at issue. The evidence adduced at the suppression hearing established that the police conduct was "justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858; *see People v De Bour*, 40 NY2d 210, 215).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1334

KA 10-00232

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. WESTBROOKS, DEFENDANT-APPELLANT.

JAMES E. NEUMAN, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Charles C. Merrell, J.), rendered December 4, 2009. The judgment convicted defendant, upon a jury verdict, of rape 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 following a jury trial of rape in the first degree (Penal Law § 130.35 [1]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. This case turned largely upon the credibility of the victim, and it is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]; *see People v Erle*, 83 AD3d 1442, *lv denied* 17 NY3d 794). Although there were various inconsistencies in the victim's trial testimony, it cannot be said that her testimony was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925; *see People v Moore* [appeal No. 2], 78 AD3d 1658, 1659-1660). Furthermore, we note that the People introduced evidence establishing that defendant fled to Ohio after the victim contacted the police, and such evidence of defendant's flight was admissible as circumstantial evidence of his consciousness of guilt (*see People v Zuhlke*, 67 AD3d 1341, *lv denied* 14 NY3d 774).

We reject defendant's further contention that County Court erred in allowing the People during their direct case to elicit testimony that defendant slapped the victim while they were arguing two days before the rape occurred. Evidence of a defendant's prior abusive or controlling behavior toward a victim is " 'admissible for the purpose of establishing the element of forcible compulsion and the victim's

delayed reporting' " (*People v King*, 56 AD3d 1193, 1194, *lv denied* 11 NY3d 926). That principle applies even where, as here, "the defense is not consensual sex, but that the rape never occurred and that the [victim's] allegation was a lie" (*People v Cook*, 93 NY2d 840, 841). Defendant failed to preserve for our review his contention that the court erred in failing to give a limiting instruction with regard to that evidence (*see People v Wright*, 5 AD3d 873, 876, *lv denied* 3 NY3d 651), as well as his contention that the court erred in admitting evidence that he was absent without leave from the United States Army following the rape (*see* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, defendant contends that he was deprived of a fair trial by alleged prosecutorial misconduct on summation. Defendant did not object to most of the alleged improper comments and thus failed to preserve his contention for our review with respect to those comments (*see* CPL 470.05 [2]). In any event, we conclude that "[t]he claimed instances of prosecutorial misconduct were not so egregious that defendant was deprived of a fair trial" (*People v Plant*, 138 AD2d 968, *lv denied* 71 NY2d 1031).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1336

CA 11-00443

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

VERIZON NEW YORK, INC., PLAINTIFF-RESPONDENT,

V ORDER

BARLAM CONSTRUCTION CORP., DEFENDANT,
AND ECSM UTILITY CONTRACTORS, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DOBSHINSKY & PRIYA, LLC, NEW YORK CITY (NEAL S. DOBSHINSKY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SOLOMON AND SOLOMON, P.C., ALBANY (TODD M. SARDELLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), dated October 26, 2010. The order awarded plaintiff judgment against defendant ECSM Utility Contractors, Inc.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1337

CA 11-00444

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

VERIZON NEW YORK, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BARLAM CONSTRUCTION CORP., DEFENDANT,
AND ECSM UTILITY CONTRACTORS, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DOBSHINSKY & PRIYA, LLC, NEW YORK CITY (NEAL S. DOBSHINSKY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SOLOMON AND SOLOMON, P.C., ALBANY (TODD M. SARDELLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), dated November 9, 2010. The judgment awarded plaintiff the sum of $47,124.87 against defendant ECSM Utility Contractors, Inc.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the complaint is dismissed.

Memorandum: Plaintiff, the owner of underground cables and facilities on a construction site in Camillus, New York, commenced this action seeking money damages arising from the damage caused to its cables. Defendant Barlam Construction Corp. (Barlam) was a subcontractor preparing the property for residential housing, and defendant ECSM Utility Contractors, Inc. (ECSM) was a utility locator for plaintiff. In accordance with General Business Law §§ 760 - 767 and 16 NYCRR part 753, Barlam telephoned the one-call notification system to request a mark-out of all underground facilities in the area that it planned to excavate. ECSM was then electronically notified to conduct the mark-out of plaintiff's underground facilities. An ECSM employee marked out plaintiff's facilities on December 1, 2005 using orange paint and flags, but almost two weeks later Barlam dug up some of plaintiff's cables while excavating the property. Following a bench trial, Supreme Court entered judgment in favor of plaintiff against ECSM. We reverse.

We note at the outset that New York does not recognize tort claims arising out of the negligent performance of a contract (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 551; *Gallup v Summerset*

Homes, LLC, 82 AD3d 1658, 1660), and plaintiff failed to prove that ECSM owed it a duty independent of any contractual obligations. We further conclude that plaintiff failed to prove that ECSM breached the contract between the parties inasmuch as plaintiff failed to introduce into evidence the original agreement between the parties, and the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it (*see Paz v Singer Co.*, 151 AD2d 234, 235). Here, plaintiff failed to establish that the original contract came within an exception to the best evidence rule by sufficiently explaining the unavailability of the original contract (*see generally Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-644), and the court erred in permitting plaintiff to establish the terms of the contract through secondary evidence in the absence of any proof that the original contract was lost or destroyed (*see id.* at 644; *Chamberlain v Amato*, 259 AD2d 1048, 1048-1049).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1344

CA 11-01016

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

WILLIAM JOHNSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNIFIRST CORPORATION, DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL L. AMODEO OF COUNSEL), AND MCGAW, ALVENTOSA & ZAJAC, JERICHO, FOR DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 8, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the first and third causes of action as well as the second cause of action insofar as it is predicated on the theory of defective design and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when, during the course of his employment as a welder with Derrick Corporation (Derrick), his uniform caught fire. The uniform was supplied by defendant to Derrick's employees pursuant to a "Customer Service Agreement" (Agreement) between defendant and Derrick. Plaintiff asserted causes of action for negligence, strict products liability and breach of the implied warranties of merchantability and fitness for a particular purpose.

We agree with defendant that Supreme Court erred in denying those parts of its motion seeking summary judgment dismissing the first and third causes of action alleging, respectively, negligence and breach of the implied warranties of merchantability and fitness for a particular purpose. We therefore modify the order accordingly. With respect to the negligence cause of action, defendant established as a matter of law that it owed no duty to plaintiff to provide or recommend flame resistant uniforms (*see generally Faery v City of Lockport*, 70 AD3d 1375, 1376; *Johnson v Transportation Group, Inc.*, 27 AD3d 1135, 1136). Defendant also "met [its] initial burden of establishing that the [uniform] was fit and reasonably safe for the ordinary purposes for which it was to be used", thus warranting

judgment in its favor on the cause of action for breach of implied warranties (*Wesp v Carl Zeiss, Inc*., 11 AD3d 965, 968). Plaintiff's submissions in opposition were insufficient to raise a triable issue of fact with regard to those two causes of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

The court further erred in denying that part of defendant's motion seeking summary judgment dismissing the second cause of action, alleging strict products liability, insofar as that cause of action is predicated on the theory of defective design. Defendant submitted evidence that it offered flame resistant uniforms to Derrick, and that Derrick, which was in the best position to evaluate the needs of its employees, made a deliberate decision not to make defendant's flame resistant uniforms available to its employees. Instead, Derrick obtained flame resistant garments from another vendor. That evidence was sufficient to establish as a matter of law that defendant fulfilled its duty not to market or supply a defective product, and plaintiff failed to raise an issue of fact (*see Dick v NACCO Materials Handling Group, Inc*., 37 AD3d 1108, 1109; *Geddes v Crown Equip. Corp*., 273 AD2d 904). We therefore further modify the order accordingly.

We conclude, however, that the court properly denied that part of defendant's motion seeking summary judgment dismissing the strict products liability cause of action insofar as that cause of action is predicated on the theory of failure to warn. "[I]n all but the most unusual circumstances, the adequacy of a warning is a question of fact" to be determined at trial (*Nagel v Brothers Intl. Food, Inc*., 34 AD3d 545, 547 [internal quotation marks omitted]; *see Repka v Arctic Cat, Inc*., 20 AD3d 916, 918). Defendant had an independent duty, irrespective of the duty undertaken by Derrick under the Agreement, to warn employees that the uniforms were not flame resistant (*see Cohen v St. Regis Paper Co*., 109 AD2d 1048, 1049, *affd* 65 NY2d 752; *Billsborrow v Dow Chem*., 177 AD2d 7, 17), and defendant failed to establish as a matter of law that the uniform label provided an adequate warning with respect to the flammability of the fabric (*see generally Cover v Cohen*, 61 NY2d 261, 276-277). Contrary to defendant's contention, moreover, the admitted failure of plaintiff to read the label on his uniform does not necessarily sever the causal connection between the alleged inadequacy of the warning and the occurrence of the accident (*see Vail v Kmart Corp*., 25 AD3d 549, 551; *Johnson v Johnson Chem. Co*., 183 AD2d 64, 71).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1345

CA 11-00532

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

VERIZON NEW YORK INC., PLAINTIFF-RESPONDENT,

V ORDER

ECSM UTILITY CONTRACTORS, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DOBSHINSKY & PRIYA, LLC, NEW YORK CITY (NEAL S. DOBSHINSKY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SOLOMON AND SOLOMON, P.C., ALBANY (TODD M. SARDELLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 2, 2010. The amended order denied the cross motion of defendant for summary judgment dismissing the complaint, granted in part the motion of plaintiff for summary judgment and awarded plaintiff $210,896.51.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1346

CA 11-00533

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

VERIZON NEW YORK INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ECSM UTILITY CONTRACTORS, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DOBSHINSKY & PRIYA, LLC, NEW YORK CITY (NEAL S. DOBSHINSKY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SOLOMON AND SOLOMON, P.C., ALBANY (TODD M. SARDELLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 16, 2010. The judgment awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiff's motion for summary judgment in its entirety, vacating the award of damages, and granting that part of defendant's cross motion for summary judgment dismissing the negligence cause of action and dismissing that cause of action and as modified the judgment is affirmed without costs.

Memorandum: This dispute arises from 45 separate incidents of property damage that occurred over the course of 16 months and across 17 different counties in New York State. Plaintiff hired defendant to locate and mark its underground telephone cables before any contractors began to conduct excavation work. On 45 different occasions, various contractors damaged plaintiff's underground facilities, which plaintiff claims defendant did not accurately mark.

Plaintiff thereafter commenced this action asserting causes of action for negligence and breach of contract based on 45 claims. Defendant's appeal from the judgment entered against it in the amount of over $300,000 brings up for our review its contention that Supreme Court erred in granting those parts of plaintiff's motion for summary judgment on the complaint with respect to 33 of the 45 claims and in denying defendant's cross motion for summary judgment dismissing the complaint or for alternative relief. As noted by the court in the amended order deciding plaintiff's motion and defendant's cross motion, plaintiff withdrew the action with respect to the 12 remaining claims.

We conclude that the court erred in granting those parts of plaintiff's motion concerning the first cause of action, for negligence, and instead should have granted that part of defendant's cross motion for summary judgment dismissing that cause of action. We therefore modify the judgment accordingly. As we noted in *Verizon New York, Inc. v Barlam Constr. Co.* ([appeal No. 2] ___ AD3d ___ [Dec. 23, 2011]), New York does not recognize negligent performance of a contract as a valid cause of action (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 551; *Gallup v Summerset Homes, LLC*, 82 AD3d 1658, 1660).

With respect to the breach of contract cause of action, plaintiff failed to meet its initial burden of proof entitling it to summary judgment with respect to the 33 claims (*see generally Zuckerman v City of New* York, 49 NY2d 557, 562). Plaintiff may not rely on its attorney's affirmation because the attorney does not have personal knowledge of the material facts (*see McGowan v Villa Maria Coll.*, 185 AD2d 674). In addition, as in *Verizon New York, Inc. v Barlam Constr. Co.* ([appeal No. 2] ___ AD3d at ___), plaintiff failed to produce the original agreement between the parties or to provide a sufficient explanation for its absence along with secondary evidence of contents in accordance with the best evidence rule, which is necessary where the terms of the agreement are disputed and the plaintiff seeks to prove those terms (*see Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-644). We thus conclude that the court also erred in granting in part plaintiff's motion with respect to the second cause of action, for breach of contract, and we therefore further modify the judgment by denying plaintiff's motion in its entirety. We have considered the remaining contentions of the parties and conclude that they are without merit.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1348

CA 11-01405

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

MARK AUSTIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RENT A CENTER EAST, INC. AND JOSH R. ARNOLD,
DEFENDANTS-APPELLANTS.

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

FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered April 7, 2011 in a personal injury action. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle he was driving collided with a vehicle owned by defendant Rent A Center East, Inc. and operated by defendant Josh R. Arnold. In his bill of particulars, plaintiff alleged that he sustained a serious injury under the permanent loss of use, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories set forth in Insurance Law § 5102 (d), but plaintiff has now abandoned his contention with respect to permanent loss of use (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We conclude that Supreme Court properly denied defendants' motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident within the meaning of the three remaining categories.

Defendants met their initial burden on the motion by establishing that plaintiff's alleged injuries did not meet the serious injury threshold under any of the three categories (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 351-353). Defendants submitted, inter alia, the affirmation of an orthopedic surgeon who, after reviewing plaintiff's medical records and radiological studies and conducting an examination of plaintiff, opined that there was no objective evidence of a serious injury caused by the motor vehicle accident (*see Herbst v Marshall* [appeal No. 2], 49 AD3d 1194, 1195; *Zeigler v Ramadhan*, 5

AD3d 1080, 1081; *Sewell v Kaplan*, 298 AD2d 840). The surgeon further opined that the degenerative changes to plaintiff's cervical and thoracic spine revealed in X rays and an MRI preexisted the motor vehicle accident.

In opposition to the motion, however, plaintiff raised triable issues of fact whether he sustained a serious injury under each of the three categories (*see Herbst*, 49 AD3d at 1195-1196; *see generally Testa v Allen*, 289 AD2d 958). Plaintiff submitted the affirmation of his treating orthopedic surgeon, who reviewed the results of X rays and an MRI and opined that plaintiff sustained a cervical whiplash injury, a cervical sprain, and a thoracic sprain in the accident. He further opined that the accident aggravated and exacerbated plaintiff's preexisting, asymptomatic degenerative disease in his cervical and thoracic spine, including disc protrusions at C5-6, C6-7 and T4-5. According to plaintiff's treating orthopedic surgeon, the aggravation of plaintiff's preexisting cervical and thoracic degenerative disease was the cause of his chronic pain, muscle spasms, and range of motion restrictions, all of which prevented plaintiff from, inter alia, working as a rural mail carrier. He opined that plaintiff's limitations were permanent in nature.

Further, plaintiff submitted his medical records and the depositions of his primary care providers establishing that, prior to the accident, he had no back or neck complaints (*see Perl v Meher*, ___ NY2d ___, ___ [Nov. 22, 2011]). Plaintiff's medical records also reflect the presence of spasms upon palpation of plaintiff's thoracic spine, which constitutes objective evidence of injury (*see Rissew v Smith*, 89 AD3d 1383; *Mancuso v Collins*, 32 AD3d 1325, 1325-1326; *Zeigler*, 5 AD3d at 1081). In addition, plaintiff submitted reports from several medical providers that quantified his loss of range of cervical and thoracic motion (*see Mancuso*, 32 AD3d at 1326). Indeed, a functional capacity evaluation conducted in December 2007 quantified plaintiff's range of motion restrictions and indicated that plaintiff was unable to perform bending and squatting activities without support and could lift only 10 pounds on a frequent basis or 15 pounds on an occasional basis. With respect to the 90/180-day category, plaintiff did not return to work after the accident upon the direction of his treating physicians and, thus, plaintiff's submissions raise an issue of fact whether he was prevented from performing his usual and customary activities during the requisite time period (*see Zeigler*, 5 AD3d at 1081; *Sewell*, 298 AD2d at 841-842).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1350

CA 11-01025

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

TIMOTHY J. DADDARIO, PLAINTIFF-RESPONDENT,

V ORDER

BUSINESS VENTURE ASSOCIATES LIMITED PARTNERSHIP,
DEFENDANT-APPELLANT.

THORN GERSHON TYMANN AND BONANNI, LLP, ALBANY (AMANDA KURYLUK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (AMY M. VANDERLYKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered March 11, 2011 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1351

CA 10-01574

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

IN THE MATTER OF JOHN HOGAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENT-RESPONDENT.

JOHN HOGAN, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 25, 2010 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III hearing, that he violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey orders]) and 109.12 (7 NYCRR 270.2 [B] [10] [iii] [failure to follow directions relating to movement within the facility]). Petitioner contends that he had a valid excuse for refusing to obey an order to move to a new cell and thus that his violation of those rules was justified. We reject that contention. "[A]lthough petitioner claims that he did not leave [his] cell because he feared for his safety, inmates are not free to choose which orders to obey and which to ignore" (*Matter of Farid v Coombe*, 236 AD2d 660). " 'Any holding to the contrary would simply encourage inmates to break rules as a means of addressing their grievances and invite chaos' " (*Matter of Rivera v Smith*, 63 NY2d 501, 515-516).

Contrary to petitioner's further contention, his "conditional right to call witnesses was not violated because the witnesses who were not called would have provided redundant testimony" (*Matter of Robinson v Herbert*, 269 AD2d 807). In addition, petitioner's contention that the Hearing Officer improperly denied his request for documentary evidence is without merit because "the documentary evidence sought by petitioner . . . was not in dispute" (*Matter of Davis v Goord*, 46 AD3d 955, 956, *lv dismissed* 10 NY3d 821), and did

"not include any information exonerating petitioner of his guilt" (*Matter of Seymour v Goord*, 24 AD3d 831, 832, *lv denied* 6 NY3d 711).

Also contrary to petitioner's contention, "[t]he Hearing Officer obtained valid extensions and the hearing was completed within the extended time period" (*Matter of Edwards v Fischer*, 87 AD3d 1328, 1329). Petitioner's contention that Supreme Court should have granted his motion for recusal because the court was biased against him similarly lacks merit. " 'Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal . . . [and a] court's decision in this respect may not be overturned unless it was an abuse of discretion' " (*People v Williams*, 66 AD3d 1440, 1441, *lv dismissed* 13 NY3d 911, quoting *People v Moreno*, 70 NY2d 403, 405-406). We perceive no abuse of discretion here.

We have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1352

TP 11-00304

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF MICHAEL ARGENTIERI, PETITIONER,

V ORDER

SUSAN CONNELL, SUPERINTENDENT, ONEIDA CORRECTIONAL FACILITY, RESPONDENT.

MICHAEL ARGENTIERI, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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, Oneida County [Anthony F. Shaheen, J.], entered May 20, 2010) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1353

KA 09-01269

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KAREN SOLOVEY, ALSO KNOWN AS KAREN M. SOLOVEY,
ALSO KNOWN AS KAREN GRISANTE, DEFENDANT-APPELLANT.

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered June 11, 2009. The judgment convicted defendant, upon her plea of guilty, of attempted criminal possession of a forged instrument in the second degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1354

KA 10-01597

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

IVAN COSTELLO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered June 16, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of stolen property in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1355

KA 11-00225

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL L. WILLIAMS, 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 January 20, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We reject defendant's contention that County Court abused its discretion in denying his motion to withdraw the plea. Defendant was not entitled to withdraw his plea based upon his misapprehension of the quality of the People's case (*see People v Jones*, 44 NY2d 76, 81, *cert denied* 439 US 846; *People v Gumpton*, 81 AD3d 1441, *lv denied* 17 NY3d 795). In addition, defendant's assertion of innocence and his contention that he was coerced into pleading guilty are belied by his statements at the plea proceeding (*see People v Garner*, 86 AD3d 955). "Even assuming, arguendo, that the motion to withdraw the plea preserved for our review defendant's challenge to the factual sufficiency of the plea allocution, we conclude that [such challenge] is without merit" (*People v Conde*, 34 AD3d 1347, 1347-1348). Finally, we reject defendant's further contention that the court erred in failing to conduct an evidentiary hearing with respect to his motion to withdraw the plea, inasmuch as "[t]he court afforded defendant the requisite 'reasonable opportunity to present his contentions' in support of that motion" (*People v Strasser*, 83 AD3d 1411, 1411).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1356

KA 10-00460

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICKEY WILLIAMS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Richard C. Kloch, Sr., A.J.), entered March 17, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 1995 conviction of criminal sale of a controlled substance in the third degree (three counts) and criminal possession of a controlled substance in the third degree (three counts).

It is hereby ORDERED that the order so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to CPL 440.46, the 2009 Drug Law Reform Act. We conclude that the record is insufficient to support the determination of Supreme Court that defendant was ineligible for resentencing on the ground that his 1976 conviction of robbery in the second degree (Penal Law § 160.10) constituted an "exclusion offense" as defined in CPL 440.46 (5) (a) (i). We agree with defendant that the record fails to establish "the time of commission of the previous felony" and whether the court properly calculated the look-back period of 10 years as tolled by defendant's periods of incarceration (CPL 440.46 [5] [a]). Although defendant failed to preserve those contentions for our review (*see* CPL 470.05 [2]), we nevertheless exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Further, we are unable to conclude on the record before us whether defendant's prior conviction of robbery in the second degree was a second violent felony offense rendering him ineligible for resentencing pursuant to CPL 440.46 (5) (b). We therefore reverse the order, and we remit the matter to Supreme Court to determine the date on which defendant committed the prior offense of robbery in the second degree and to

calculate the periods for which defendant was incarcerated after that offense in order to determine if that offense constituted an exclusion offense pursuant to CPL 440.46 (5) (a) (i). Upon remittal, the court must also determine whether that offense was a second violent felony offense that constitutes an exclusion offense pursuant to CPL 440.46 (5) (b).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1357

KA 09-02360

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAY J. BARBONI, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered September 4, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and 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 a jury verdict of murder in the second degree (Penal Law § 125.25 [4] [depraved indifference murder]) and manslaughter in the first degree (§ 125.20 [4]), defendant contends that he was denied effective assistance of counsel during jury selection. We reject that contention. "The alleged error[] in defense counsel's representation [during jury selection is a] mere disagreement[] with defense counsel's . . . tactics, and defendant has failed to establish 'the absence of strategic or other legitimate explanations' for defense counsel's alleged shortcomings" (*People v Martin*, 79 AD3d 1793, 1793, *lv denied* 16 NY3d 861, quoting *People v Rivera*, 71 NY2d 705, 709).

We also reject defendant's challenge to the legal sufficiency of the evidence supporting the conviction of depraved indifference murder (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to the contention of defendant, the evidence is legally sufficient to establish that he possessed the requisite culpable mental state to support that conviction (*see People v Varmette*, 70 AD3d 1167, 1169-1171, *lv denied* 14 NY3d 845; *People v Griffin*, 48 AD3d 1233, 1234-1235, *lv denied* 10 NY3d 840; *People v Bowman*, 48 AD3d 178, 184-185, *lv denied* 10 NY3d 808; *People v Maddox*, 31 AD3d 970, 971-972, *lv denied* 7 NY3d 868; *cf. People v Lewie*, 17 NY3d 348, 359-360; *see generally People v Suarez*, 6 NY3d 202, 210-213). Indeed, the evidence establishes that, on the day the crimes occurred, the victim, a 15-

month-old child, was happy and healthy before he was left alone with defendant. The expert medical testimony presented by the People demonstrates that the child sustained at least five traumatic blows to the head, which led to brain swelling that caused his death, and that he sustained other injuries that would have resulted in legal blindness had he survived. The injuries at issue were caused by trauma that occurred approximately two hours before the child's death, during which time he was in the sole care of defendant.

The record further establishes that the child's suffering yielded an apathetic response from defendant. Around 8:00 P.M. on the night of the child's death, defendant telephoned his girlfriend, who was the mother of the child, and informed her that she needed to come home because the child was not breathing. When the mother arrived approximately two minutes later, she ran past defendant, who was in the kitchen of her apartment and said to the mother that "he didn't know what happened." When the mother reached the child's crib on the second floor of the apartment, she observed that the child was blue and not breathing. Although defendant did not seek medical assistance for him, the child was transported to a hospital, where he was pronounced dead at 8:20 P.M. The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is also legally sufficient to support the conviction of manslaughter in the first degree (*see generally Bleakley*, 69 NY2d at 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We also conclude that there is no merit to defendant's contention that County Court erred in refusing to suppress certain physical evidence on the ground that it was illegally seized, inasmuch as defendant and the attorney who represented him when he was questioned by the police consented to the seizure of the evidence in question (*cf. People v Farrell*, 42 AD3d 954). Defendant further contends that he was denied effective assistance of counsel based on that attorney's consent to the seizure. "Even assuming, [arguendo, that] the right to effective assistance of counsel attached prior to [the seizure of the physical evidence in question] and that suppression is the appropriate remedy where a [seizure arises from] ineffective assistance of counsel" (*People v Carncross*, 14 NY3d 319, 331), we reject defendant's contention inasmuch as he failed to demonstrate the absence of a strategic explanation for that attorney's alleged shortcomings (*see People v Benevento*, 91 NY2d 708, 712; *see generally People v Baldi*, 54 NY2d 137, 147).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1358

KA 11-01407

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. POOLE, DEFENDANT-APPELLANT.

HEATON & VENUTI, LLP, GENEVA (MARK A. VENUTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Craig J. Doran, J.), dated November 9, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in assessing 30 points against him under risk factor 3, for the number of victims. It is well established that children depicted in pornographic images constitute "victims" for the purposes of SORA (*see People v Johnson*, 47 AD3d 140, 142-143, *affd* 11 NY3d 416; *People v Bretan*, 84 AD3d 906, 907; *People v Perahia*, 57 AD3d 865) and, here, defendant admitted that he possessed approximately 1,900 images and 300 videos depicting child pornography at the time of his arrest. The People therefore established by the requisite clear and convincing evidence that the crime in question involved three or more victims (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 10 [2006]; *see generally* § 168-n [3]; *People v Pettigrew*, 14 NY3d 406, 409; *People v Mingo*, 12 NY3d 563, 571). There is no merit to defendant's further contention that, inasmuch as he merely possessed child pornography, he should not have been assessed 20 points under risk factor 7, for a crime that "was directed at a stranger" (Risk Assessment Guidelines and Commentary, at 12; *see Johnson*, 11 NY3d at 419-421). Inasmuch as defendant admitted that he did not know any of the children depicted in the pornographic images, the court properly assessed points under that risk factor (*see Johnson*, 11 NY3d at 419-421; *see generally Mingo*, 12 NY3d at 572).

Finally, we conclude that "defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703; *see People v Fredendall*, 83 AD3d 1545), particularly in light of defendant's admission that many of the pornographic images at issue depicted violence (*see generally Bretan*, 84 AD3d at 907-908).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1360

KA 10-01771

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS W. ZOLNER, DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, WEST VALLEY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered July 19, 2010. The judgment convicted defendant, upon his plea of guilty, of aggravated vehicular assault and driving while intoxicated, a misdemeanor.

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 aggravated vehicular assault (Penal Law § 120.04-a [2] [a]) and driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). The valid waiver by defendant of his right to appeal encompasses his contention that County Court erred in refusing to suppress his statement to the police (*see People v Kemp*, 94 NY2d 831, 833; *People v Spencer*, 87 AD3d 1284, 1285), as well as his challenge to the factual sufficiency of the plea allocution (*see People v Simcoe*, 74 AD3d 1858, *lv denied* 15 NY3d 778). Defendant's further contention that he was denied effective assistance of counsel with respect to both assigned and retained defense counsel does not survive the plea or valid waiver of the right to appeal inasmuch as "defendant failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [the] allegedly poor performance[s by defense counsel]" (*People v Paduano*, 84 AD3d 1730, 1731 [internal quotation marks omitted]; *see People v Bellamy*, 85 AD3d 1395).

Defendant's contention that he was penalized for exercising his right to be represented by counsel of his own choosing does not implicate the voluntariness of the plea and thus it is also encompassed by his valid waiver of the right to appeal (*see People v Doyle*, 82 AD3d 564, *lv denied* 17 NY3d 805). In any event, that contention is belied by the record (*see generally People v Arroyave*, 49 NY2d 264, 270). Finally, although the further contention of defendant with respect to the voluntariness of his plea survives his

waiver of the right to appeal, he failed to preserve that contention for our review, and this case does not fall within the narrow exception to the preservation requirement (*see People v Morgan*, 59 AD3d 950, *lv denied* 12 NY3d 857).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1361

CAF 10-01438

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF KANIYA T., ASHONTE T., QUEENASIA T., DE'AMARI W., LAKARIE W. AND ROBERT H.

---------- ORDER

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

LATOYA T., RESPONDENT-APPELLANT.

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

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

KATHERINE GLADSTONE, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR KANIYA T., ASHONTE T., QUEENASIA T., DE'AMARI W., LAKARIE W. AND ROBERT H.

Appeal from an order of the Family Court, Monroe County (Gail A. Donofrio, J.), entered June 23, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1362

CAF 10-02051

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF SUSAN HARTMAN,
PETITIONER-APPELLANT,

V ORDER

RICHARD C. HARTMAN, JR., RESPONDENT-RESPONDENT.

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

EMILY A. VELLA, ATTORNEY FOR THE CHILD, SPRINGVILLE, FOR BRANDI H.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered September 2, 2010 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: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1366

CA 11-00740

PRESENT: PERADOTTO, J.P., LINDLEY, GREEN, AND GORSKI, JJ.

ART CAPITAL PARTNERS, LP, ART HOLDINGS, LLC, KEITH A. BLAKELY, LINDA B. BLAKELY, W. DALE COMPTON, AS TRUSTEE UNDER THE W. DALE COMPTON TRUST AGREEMENT DATED MAY 18, 1977, MICHAEL T. KELLEY, JAMES W. TAKACS, AS TRUSTEE OF THE EVANS FAMILY TRUST, ROGER STORM, WARBURG, PINCUS CAPITAL PARTNERS, L.P., JAMES B. ADLER, HARVEY H. BLAKELY, E. JOHN FINN, ANDREW G. KNAFEL AND SIDNEY R. KNAFEL, INDIVIDUALLY AND AS TRUSTEES OF THE DOUGLAS R. KNAFEL TRUST (1983), DON KOSTER, GEORGE PASHEL, PINPOINT PARTNERS I, MARY T. SPOHN AND JAMES H. STEINER, PLAINTIFFS-RESPONDENTS,

V ORDER

TYCO ACQUISITION CORP. XVIII, NOW KNOWN AS MA/COM TECH HOLDINGS, INC., TYCO ELECTRONICS CORPORATION, TYCO INTERNATIONAL (US) INC., TYCO INTERNATIONAL LTD., AND M/A-COM CERAM, INC., DEFENDANTS-APPELLANTS.

DEWEY PEGNO & KRAMARSKY LLP, NEW YORK CITY (THOMAS E.L. DEWEY OF COUNSEL), AND PHILLIPS LYTLE LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered December 30, 2010. The judgment awarded plaintiffs the sum of $5,719,050.24 against defendants.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1370

CA 11-01280

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

ROBERT V. WINSTEL, JR. AND CHRISTINE WINSTEL,
PLAINTIFFS,

V MEMORANDUM AND ORDER

ROMAR WNY PROPERTIES, LLC, DEFENDANT.

ROMAR WNY PROPERTIES, LLC, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

ROMAR MECHANICAL SERVICES, HARLEM ROAD, INC.,
THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (MICHAEL A. RIEHLER OF COUNSEL), BUFFALO, FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered March 8, 2011 in a personal injury action. The order, insofar as appealed from, denied the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Robert V. Winstel, Jr. (plaintiff) when he slipped and fell on property owned by defendant-third-party plaintiff (defendant) and leased to third-party defendant, plaintiff's employer, pursuant to a commercial lease that contained an indemnification clause. Defendant thereafter commenced a third-party action seeking, inter alia, contractual indemnification. Supreme Court properly denied third-party defendant's motion seeking summary judgment dismissing the third-party complaint. Even assuming, arguendo, that defendant ultimately is held to be free from negligence, which would render the indemnification clause enforceable, we conclude that third-party defendant failed to meet its initial burden on the motion by establishing that the indemnification clause was not broad enough to encompass the attorney's fees and disbursements incurred by defendant (*cf. Boshnakov v Board of Educ. of Town of Eden*, 302 AD2d

857, 858-859; *see generally Boyd v Bethlehem Steel Corp.*, 247 AD2d 864, *lv dismissed in part and denied in part* 92 NY2d 885; *Blair v County of Albany*, 127 AD2d 950, 951).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1373

KA 11-01406

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES VANVALKINBURGH, DEFENDANT-APPELLANT.

BENDER & BENDER, LLP, BUFFALO (PAUL A. BENDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 23, 2010. Defendant was resentenced upon his conviction of rape in the third degree (three counts).

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Erie County, for resentencing.

Memorandum: Defendant appeals from a resentence upon his conviction of three counts of rape in the third degree (Penal Law § 130.25 [2]). Defendant's contentions regarding the severity of his resentence are encompassed by the valid waiver of the right to appeal from the resentence (*see People v Lopez*, 6 NY3d 248, 256). Contrary to defendant's contention, the waiver of the right to appeal at the time of the plea is not subject to our review inasmuch as he did not appeal from the judgment, and the resentence occurred more than 30 days after the original sentence (*see* CPL 450.30 [3]). We nevertheless note, however, that defendant's contention that Supreme Court imposed an aggregate period of 30 years of postrelease supervision is not supported by the record (*cf. People v Kennedy*, 78 AD3d 1477, 1479, *lv denied* 16 NY3d 798). As defendant has failed to recognize, the periods of postrelease supervision imposed on the consecutive terms of imprisonment "shall merge with and be satisfied by discharge of the period of post[]release supervision having the longest unexpired time to run" (Penal Law § 70.45 [5] [c]).

Although defendant does not challenge the legality of the sentence, the court was required to impose determinate terms of imprisonment in "whole or half years" (Penal Law § 70.80 [3]), and we cannot allow the illegal sentences of 2a years of imprisonment imposed on each count to stand (*see Kennedy*, 78 AD3d at 1479; *see*

generally People v March, 89 AD3d 1496). We therefore reverse the resentence and remit the matter to Supreme Court for a further resentencing.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1374

KA 09-00310

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MORRISON, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ROBERT R. REITTINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROSEANN B. MACKECHNIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 18, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, sexual abuse in the first degree and endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person 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 rape in the first degree (Penal Law § 130.35 [1]), sexual abuse in the first degree (§ 130.65 [1]), and endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person in the second degree (§ 260.32 [4]), stemming from charges that he raped a 90-year-old resident of a residential health care facility where he worked as a certified nurse's aide. An investigator with the Medicaid Fraud Control Unit interviewed defendant approximately two weeks after the rape and made a written report of that interview, but that report was not turned over to defense counsel until after the investigator testified at trial. County Court denied defendant's motion for a mistrial but struck the testimony of the investigator, and the court directed that he testify again, precluding the People from questioning the investigator about that interview.

On appeal, defendant contends that the People's delayed disclosure of the report constituted a *Brady* violation, a violation of CPL 240.20 (1) (a), and a *Rosario* violation, and that a mistrial was warranted. We reject defendant's contention that the People's delayed disclosure constituted a *Brady* violation. "To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to

the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766; *see Strickler v Greene*, 527 US 263, 281-282). Evidence cannot be said to have been suppressed by the prosecution "where the defendant 'knew of, or should reasonably have known of, the evidence and its exculpatory nature' " (*People v LaValle*, 3 NY3d 88, 110). Here, there is no question that defendant knew what statements he made to the investigator during the interview, and thus possession of the investigator's report "would not have revealed any essential information that the defense did not already know" (*id.*). Moreover, "a defendant's constitutional right to a fair trial is not violated when, as here, he is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case" (*People v Cortijo*, 70 NY2d 868, 870; *see People v Comfort*, 60 AD3d 1298, 1300, *lv denied* 12 NY3d 924; *People v Barney*, 295 AD2d 1001, 1002, *lv denied* 98 NY2d 766).

We agree with defendant that, based on their delay in disclosing the report, the People violated CPL 240.20 (1) (a) and committed a *Rosario* violation (*see* CPL 240.45 [1] [a]). Nevertheless, reversal is not warranted based on those violations because defendant failed to establish that he was substantially prejudiced by the delay in obtaining the report (*see People v Benton*, 87 AD3d 1304, 1305; *People v Sweney*, 55 AD3d 1350, 1351-1352, *lv denied* 11 NY3d 901; *People v Gardner*, 26 AD3d 741, *lv denied* 6 NY3d 848). Rather, we conclude that the court did not abuse its discretion by denying defendant's motion for a mistrial (*see People v Lluveres*, 15 AD3d 848, 849, *lv denied* 5 NY3d 807), and by instead providing "suitable alternative relief" (*People v Lewis*, 37 AD3d 176, 177, *lv denied* 9 NY3d 846, 847; *see* CPL 240.70 [1]).

Defendant further contends that the admission in evidence of a certified DNA report prepared by an analyst who did not testify at trial and the testimony of an analyst who testified at trial regarding that report violated his rights under the Confrontation Clause of the US Constitution Sixth Amendment (*see generally Crawford v Washington*, 541 US 36, 50-54). We agree. "The Sixth Amendment to the United States Constitution guarantees a defendant the right to be 'confronted with the witnesses against him [or her]' " (*People v Brown*, 13 NY3d 332, 338). "This provision bars 'admission of testimonial statements of a witness who did not appear at trial unless he [or she] was unavailable to testify, and the defendant . . . had a prior opportunity for cross-examination' " (*id.*, quoting *Crawford*, 541 US at 53-54). We must therefore determine whether the statements were "testimonial," because only testimonial statements are subject to the Confrontation Clause (*see Davis v Washington*, 547 US 813, 821).

In *Brown* (13 NY3d at 336), the report in question contained machine-generated raw data, graphs and charts of a male specimen's DNA characteristics that were isolated from a rape kit. The Court of Appeals held that the report was not testimonial inasmuch as there

were "no conclusions, interpretations, or comparisons apparent in the report" (*id.* at 340; *see People v Thompson*, 70 AD3d 866, 866-867, *lv denied* 15 NY3d 757). The forensic biologist who conducted the actual analysis that linked the defendant's DNA profile to the profile in the victim's rape kit was in fact called by the People as a witness in *Brown* (*id.* at 340). That was not the case here, where the analyst who performed the tests and concluded that the DNA mixture profile from the vaginal swab sample was consistent with DNA from the victim mixed with DNA from defendant was never called to testify. Contrary to the People's contention, the analyst who was called to testify, i.e., the supervisor of the other analyst, did not perform her own independent review and analysis of the DNA data. Rather, her testimony makes clear that she had nothing to do with the analysis performed by the uncalled witness, and that her only involvement was simply reading the report after it was completed to ensure that the uncalled witness followed proper procedure. The People could not substitute her testimony for that of the actual analyst who performed the tests in order to avoid a violation of the Confrontation Clause (*see Bullcoming v New Mexico*, ___ US ___, ___, 131 S Ct 2705, 2709-2710).

We agree with the People, however, that the error is harmless. "Trial errors resulting in violation of a criminal defendant's Sixth Amendment right to confrontation 'are considered harmless when, in light of the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict' " (*People v Porco*, 17 NY3d 877, 878). A forensic scientist testified at trial that the vaginal smear slide she examined was "sperm positive," thus establishing that someone had intercourse with the victim. The DNA evidence established that it was defendant who had intercourse with the victim, but his identity was not in issue inasmuch as he confessed to having intercourse with her. We thus conclude that there is no reasonable possibility that the error in admitting the DNA testimony affected the jury's verdict (*see id.*). We further conclude that any error in allowing certain hearsay testimony of the victim is likewise harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1378

KA 09-01312

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERLAND W. BOUWENS, III, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (SCOTT P. FALVEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered May 8, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance 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 criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Contrary to defendant's contention, County Court did not err in refusing to conduct a hearing regarding a cooperation agreement with the People. The court participated in discussions regarding the agreement prior to the entry of the plea, and defendant also had "a reasonable opportunity to present his contentions" to the court at sentencing (*People v Saxon*, 28 AD3d 330, 331, *lv denied* 7 NY3d 763; *see generally People v Frederick*, 45 NY2d 520, 525). We therefore conclude that the court had an opportunity to make an informed determination whether defendant complied with the cooperation agreement (*see Saxon*, 28 AD3d at 331). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the terms of the plea agreement were ambiguous and that he should have been afforded the opportunity to withdraw his plea on the ground that it was not voluntarily entered because it was ambiguous (*see generally People v Colbert*, 84 AD3d 1755, *lv denied* 17 NY3d 815). This case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666). " 'In order to avoid disputes as to the promises made when a guilty plea is entered, the terms of the plea agreement should be explicitly and unambiguously set forth on the record' " (*People v Davey*, 193 AD2d 1108, 1108), and here

that requirement was met.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1379

KA 11-01306

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

BRYAN M. KALIKOW, DEFENDANT-RESPONDENT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR APPELLANT.

ANTHONY J. DIMARTINO, JR., OSWEGO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Oswego County Court (Walter W. Hafner, Jr., J.), dated July 19, 2010. The order, among other things, granted the motion of defendant to suppress evidence and statements.

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

Memorandum: On appeal from an order suppressing evidence seized from defendant along with statements that he made to the police, the People contend that the warrantless search of defendant was permissible. As the People correctly contend, the police may lawfully arrest a person for violating an ordinance and conduct a search incident to that arrest (*see People v Canal*, 24 AD3d 1034, *lv denied* 6 NY3d 846; *People v Taylor*, 294 AD2d 825; *People v Pantusco*, 107 AD2d 854, 855-856). If there is no arrest, however, there can be no search incident thereto (*see People v Evans*, 43 NY2d 160, 165-166; *People v Erwin*, 42 NY2d 1064, 1065). The record here supports County Court's determination that a police officer merely issued an appearance ticket to defendant for violating a municipal open container ordinance and had no intention of performing a custodial arrest, but that defendant nevertheless was searched. We therefore cannot agree with the People that the search was justified as a search incident to a lawful arrest (*see Erwin*, 42 NY2d at 1065; *cf. Canal*, 24 AD3d 1034; *Taylor*, 294 AD2d at 826).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1382

CAF 11-00306

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF RICHARD A. VAZQUEZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ALLISON M. VELEZ, RESPONDENT-RESPONDENT.

IN THE MATTER OF RICHARD A. VAZQUEZ,
PETITIONER-APPELLANT,

V

ALLISON M. VELEZ, RESPONDENT-RESPONDENT.

IN THE MATTER OF EVELYN SANTIAGO,
PETITIONER-RESPONDENT,

V

RICHARD A. VAZQUEZ, RESPONDENT-APPELLANT.

IN THE MATTER OF RICHARD A. VAZQUEZ,
PETITIONER-APPELLANT,

V

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.

TIMOTHY R. LOVALLO, BUFFALO, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

LEGAL SERVICES FOR THE ELDERLY, DISABLED OR DISADVANTAGED OF WNY, BUFFALO (DAVID A. SHAPIRO OF COUNSEL), FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR JULISSA V.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered February 8, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted joint custody of the subject child to Evelyn Santiago and Richard A. Vazquez.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner-respondent father appeals from an order granting physical custody of his child to petitioner maternal grandmother (grandmother), and joint custody to the father and grandmother. It is well established that a parent has a superior right to custody to that of a nonparent (*see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 546-548). Specifically, "[t]he State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*id.* at 544). Here, Family Court erred in failing to determine whether extraordinary circumstances exist before proceeding to determine that it is in the best interests of the child to grant physical custody to the grandmother and joint custody to the father and grandmother (*see id.* at 548). Because "the record is insufficient to enable us to make our own determination with respect to whether extraordinary circumstances exist" (*Matter of Howard v McLoughlin*, 64 AD3d 1147, 1148), we remit the matter to Family Court to make that determination, upon affording the parties the opportunity to submit additional evidence if they be so advised. In the event that the court determines that extraordinary circumstances exist, the court must then consider the best interests of the child in making a custody determination (*see Matter of McArdle v McArdle*, 1 AD3d 822, 823).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1383

CAF 10-02195

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF AVA R.

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

ANGEL R., RESPONDENT-APPELLANT.

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

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

NANCY A. DIETZEN, ATTORNEY FOR THE CHILD, FREDONIA, FOR AVA R.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 1, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred custody and guardianship of the subject child to petitioner.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1384

CAF 11-01371

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF KAREN MATTESON,
PETITIONER-APPELLANT,

V ORDER

KAREN L. MEINHOLD, RESPONDENT-RESPONDENT.

IN THE MATTER OF KAREN MATTESON,
PETITIONER-APPELLANT,

V

ROBERT F. MEINHOLD, RESPONDENT-RESPONDENT.

HOGANWILLIG, PLLC, BUFFALO (KENNETH A. OLENA OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICES OF JAWORSKI & GIACOBBE, CHEEKTOWAGA (DAVID V. JAWORSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT KAREN L. MEINHOLD.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILDREN, WILLIAMSVILLE, FOR DONALD M., ALEXANDRA M., CHRISTOPHER M. AND VICTORIA M.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered December 9, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petitions seeking visitation.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1392

CA 11-01432

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

ROBERT J. LUDWIG, PLAINTIFF-RESPONDENT,

V ORDER

CONFERENCE ARCHIVES, INC. AND TODD A. WAGNER,
DEFENDANTS-APPELLANTS.

FESSENDEN, LAUMER & DEANGELO, JAMESTOWN (MARY B. SCHILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (RICHARD F. GIOIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (John A. Michalek, J.), entered January 25, 2011. The order denied the cross motion of defendants to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 2, 2011,

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1394

KA 10-01255

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAHEED M. MOFFETT, ALSO KNOWN AS TAHEED MOFFETT, ALSO KNOWN AS T. MOFFETT, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 11, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). "Defendant failed to preserve for our review his contention that County Court erred in failing to advise him of his right to a hearing concerning his alleged violations of the plea agreement prior to imposing an enhanced sentence" (*People v Gibson*, 52 AD3d 1227, 1227; *see also People v Sprague*, 82 AD3d 1649, *lv denied* 17 NY3d 801; *People v Perry*, 252 AD2d 990, *lv denied* 92 NY2d 929). In any event, that contention is without merit. Pursuant to the plea agreement, in order to receive the promised sentence, defendant was required to comply with a curfew, to appear as required by the probation officer preparing the presentence report and to remain arrest free. Defendant admitted that he had been rearrested and violated his curfew (*see People v Valencia*, 3 NY3d 714, 715-716; *People v Laskowski*, 46 AD3d 1383), and he did not contest the remaining accusations concerning violations of the sentencing conditions. Consequently, we conclude that defendant was not entitled to a hearing before the court enhanced his sentence (*see generally People v Figgins*, 87 NY2d 840).

The sentence is not unduly harsh or severe.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1395

KA 10-00827

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRENTON L. IVERSON, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered January 29, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Defendant was previously classified a level one risk pursuant to SORA, and he contends that the People were required to file a petition seeking modification of his risk level pursuant to Correction Law § 168-*o* (3). Defendant failed to preserve that contention for our review (*see generally People v Windham*, 10 NY3d 801; *People v Charache*, 9 NY3d 829, 830; *People v Daniels*, 86 AD3d 921, 922, *lv denied* 17 NY3d 715) and, in any event, that contention is without merit. Correction Law § 168-*o* (3) does not require the filing of a petition to modify the classification of a sex offender convicted of a new qualifying sex offense (*see* § 168-a [2] [a]).

Defendant was assessed 115 points based upon the factors set forth in the risk assessment instrument (RAI), presumptively classifying him as a level three risk (*see generally* Correction Law § 168-*l* [5], [6]). Contrary to the contention of defendant, his prior felony conviction for a sex offense, i.e., rape in the third degree (Penal Law § 130.25 [2]), " 'may be used as both an override factor and a basis upon which to add 30 points for risk factor 9 on the [RAI]' " (*People v Gilbert*, 78 AD3d 1584, 1585, *lv denied* 16 NY3d 704; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 13-14 [2006]). We further conclude that County Court's

alternative application of the presumptive override for a prior sex felony conviction to classify defendant a level three risk was warranted (*see* Risk Assessment Guidelines and Commentary, at 3-4; *People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708).

Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level on the ground that both the present and prior sex offenses were nonviolent (*see Gilbert*, 78 AD3d at 1585-1586; *Ratcliff*, 53 AD3d 1110). In any event, "defendant's multiple convictions of sexual crimes constitute 'compelling evidence that [he] poses a serious risk to public safety' . . ., and thus a downward departure from the presumptive risk level is not warranted" (*Gilbert*, 78 AD3d at 1586).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1397

KA 10-00200

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSE PRATTS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 15, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1398

KA 10-01756

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS C. RICKS, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered August 2, 2010. Defendant was resentenced upon his conviction of sodomy in the first degree (five counts) and endangering the welfare of a child.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law, and the matter is remitted to Supreme Court, Erie County, for resentencing in accordance with the following Memorandum: Defendant appeals from a resentence pursuant to which Supreme Court sentenced him as a second felony offender. On a prior appeal, we modified the judgment convicting defendant upon his plea of guilty of, inter alia, five counts of sodomy in the first degree (Penal Law former § 130.50 [4]) by vacating the sentence and remitted the matter to Supreme Court for resentencing to allow the People to overcome the technical defects in their proof of defendant's status as a second felony offender inasmuch as the original proof failed to comply with CPLR 4540 (c) (*People v Ricks*, 71 AD3d 1444). Pursuant to that statute, "[w]here the copy [of an official publication] is attested by an officer of another jurisdiction, it shall be accompanied by a certificate that such officer has legal custody of the record, and that his [or her] signature is believed to be genuine, which certificate shall be made by a judge of a court of record of the district or political subdivision in which the record is kept, with the seal of the court affixed; or by any public officer having a seal of office and having official duties in that district or political subdivision with respect to the subject matter of the record, with the seal of his [or her] office affixed" (CPLR 4540 [c]).

Following remittal, the court conducted another second felony offender hearing, where the People submitted a fingerprint record from Colorado that was properly authenticated by the agent in charge of the identification unit for the Colorado Bureau of Investigation in conformance with the first requirement of CPLR 4540 (c). The document

that purports to certify that the agent in charge had legal custody of the fingerprint record, however, is also signed by that agent in charge, and thus it does not comply with the statute's requirement that the out-of-state document be authenticated by the certificate of a second, separate authority (*see generally* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4540:4). We reject the People's contention that strict compliance with CPLR 4540 (c) is not necessary (*see People v Redmond*, 41 AD3d 514, 515, *lv denied* 16 NY3d 745; *People v James*, 4 AD3d 774). We therefore reverse the resentence, and we remit the matter to Supreme Court for resentencing "to allow the People to overcome the technical defects of their proof" (*James*, 4 AD3d at 775; *see People v Hines*, 90 AD2d 621).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1399

KA 10-00852

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE A. WEBB, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 10, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We agree with defendant that he was deprived of effective assistance of counsel based on, inter alia, defense counsel's elicitation of testimony from defendant concerning a prior conviction that had been excluded by County Court. We therefore reverse.

The court's *Sandoval* ruling permitted the People to cross-examine defendant regarding three of his prior convictions but precluded any questions with respect to his fourth prior conviction, for attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). Despite obtaining that ruling, defense counsel asked defendant to list his prior convictions, thereby eliciting testimony regarding the fourth prior conviction that had been excluded. To compound the error, defense counsel did not object to the prosecutor's additional questions regarding the underlying facts of that conviction, including the facts that defendant sold drugs to an undercover officer and then ran from the police prior to apprehension. The evidence of defendant's flight from the police was particularly prejudicial here, inasmuch as the People presented evidence that defendant fled from the police in the case before us. Thus, "defense counsel's inexplicable . . . elicit[ation of] the

[fourth] prior conviction simply cannot be construed as a misguided though reasonably plausible strategy decision . . . The error of [defense] counsel herein is sufficiently serious to have deprived defendant of a fair trial, especially when defendant's credibility was of primary importance in establishing his defense" (*People v Ofunniyin*, 114 AD2d 1045, 1047 [internal quotation marks omitted]; *see People v Zaborski*, 59 NY2d 863, 864-865).

In addition, defendant was deprived of effective assistance of counsel based on defense counsel's failure to object when the prosecutor elicited testimony from a defense witness on cross-examination that defendant's nickname was "Threat," and based on defense counsel's failure to object to the prosecutor's comment on summation that the jury should consider defendant's nickname as evidence that he possessed the weapon at issue (*see People v Lauderdale*, 295 AD2d 539, 540-541; *see also People v Ramos*, 139 AD2d 775, 776-777, *appeal dismissed* 73 NY2d 866; *see generally People v Santiago*, 255 AD2d 63, 65-66, *lv denied* 94 NY2d 829). The People's contention that the prosecutor elicited the nickname to establish the witness's familiarity with defendant is belied by the record. The witness testified that he had known defendant for 16 years, and thus there was no issue regarding his identification of defendant. Furthermore, the prosecutor asked the jurors on summation whether they thought defendant's nickname was Threat "because he was riding a bike down the street with no bell on it? You think [his nickname was] Threat because he was riding down the street drinking a beer? No. [His nickname was] Threat because he possessed that gun."

Defendant's remaining contentions are academic in light of our determination.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1400

KA 07-02492

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER L. SMITH, DEFENDANT-APPELLANT.

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

CHRISTOPHER L. SMITH, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered November 19, 2007. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit (*see People v Green*, 74 AD3d 1899, 1900, *lv denied* 15 NY3d 852; *People v Flecha*, 43 AD3d 1385, *lv denied* 9 NY3d 990; *see generally People v Bleakley*, 69 NY2d 490, 495).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although "an acquittal would not have been unreasonable" in light of defendant's testimony (*Danielson*, 9 NY3d at 348), it cannot be said that the jury failed to give the evidence the weight it should be accorded in concluding that defendant possessed the requisite intent for the commission of the

crimes (*see People v Simcoe*, 75 AD3d 1107, 1108-1109, *lv denied* 15 NY3d 924). The jury " 'see[s] and hear[s] the witnesses[and thus] can assess their credibility and reliability in a manner that is far superior to that of [this Court, which] must rely on the printed record' " (*People v Horton*, 79 AD3d 1614, 1615, *lv denied* 16 NY3d 859, quoting *People v Lane*, 7 NY3d 888, 890), and we perceive no reason to disturb the jury's credibility determinations.

We reject the further contention of defendant that County Court erred in denying his request for a circumstantial evidence charge. "A circumstantial evidence charge is required [only] where the evidence against a defendant is 'wholly circumstantial' " (*People v Guidice*, 83 NY2d 630, 636, quoting *People v Silva*, 69 NY2d 858, 859; *see People v Daddona*, 81 NY2d 990, 992). Here, however, "[t]he evidence presented at trial . . . consisted of both circumstantial and direct evidence, and thus a circumstantial evidence charge was not required" (*People v Whitfield*, 72 AD3d 1610, *lv denied* 15 NY3d 811; *see e.g. People v Allen*, 1 AD3d 947, *lv denied* 1 NY3d 594; *People v Goncalves*, 283 AD2d 1005, *lv denied* 96 NY2d 918).

By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention that the court abused its discretion in allowing the prosecutor to question defendant concerning the underlying facts of a youthful offender adjudication (*see People v Goodrum*, 72 AD3d 1639, *lv denied* 15 NY3d 773). In any event, defendant's contention is without merit. Although it is "impermissible to use a youthful offender . . . adjudication as an impeachment weapon, because '[those] adjudications are not convictions of a crime' . . ., the [prosecutor] may bring out 'the illegal or immoral acts underlying such adjudications' " (*People v Gray*, 84 NY2d 709, 712; *see People v Smikle*, 82 AD3d 1697, *lv denied* 17 NY3d 801).

Contrary to defendant's further contention, the sentences imposed for attempted murder and assault are not unduly harsh or severe, particularly in view of the serious nature of the offenses and the lack of remorse displayed by defendant. In addition, "[t]he fact that defendant's sentence was greater than that of his codefendant[, who accepted a plea agreement,] does not substantiate his [contention] that he was improperly punished for going to trial" (*People v Elwood*, 80 AD3d 988, 990, *lv denied* 16 NY3d 858).

Defendant failed to preserve for our review the contention in his pro se supplemental brief that he was deprived of a fair trial by prosecutorial misconduct during summation inasmuch as he did not object to the alleged improprieties (*see People v Roman*, 85 AD3d 1630, 1631-1632, *lv denied* 17 NY3d 821). Defendant likewise failed to preserve for our review the contention in his pro se supplemental brief that the consciousness of guilt based on flight charge was improper (*see generally Whitfield*, 72 AD3d 1610). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We have reviewed the remaining contention of defendant in his pro se

supplemental brief and conclude that it is without merit.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1403

CAF 10-01293

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

IN THE MATTER OF KYRAH A.J.S.

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

LEONARD S., RESPONDENT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT.

SUSAN M. SUSSMAN, NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

TIMOTHY D. HASELEY, ATTORNEY FOR THE CHILD, LOCKPORT, FOR KYRAH A.J.S.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered May 20, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject child to petitioner.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1404

CAF 10-01820

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

IN THE MATTER OF ALEXA P. AND AIRIANA P.

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

JAIME P., RESPONDENT-APPELLANT.

DEETZA G. BENNO, BATH, FOR RESPONDENT-APPELLANT.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF COUNSEL), FOR PETITIONER-RESPONDENT.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILDREN, CANANDAIGUA, FOR ALEXA P. AND AIRIANA P.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered August 4, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject children to petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Shawn A. [Milisa C.B.]*, 85 AD3d 1598, *lv denied* 17 NY3d 713).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1405

CAF 11-01416

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

IN THE MATTER OF JAY D.H., RESPONDENT-APPELLANT.
---------- ORDER
WAYNE COUNTY PRESENTMENT AGENCY,
PETITIONER-RESPONDENT.

ROBERT A. DINIERI, ATTORNEY FOR THE CHILD, CLYDE, FOR RESPONDENT-APPELLANT.

DANIEL C. CONNORS, COUNTY ATTORNEY, LYONS (KATHLEEN H. POHL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered April 26, 2011 in a proceeding pursuant to Family Court Act article 3. The order adjudged that respondent is a juvenile delinquent and placed him on probation.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1409

CA 11-01352

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

GREECE CENTRAL SCHOOL DISTRICT,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GARDEN GROVE LANDSCAPE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (GREGORY J. MCDONALD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered September 10, 2010 in a breach of contract action. The order denied the motion of defendant Garden Grove Landscape to deem its notice of claim timely pursuant to Education Law § 3813 (2-a).

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

Memorandum: In this breach of contract action arising from a school construction project (hereafter, project), Garden Grove Landscape (defendant) appeals from an order that denied its motion seeking, inter alia, to deem its notice of claim timely pursuant to Education Law § 3813 (2-a). Contrary to defendant's contention, Supreme Court properly concluded that the notice of claim was untimely.

"Pursuant to Education Law § 3813 (1), a notice of claim must be served upon a school district within three months after the accrual of a claim. The timely service of a notice of claim is a condition precedent to the commencement of an action against a school district" (*Lenz Hardware, Inc. v Board of Educ. of Van Hornesville-Owen D. Young Cent. School Dist.*, 24 AD3d 1278, 1279). "In the case of an action . . . for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied" (§ 3813 [1]), and "[a] denial of payment is deemed to occur upon an explicit refusal to pay[] or when a party should have viewed [its] claim as having been constructively rejected" (*Oriska Ins. Co. v Board of Educ., Richfield Springs Cent. School Dist.*, 68 AD3d 1190, 1191 [internal quotation marks omitted]; *see Granite*

Capital Holdings, Inc. v Sherburne-Earlville Cent. School Dist., 84 AD3d 1607, 1608). Here, defendant received a letter from the project's architect, dated July 21, 2008, stating that plaintiff was cancelling the contract because defendant "failed to complete the work of the contract in compliance with the contract documents or within the schedule required." In addition, the attorney for plaintiff sent a letter to defendant's insurer, dated August 6, 2008, indicating that defendant "failed to perform the work and as a result has received a notice of default." Consequently, we conclude that defendant should have viewed its claim for payment under the contract as having been constructively rejected as of the receipt of those letters, and thus the court properly concluded that the claim accrued at that time. Defendant's notice of claim was filed July 20, 2010, and it therefore was untimely.

We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1412

CA 11-01365

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

PAUL DE LIMA COMPANY, INC., PLAINTIFF-RESPONDENT,

V ORDER

ARAMATIC REFRESHMENT SERVICES, INC., ET AL.,
DEFENDANTS,
AND AMERICAN FOOD & VENDING CORPORATION,
DEFENDANT-APPELLANT.

DEFRANCISCO & FALGIATANO LAW FIRM, SYRACUSE (JOHN A. DEFRANCISCO OF COUNSEL), FOR DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered June 13, 2011. The order, among other things, denied that part of the motion of defendant American Food & Vending Corporation seeking to dismiss the complaint against it or for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 13, 2011,

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1413.1

CAF 11-00832

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

IN THE MATTER OF EMMA J. CASWELL,
PETITIONER-RESPONDENT-APPELLANT,

V ORDER

DERRICK D. ORR, SR.,
RESPONDENT-PETITIONER-RESPONDENT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

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

CAROLE A. ROWLAND, ATTORNEY FOR THE CHILDREN, FULTON, FOR DE'NAYAH O. AND DERRICK O., JR.

Appeal from an order of the Family Court, Oswego County (Donald E. Todd, A.J.), entered March 21, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded physical custody of the subject children to respondent-petitioner.

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: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1415

KA 10-01059

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVON S. GARRY, ALSO KNOWN AS "D,"
DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered May 5, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). We reject defendant's contention that his waiver of his right to appeal was invalid. The record of the plea colloquy and the written waiver of the right to appeal establish that defendant was "adequately apprised . . . that 'the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Kulyeshie*, 71 AD3d 1478, 1478, *lv denied* 14 NY3d 889, quoting *People v Lopez*, 6 NY3d 248, 256). Although defendant's contention that his plea was not voluntarily, knowingly, and intelligently entered survives his valid waiver of the right to appeal, defendant failed to preserve that contention for our review by moving to withdraw the plea or to vacate the judgment of conviction (*see People v Davis*, 45 AD3d 1357, *lv denied* 9 NY3d 1005; *People v Jones*, 42 AD3d 968). Further, contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666), because nothing in the plea allocution calls into question the voluntariness of the plea or casts "significant doubt" upon his guilt (*People v Lewandowski*, 82 AD3d 1602, 1602; *see Lopez*, 71 NY2d at 666; *Jones*, 42 AD3d 968).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1416

KA 10-01874

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM C. MARION, DEFENDANT-APPELLANT.

DAVID M. PALMIERE, ROCHESTER, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (William F. Kocher, J.), dated September 25, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). The total risk factor score on the risk assessment instrument prepared by the Board of Examiners of Sex Offenders (Board) resulted in the presumptive classification of defendant as a level three risk but, as defendant correctly notes, the Board recommended a downward departure to level two. "County Court, however, was not bound by the Board's recommendation and, in the proper exercise of its discretion, the court determined defendant's risk level based upon the record before it" (*People v Woodard*, 63 AD3d 1655, 1656, *lv denied* 13 NY3d 706; *see People v Charache*, 32 AD3d 1345, *affd* 9 NY3d 829). "The record supports the court's determination that there was no 'mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines,' and thus that a departure from the presumptive risk level was not warranted" (*Charache*, 32 AD3d 1345).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1417

KA 10-00855

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM TERRY, DEFENDANT-APPELLANT.

CHRISTOPHER S. BRADSTREET, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered August 12, 2009. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the period of postrelease supervision to a period of three years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, course of sexual conduct against a child in the second degree for conduct occurring between April 2003 and August 2005 (Penal Law § 130.80 [1]). Contrary to defendant's contention, County Court did not err in failing sua sponte to order a competency examination pursuant to CPL 730.30 (1). "Although defendant stated during the plea proceeding that he was taking medication and was being treated for a mental disability, defendant nonetheless responded appropriately to questioning by the court . . . and was 'unequivocal in assuring the court that he understood the meaning of the plea proceeding, and the implications of his decision to accept the plea agreement' " (*People v Yoho*, 24 AD3d 1247, 1248). Further, the court had the opportunity to interact with defendant and in fact noted on the record its observations that defendant appeared "level and unaffected," did not "appear particularly nervous or distraught," and "look[ed] pretty stable" (*see generally People v Phillips*, 16 NY3d 510, 517; *People v Jermain*, 56 AD3d 1165, *lv denied* 11 NY3d 926). To the extent that defendant's further contention that he was denied effective assistance of counsel survives his guilty plea (*see People v Garner*, 86 AD3d 955, 956), we reject that contention (*see generally People v Ford*, 86 NY2d 397, 404). Finally, although we reject defendant's challenge to the

severity of the terms of incarceration imposed, we conclude that the court erred in imposing a 10-year period of postrelease supervision because the crime for which it was imposed, i.e., course of sexual conduct against a child in the second degree, was committed prior to the effective date of Penal Law § 70.45 (2-a). Defendant's failure to preserve that issue for our review or to raise it on appeal is of no moment, inasmuch as we cannot permit an illegal sentence to stand (*see People v Moore* [appeal No. 1], 78 AD3d 1658, *lv denied* 17 NY3d 798). We therefore modify the judgment by reducing the period of postrelease supervision to a period of three years, the maximum allowed (*see People v Smith*, 63 AD3d 1625, *lv denied* 13 NY3d 800).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1418

KA 07-00923

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LORENZO D. SWEENEY, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KELLEY PROVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered March 14, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that County Court erred in refusing to allow defendant to withdraw his guilty plea because the plea was not voluntarily entered. We note that, in support of his motion to withdraw the plea, defendant contended only that he was denied effective assistance of counsel. Defendant thus failed to preserve for our review his present contention that his plea was not voluntarily entered, inasmuch as he also failed to move to vacate the judgment of conviction on that ground (*see People v Mackey*, 79 AD3d 1680, *lv denied* 16 NY3d 860). In any event, we reject defendant's contention. The court's statement that defendant could not receive a more lenient sentence if a jury convicted him after trial and that the sentence promise of 10 years was reasonable did not render the plea involuntary, in view of the transcript of the plea colloquy when read as a whole (*see People v Jackson*, 64 AD3d 1248, 1249, *lv denied* 13 NY3d 745; *see also People v Boyde*, 71 AD3d 1442, 1443, *lv denied* 15 NY3d 747). " 'The fact that defendant may have pleaded guilty to avoid receiving a harsher sentence does not render his plea coerced' " (*Boyde*, 71 AD3d at 1443).

We further conclude that the police had reasonable suspicion to stop and detain defendant for the two show-up identification procedures based upon the totality of the circumstances (*see People v Casillas*, 289 AD2d 1063, 1064, *lv denied* 97 NY2d 752; *see also People*

v Wiley, 32 AD3d 1352, *lv denied* 7 NY3d 930). Finally, although show-up identifications are generally disfavored because they are suggestive by their very nature (*see People v Ortiz*, 90 NY2d 533, 537), we conclude under the circumstances of this case that the show-up identifications that were the subject of the suppression hearing arising from two distinct robberies were valid (*see People v Riley*, 70 NY2d 523, 529).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1419

KA 10-02138

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

THOMAS J. PREEDOM, ALSO KNOWN AS THOMAS PREEDOM,
DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 13, 2010. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree and attempted escape in the second degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1420

KA 07-02075

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENNIE BURNETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered September 18, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and criminal mischief in the fourth degree (§ 145.00 [1]). Defendant was convicted upon a retrial after we reversed the first judgment of conviction based on an error in the jury charge (*People v Burnett*, 41 AD3d 1201). We held in the prior appeal that County Court did not err in refusing to suppress statements that defendant made to the police but we noted that, "[i]n view of the fact that we [were] granting a new trial," defendant could seek to reopen the suppression hearing to address inconsistencies in the testimony of the arresting officer at the suppression hearing and at trial (*id.* at 1202). Prior to the new trial, defendant again sought to suppress his statements and further sought to suppress a pair of scissors that the police obtained from his person upon his arrest. Rather than recalling any witnesses, however, defendant submitted copies of the transcripts of the trial testimony of the arresting officer and the suppression hearing testimony of another officer.

The court granted the relief sought by defendant in part by suppressing the statements, but defendant contends on appeal that the court erred in also refusing to suppress the scissors. We reject that contention. A police officer found the scissors when he conducted a pat-down search of defendant at the time of his arrest, and we agree with the court that the officer had the requisite probable cause for

the arrest (*see People v De Bour*, 40 NY2d 210, 223). At the time of defendant's arrest, the officer knew that a residence had been burglarized inasmuch as the burglar alarm was activated and he saw a broken window and an open door at the back of the residence. He heard the suspect running through the bushes in the backyard, heading southwest, and within two minutes he found defendant walking down a driveway at a location that was one block away and southwest of the location of the burglarized residence. Defendant had grass stains on his clothing, his shoes were wet from the dew on the grass, and he was sweating. The officer questioned defendant, who gave statements that were not credible concerning where he had been and where he was going. Based on all of that information, the officer had probable cause to arrest defendant, and the scissors were properly seized during the lawful pat down pursuant to the arrest (*see People v Troche*, 185 AD2d 368, 369, *lv denied* 80 NY2d 977; *People v Kelland*, 171 AD2d 885, 886, *lv denied* 77 NY2d 997; *cf. People v Ayers*, 85 AD3d 1583).

Defendant next contends that he was denied effective assistance of counsel based on defense counsel's failure to recall the witnesses from the first suppression hearing to testify, and based on defense counsel's having allowed defendant to appear in jail garb for trial. With respect to the suppression hearing testimony, we fail to comprehend the basis for defendant's contention inasmuch as the court in fact suppressed the statements. In any event, defendant failed to "demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to recall the witnesses (*People v Rivera*, 71 NY2d 705, 709). Indeed, if recalled to the stand, the arresting officer may have explained the seeming inconsistencies between his testimony at the first suppression hearing and the trial regarding the circumstances when defendant made his statements, thus negating the basis for defendant's request for suppression of those statements. With respect to defendant's attire at the first day of the trial, defense counsel noted on the record that he had contacted defendant about wearing appropriate clothing to court and had told defendant to contact him if he needed anything, and defendant did not respond. Defense counsel also spoke with defendant's mother about the need for defendant to wear appropriate clothing at trial, and she assured him that either she or defendant's brother would take care of the matter of the clothing. Thus, the record establishes that defense counsel took appropriate steps to ensure that defendant was dressed appropriately for trial. Although defendant contends that defense counsel was ineffective for failing to move for an adjournment upon observing that defendant was not appropriately dressed, it is well settled that a defendant is not denied effective assistance of counsel for failing to make a motion "that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

We reject defendant's further contention that the court erred in summarily denying his request for a new attorney. A court should grant a defendant's request for new counsel when a defendant demonstrates good cause for the substitution (*see People v Linares*, 2 NY3d 507, 510). A court "must carefully evaluate seemingly serious requests in order to ascertain whether there is indeed good cause for

substitution" (*People v Sides*, 75 NY2d 822, 824), and may not summarily dismiss a request for new counsel but must make "some minimal inquiry" (*id.* at 825). Here, when defendant requested a new attorney, the court made the requisite minimal inquiry by asking defendant for the reason for his request, but defendant was unable to give one. Contrary to defendant's contention, he never renewed his request for new counsel.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1421

KA 07-02437

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH EDWARDS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered November 9, 2007. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree and endangering the welfare of a child.

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 sexual abuse in the first degree (Penal Law § 130.65 [2]) and endangering the welfare of a child (§ 260.10 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's objection to the testimony of the victim's half-sister on the ground that it was speculative and irrelevant did not preserve for our review his present contentions that such testimony improperly bolstered the victim's credibility (*see People v Valentine*, 48 AD3d 1268, 1268-1269, *lv denied* 10 NY3d 871), and exceeded the scope of the prompt outcry exception to the hearsay rule (*see People v Stearns*, 72 AD3d 1214, 1218, *lv denied* 15 NY3d 778). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1422

KA 09-02351

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO CLARK, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered October 24, 2008. The judgment convicted defendant, upon a jury verdict, of conspiracy in the fourth degree (two counts), burglary in the first degree (five counts), burglary in the second degree, robbery in the first degree (six counts), robbery in the second degree (two counts) and assault in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of burglary in the second degree and dismissing count eight of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, two counts of conspiracy in the fourth degree (Penal Law § 105.10 [1]) and five counts of burglary in the first degree (§ 140.30 [2] - [4]). Defendant contends that the conviction of the two counts of conspiracy in the fourth degree is not supported by legally sufficient evidence because the People failed to establish that he was present when the conspiracy occurred. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's presence when the agreement was reached "could be readily inferred from the evidence" (*People v Serra*, 293 AD2d 338, *lv denied* 98 NY2d 681; *see People v Smoke*, 43 AD3d 1332, *lv denied* 9 NY3d 1039). Defendant further contends that, by giving a circumstantial evidence charge, County Court improperly permitted the jury to infer that he participated in the conspiracy based merely on his alleged participation in the underlying crimes. Defendant failed to preserve that contention for our review inasmuch as he did not object to the circumstantial evidence charge on that specific ground (*see People v Vassar*, 30 AD3d 1051, *lv denied* 7 NY3d 796). In any event, given that there was no direct proof of defendant's presence when the agreement was reached, we conclude that the circumstantial evidence charge was

proper (*see generally People v Daddona*, 81 NY2d 990, 992). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley,* 69 NY2d at 495).

Defendant further contends that the court committed reversible error by providing the jurors with a written copy of the entire jury charge both while the court orally delivered the charge and during the jury's deliberations. Defendant failed to preserve that contention for our review (*see People v Williams*, 8 AD3d 963, 964, *lv denied* 3 NY3d 683, *cert denied* 543 US 1070), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's final contention, the sentence is not unduly harsh or severe. Nevertheless, we note that count eight of the indictment, charging defendant with burglary in the second degree under Penal Law § 140.25 (2), must be dismissed as a lesser inclusory concurrent count of counts three through seven, charging defendant with burglary in the first degree (*see People v Coleman*, 82 AD3d 1593, 1595, *lv denied* 17 NY3d 793; *People v Skinner*, 211 AD2d 979, 980, *lv denied* 86 NY2d 741). We therefore modify the judgment accordingly.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1426

CA 11-00437

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

SHAWN GREEN, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 112892.)

SHAWN GREEN, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered January 15, 2010. The order denied the motion of claimant for summary judgment, granted the cross motion of defendant for summary judgment and dismissed the claim.

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

Memorandum: Claimant, a prisoner incarcerated at the Elmira Correctional Facility, filed a claim that sought damages "due to various improprieties imposed upon him via disciplinary actions." The Court of Claims denied claimant's motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the claim. The court determined, inter alia, that defendant's employees acted within the scope of their authority and followed applicable rules, and thus were therefore entitled to absolute immunity. Although claimant contends on appeal that the court erred in denying his motion, we note that defendant, as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), contends on appeal that the claim should have been dismissed because the court lacked subject matter jurisdiction. We agree. Although defendant did not raise that contention in support of its cross motion and thus failed to preserve it for our review (*cf. id.*), we note that a question of subject matter jurisdiction may be raised at any time (*see Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718; *Moulden v White*, 49 AD3d 1250, 1250-1251).

In determining whether the Court of Claims has subject matter jurisdiction over a claim, the initial question is "[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim" (*Matter of Gross v Perales*, 72 NY2d 231, 236, *rearg denied* 72 NY2d 1042; *see Buonanotte v*

New York State Off. of Alcoholism & Substance Abuse Servs., 60 AD3d 1142, 1144, *lv denied* 12 NY3d 712; *Sarbro IX v State of N.Y. Off. of Gen. Servs.*, 229 AD2d 910, 911). Regardless of how a claim is characterized, one that requires, as a threshold matter, the review of an administrative agency's determination falls outside the subject matter jurisdiction of the Court of Claims (*see Gross*, 72 NY2d at 236; *Buonanotte*, 60 AD3d at 1143-1144; *Matter of Salahuddin v Connell*, 53 AD3d 898, 899). Although claimant characterized his claim as one for money damages, upon our review of the record we conclude that adjudication of his claim requires review of the underlying administrative determination, over which the Court of Claims lacks subject matter jurisdiction (*see Salahuddin*, 53 AD3d at 899; *Lublin v State of New York*, 135 Misc 2d 419, *affd* 135 AD2d 1155, *lv denied* 71 NY2d 802; *see generally Gross*, 72 NY2d at 236).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1427.1

CA 11-00666

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

LEO J. ROTH CORPORATION, PLAINTIFF-RESPONDENT,

V ORDER

TRADEMARK DEVELOPMENT CO., INC., LEGACY AT ERIE STATION LLC, U.S. HOMES CO., INC., LEGACY AT FAIRWAYS LLC, AND MARK IV CONSTRUCTION CO., INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

GATES & ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (DAVID J. EDWARDS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered November 18, 2010 in a breach of contract action. The order granted in part plaintiff's motion for summary judgment.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1427

CA 11-01260

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

LEO J. ROTH CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TRADEMARK DEVELOPMENT CO., INC., LEGACY AT ERIE STATION LLC, U.S. HOMES CO., INC., LEGACY AT FAIRWAYS LLC, AND MARK IV CONSTRUCTION CO., INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

GATES & ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (DAVID J. EDWARDS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 1, 2010 in a breach of contract action. The judgment, among other things, awarded plaintiff the sum of $464,523.36 against defendants.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying in their entirety those parts of plaintiff's motion seeking summary judgment on the first through third and fifth through eighth causes of action, and by denying those parts of plaintiff's motion seeking dismissal of the first affirmative defense and counterclaim and reinstating that affirmative defense and counterclaim, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff, a heating, ventilation and air conditioning (HVAC) subcontractor, commenced this action seeking damages resulting from defendants' alleged failure to pay plaintiff in full for its work on two construction projects, i.e., Legacy at Erie Station (Erie Station project) and Legacy at Fairways (Fairways project). Defendant Trademark Development Co., Inc. (Trademark) was the general contractor and defendant Legacy at Erie Station, LLC was the owner of the Erie Station project, and defendant U.S. Homes Co., Inc. (U.S. Homes) was the general contractor and defendant Legacy at Fairways, LLC was the owner of the Fairways project. Defendant Mark IV Construction Co., Inc. (Mark IV) is the assignee of both HVAC subcontracts awarded to plaintiff by the general contractors.

Supreme Court erred in granting, with the exception of the claim

for compensation for extra work, that part of plaintiff's motion seeking summary judgment on the first cause of action alleging breach of the subcontract with Trademark, and in granting those parts of the motion seeking dismissal of the first affirmative defense and counterclaim alleging plaintiff's breach of that subcontract. We therefore modify the judgment accordingly. The subcontract provides, inter alia, for plaintiff's work to be performed in accordance with the plans and specifications prepared by the Erie Station project's engineering firm and the standards and guidelines for the New York State Energy Research and Development Authority (NYSERDA) incentive certification obtained by Trademark. In support of its motion, however, plaintiff failed to submit the engineering plans and specifications or the NYSERDA certification, and thus failed to establish its compliance therewith (*see generally Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771; *Arbatosky v Herman*, 28 AD3d 1241, 1242). In particular, by failing to submit those documents plaintiff failed to establish that the heat pumps it installed at Erie Station complied with the pertinent requirements set forth in the subcontract at the time it was executed.

We reach a different conclusion with respect to the fourth cause of action, alleging breach of the subcontract between plaintiff and U.S. Homes for the Fairways project. The court properly granted those parts of plaintiff's motion seeking summary judgment on that cause of action and seeking dismissal of the second affirmative defense and counterclaim, alleging plaintiff's breach of that subcontract. Plaintiff met its initial burden on those parts of the motion by establishing the relevant terms of that subcontract, plaintiff's performance thereof and the failure of U.S. Homes to pay the full amount due under that subcontract (*see North Cent. Mech., Inc. v Hunt Constr. Group, Inc.*, 43 AD3d 1396, 1397, *lv dismissed* 9 NY3d 1029). In opposition, defendants failed to raise a triable issue of fact with respect to the fourth cause of action or the merits of the second affirmative defense and counterclaim (*see generally Pando v Tapia*, 79 AD3d 993, 995; *NYCTL 1998-2 Trustee v 2388 Nostrand Corp.*, 69 AD3d 594, 595).

The court erred, however, in granting those parts of plaintiff's motion seeking summary judgment on the remaining causes of action, and we therefore further modify the judgment accordingly. The second, third, fifth and sixth causes of action, seeking recovery under the theories of unjust enrichment or quantum meruit, are duplicative of the breach of contract causes of action, and thus recovery under those theories is barred by the existence of the valid and enforceable subcontracts (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572; *Clark-Fitzpatrick v Long Is. R.R. Co.*, 70 NY2d 382, 388-389; *CFI Constr., Inc. v Central Sq. Cent. School Dist.*, 34 AD3d 1354, 1355). The court also erred in granting in its entirety that part of plaintiff's motion seeking summary judgment on the seventh cause of action and granting, with the exception of the claim for compensation for extra work, that part of plaintiff's motion seeking summary judgment on the eighth cause of action. We thus additionally modify the judgment accordingly. Plaintiff failed to meet its burden with respect to those causes of action, which are each for an account

stated. "Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (*Legum v Ruthen*, 211 AD2d 701, 703). We conclude, in light of all the circumstances presented, that more than one inference is rationally possible on the issue whether an account stated may be found based upon the retention of plaintiff's invoices, thus precluding summary judgment on that issue (*see Yannelli, Zevin & Civardi v Sakol*, 298 AD2d 579, 580-581).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1428

CA 11-01172

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

RYAN D. KIRBIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LPCIMINELLI, INC. AND LPCIMINELLI CONSTRUCTION CORP., DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (RYAN J. LUCINSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 5, 2010 in a personal injury action. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

It is hereby ORDERED that said appeal insofar as taken by defendant LPCiminelli Construction Corp. is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action to recover damages for injuries he sustained when he fell from a six-foot stepladder. Defendants appeal from that part of an order granting plaintiff's motion for partial summary judgment on liability under Labor Law § 240 (1). As a threshold matter, we note that defendant LPCiminelli Construction Corp. is not an aggrieved party and thus that the appeal, insofar as it is taken by that defendant, is dismissed (*see* CPLR 5511). Turning to the merits, we agree with LPCiminelli, Inc. (defendant) that the unsworn medical records submitted by plaintiff in support of the motion do not constitute "proof in admissible form" (*Doyle v Sithe/Independence Power Partners*, 296 AD2d 847; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Nevertheless, we conclude that plaintiff established his entitlement to partial summary judgment on liability under Labor Law § 240 (1). Plaintiff met his initial burden by submitting his uncontroverted affidavit in which he attested that the ladder "buckled" or "twisted" and then "collapsed." Plaintiff thus established as a matter of law " 'that it was not so placed . . . as to give proper protection to [him]' " (*Woods v Design Ctr., LLC*, 42 AD3d 876, 877; *see Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1136; *Nephew v Klewin Bldg. Co., Inc.*, 21 AD3d 1419, 1420). Plaintiff further established that the violation of Labor Law § 240 (1) "was a proximate cause of his injuries" (*Arnold v Baldwin Real Estate Corp.*, 63 AD3d 1621; *see Rudnik v Brogor Realty Corp.*, 45 AD3d

828).

In opposition, defendant failed to raise an issue of fact whether plaintiff's conduct was the sole proximate cause of the accident. In order to meet that burden, defendant was required to present "some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may [have been] the sole proximate cause of his . . . injuries" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188; *see Evans*, 53 AD3d at 1137). "Evidence that the ladder was structurally sound and not defective 'is not relevant on the issue of whether it was properly placed' . . ., and defendant's contention that plaintiff fell because [he may have misused the ladder] is based upon mere conjecture and thus is insufficient to defeat plaintiff['s] motion" (*Woods*, 42 AD3d at 877; *see Evans*, 53 AD3d at 1137).

Contrary to defendant's further contention, "the fact that discovery has not been completed does not provide a basis to defeat plaintiff['s] motion inasmuch as [d]efendant[ ] failed to establish that facts essential to justify opposition [to the motion] may exist but cannot then be stated" (*Ewing v ADF Constr. Corp.*, 16 AD3d 1085, 1087 [internal quotation marks omitted]; *see* CPLR 3212 [f]). Indeed, "[m]ere speculation . . . that the accident may have occurred in a different manner is not sufficient to raise an issue of fact" (*Rich v State of New York*, 231 AD2d 942, 943; *see Ewing*, 16 AD3d at 1087). Likewise, "the fact that the accident was unwitnessed does not provide a basis to defeat plaintiff['s] motion where, as here, 'there are no bona fide issues of fact with respect to how it occurred' " (*Ewing*, 16 AD3d at 1086). Defendant failed to raise an issue of fact by "merely criticiz[ing] plaintiff's account as unwitnessed and unsubstantiated by independent sources" (*Niles v Shue Roofing Co.*, 219 AD2d 785, 785; *see Evans*, 53 AD3d at 1137).

Finally, we reject the contention of defendant that plaintiff's affidavit is inherently unreliable because plaintiff is a convicted felon. Defendant failed to come forward with any evidence to contest plaintiff's version of the events, and plaintiff's account of the events "relate[s] a consistent and coherent version of the occurrence of the accident" (*Morris v Mark IV Constr. Co.*, 203 AD2d 922, 923; *see Boivin v Marrano/Marc Equity Corp.*, 79 AD3d 1750). We therefore cannot conclude that plaintiff's affidavit is incredible as a matter of law (*see Prince v 209 Sand & Gravel, LLC*, 37 AD3d 1024, 1025).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1431

CA 11-01393

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

MICHAEL A. THOMANN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (R. CHARLES MINER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (DAVID M. HEHR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered September 15, 2010 in a personal injury action. The order, insofar as appealed from, granted the motion of defendant Niagara Mohawk Power Corporation, doing business as National Grid, for summary judgment dismissing plaintiff's complaint and all cross claims against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he struck a guy wire attached to a utility pole while snowmobiling on a bike path in defendant Town of Amherst. It is undisputed that defendant Niagara Mohawk Power Corporation, doing business as National Grid (Niagara Mohawk), owned the guy wire and that, at the time of the accident, the guy wire was missing its yellow safety shield. Niagara Mohawk moved for summary judgment dismissing the complaint and all cross claims against it, contending that it was immune from liability pursuant to General Obligations Law § 9-103. We conclude that Supreme Court properly granted the motion.

Contrary to plaintiff's contention, Niagara Mohawk had an "authorized presence on the premises" where the accident occurred and thus was an occupant within the meaning of section 9-103 (1) (a) (*Albright v Metz*, 88 NY2d 656, 665; *see Bush v Valley Snow Travelers of Lewis County, Inc.*, 7 Misc 3d 285, 287-288, *affd for reasons stated* 27 AD3d 1177; *Weller v Colleges of the Senecas*, 261 AD2d 852, 853, *lv denied* 93 NY2d 817; *Weller v Marriott Mgt. Servs. Corp.*, 238 AD2d 888). Contrary to plaintiff's further contention, Niagara Mohawk established that the bike path is "the 'type of property which is not

only physically conducive to [snowmobiling] but is also a type which would be appropriate for public use in pursuing [snowmobiling] as recreation' " (*Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 548; *see Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 45-46).

Although it is undisputed that the bike path was held open to the public, that fact does not preclude Niagara Mohawk from relying on the immunity provided by section 9-103 (1) (a). First, Niagara Mohawk was not a municipality and, second, the path itself was undeveloped and unsupervised (*see Myers v State of New York*, 11 AD3d 1020, 1021; *Blair v Newstead Snowseekers*, 2 AD3d 1286, 1288-1289, *lv denied* 2 NY3d 704; *cf. Ferres v City of New Rochelle*, 68 NY2d 446, 453-454; *Celia v Town of Whitestown*, 71 AD3d 1427, 1427-1428; *Quackenbush v City of Buffalo*, 43 AD3d 1386, 1388).

Finally, we conclude that Niagara Mohawk established as a matter of law "that the willful conduct exception [set forth in General Obligations Law § 9-103 (2)] that would void the protection" of section 9-103 (1) (a) is inapplicable here (*Blair*, 2 AD3d at 1289), and plaintiff failed to raise a triable issue of fact on that issue (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although there was evidence that Niagara Mohawk had been advised that the yellow safety shield was missing from the guy wire, that evidence, alone, is insufficient to establish the "high-threshold demonstration by the injured party to show willful intent by the alleged wrongdoer" (*Farnham v Kittinger*, 83 NY2d 520, 529; *see* § 9-103 [2]; *Cutway v State of New York*, 60 NY2d 183, 192, *rearg denied* 61 NY2d 670; *Scuderi v Niagara Mohawk Power Corp.*, 243 AD2d 1049, 1050).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1432

CA 11-00947

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

JOSEPH LAWRENCE SHERIDAN, PLAINTIFF-APPELLANT,

V ORDER

MICHAEL GUINDY, INDIVIDUALLY, AND M&C OF USA, INC., DEFENDANTS-RESPONDENTS.

MORGAN LAW FIRM, P.C., SYRACUSE (WILLIAM R. MORGAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 25, 2010. The order denied the motion of plaintiff for partial summary judgment and granted the cross motion of defendants for partial summary judgment.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1433

TP 11-01255

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF KEVIN W. FOSTER, PETITIONER,

V MEMORANDUM AND ORDER

AURELIUS FIRE DISTRICT, RESPONDENT.

LAW OFFICE OF NORMAN J. CHIRCO, AUBURN (NORMAN J. CHIRCO OF COUNSEL), AND SCICCHITANO & PINSKY, PLLC, SYRACUSE, FOR PETITIONER.

THE LAW OFFICES OF MARK C. BUTLER, PLLC, WILLIAMSVILLE (MARK C. BUTLER 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, Cayuga County [Thomas G. Leone, A.J.], entered June 7, 2011) to review a determination of respondent. The determination suspended petitioner from respondent.

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 challenging the determination finding him guilty of misconduct based upon actions constituting insubordination and failure to follow the chain of command, and imposing a penalty. We note at the outset that petitioner does not raise a substantial evidence issue, and thus Supreme Court erred in transferring the proceeding to this Court (*see Matter of Smeraldo v Rater*, 55 AD3d 1298, 1299). In the interest of judicial economy, however, we will address the merits of the issues raised by petitioner (*see id*.).

We reject petitioner's contention that the charge against him should have been dismissed because it failed to specify any rule, regulation, policy or bylaw that he violated. Petitioner conceded at the administrative hearing that he was aware of respondent's policies with respect to the chain of command, and the record establishes that he deliberately circumvented that chain of command to undermine the authority of his superior officer. Thus, "given the facts of this case, petitioner's assertion that a specific act or misdeed must be embodied in a formal rule or regulation before it may serve as a basis for disciplinary action is unavailing" (*Matter of Murphy v County of Ulster*, 218 AD2d 832, 833, *lv denied* 87 NY2d 804).

We reject petitioner's further contention that the penalty

imposed, which includes suspension followed by a probationary period, is " 'so disproportionate to the offense as to be shocking to one's sense of fairness' " (*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1434

TP 11-01447

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF JAMES T. HASTINGS, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF SHERRILL AND ROBERT A. COMIS, CITY MANAGER, RESPONDENTS.

DONALD R. GERACE, UTICA, FOR PETITIONER.

SAUNDERS, KAHLER, L.L.P., UTICA (GREGORY J. AMOROSO 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, Oneida County [Bernadette T. Clark, J.], entered July 11, 2011) to review a determination of respondents. The determination terminated the employment of petitioner.

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 terminating his employment as police chief for respondent City of Sherrill following a hearing conducted pursuant to Civil Service Law § 75. Petitioner's employment was terminated based on, inter alia, his continued association with "person(s) notoriously suspected of illegal activities," specifically his 29-year-old son, outside the performance of petitioner's official duties. Contrary to petitioner's contention, the departmental regulations that he was found to have violated did not impermissibly interfere with his constitutionally protected right of intimate association (*see generally Roberts v United States Jaycees*, 468 US 609, 617-619; *Matter of Morrisette v Dilworth*, 59 NY2d 449, 452). "[I]t is well established that it is within the State's power to regulate the conduct of its police officers even when that conduct involves the exercise of a constitutionally protected right" (*Morrisette*, 59 NY2d at 452), and we reject petitioner's contention that the departmental regulations at issue here are constitutionally overbroad (*see id.* at 452-453). Moreover, the record supports the conclusion that petitioner's termination was not impermissibly based solely on the existence of petitioner's relationship with his son but instead resulted from concern with regard to maintaining the integrity of the police department (*see Jenkins v Tyler*, 167 F Supp 2d 652, 655;

cf. Adler v Pataki, 185 F3d 35, 44-45). We further note that, in light of the age of petitioner's son and the absence of any evidence that his son was mentally incapacitated, this case does not involve the constitutionally protected interest in custodial relationships between parents and their children (*see generally Troxel v Granville*, 530 US 57, 66; *Pizzuto v County of Nassau*, 240 F Supp 2d 203, 209-211).

We conclude that petitioner's contention that the charges were insufficiently specific to put him on notice thereof "was the subject of a separate unsuccessful CPLR article 78 proceeding and, as such, is precluded by the doctrine of collateral estoppel" (*Matter of Ruiz v New York State Div. of Parole*, 70 AD3d 1162, 1163; *see generally Town of Union v Pallet Co.*, 50 AD2d 628, 629, *lv denied* 38 NY2d 710). We further conclude that the record contains substantial evidence to support the determination with respect to all of the charges (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). Finally, we have considered petitioner's remaining contentions and conclude that they are without merit, or are not properly before us because they involve a second set of charges that were not the subject of the determination before us.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1435

TP 11-01442

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF HENRY HUDSON, PETITIONER,

V ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE DIVISION OF PAROLE, RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY 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 [Mark H. Dadd, A.J.], entered June 23, 2011) to review a determination of respondent. The determination revoked petitioner's release to parole supervision.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Darnel v David*, 300 AD2d 766, 767).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1436

KA 10-01660

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEPHEN M. COLLINS, DEFENDANT-APPELLANT.

SCOTT P. FALVEY, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER A. PARKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (James R. Harvey, J.), rendered November 27, 2002. The judgment convicted defendant, upon his plea of guilty, of use of a child in a sexual performance and course of sexual conduct against a child in the second degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1437

KA 09-01512

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RANDY F. WILSON, DEFENDANT-APPELLANT.

MICHAEL G. CONROY, TONAWANDA, 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 (Mark H. Fandrich, A.J.), rendered May 26, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree, assault in the second degree (two counts) and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1438

KA 10-02422

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEITH C. FERRIN, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN J. MULDOON OF COUNSEL), 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 7, 2010. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree and evading or defeating cigarette and tobacco products tax.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1439

KA 10-01842

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL CASEY, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered December 1, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1440

KA 10-02203

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HAROLD D. HILL, JR., DEFENDANT-APPELLANT.

MARCEL J. LAJOY, ALBANY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered October 4, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1443

KA 11-01327

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DANIEL J. EARLEY, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 17, 2010. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree and criminal possession of a controlled substance in the seventh degree.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1445

CAF 11-01150

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF THOMAS EDWARD MORRISON,
PETITIONER-RESPONDENT,

V ORDER

JESSICA DAWN MURRAY, RESPONDENT-APPELLANT.

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

BURGETT & ROBBINS, LLP, JAMESTOWN (KENNETH M. LASKER OF COUNSEL), FOR PETITIONER-RESPONDENT.

MYRA V. BLASIUS, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR LILLIANNA R.M.

Appeal from an order of the Family Court, Chautauqua County (Paul G. Buchanan, A.J.), entered August 30, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint custody of their child.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1447

CAF 10-02002

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF DONNA H., SEAN H.,
AND CHLOE H.

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

RICHARD H., RESPONDENT-APPELLANT,
AND TIFFANY H., RESPONDENT.

BERNADETTE M. HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR DONNA H., SEAN H., AND CHLOE H.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 14, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Richard H. had neglected the subject children.

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

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1457

CAF 11-01326

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF JULAXES T.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-APPELLANT;

JENNIFER R., RESPONDENT-RESPONDENT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (CAROL EISENMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered June 24, 2011 in a proceeding pursuant to Family Court Act article 10. The order dismissed the neglect petition.

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: December 23, 2011

Frances E. Cafarell
Clerk of the Court

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

1667/09

KA 08-01267

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY HILL, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 14, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree. The judgment was affirmed by an order of this Court entered February 11, 2010 in a memorandum decision (70 AD3d 1487), and defendant on July 21, 2010 was granted leave to appeal to the Court of Appeals from the order of this Court (15 NY3d 774), and the Court of Appeals on October 20, 2011 modified the order and remitted the case to this Court for further proceedings in accordance with the opinion (___ NY3d ___).

Now, upon remittitur from the Court of Appeals and having considered the issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: On a prior appeal in *People v Hill* (70 AD3d 1487), we affirmed the judgment convicting defendant upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]). The Court of Appeals modified our order and remitted the case to this Court for consideration of the suppression issues raised by defendant but not determined by this Court (*People v Hill*, ___ NY3d ___ [Oct. 20, 2011]). Defendant contends that Supreme Court erred in refusing to suppress his statements to the police because they were the fruit of the alleged unlawful entry into his apartment. Even assuming, arguendo, that the court erred in refusing to suppress those statements, we conclude that the error is harmless (*see People v Watkins*, 59 AD3d 1128, 1129, *lv denied* 12 NY3d 922; *see generally*

People v Crimmins, 36 NY2d 230, 237).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

MOTION NO. (327/97) KA 11-01735. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMEL POWELL, ALSO KNOWN AS GERMAINE ELLISON, ALSO KNOWN AS SPLIFF, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (506/08) KA 05-01253. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL W. TIMMONS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: FAHEY, J.P., GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (911/08) KA 04-00435. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY R. THOMAS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (879/11) KAH 10-00962. –- THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHRIS APPLEWHITE, PETITIONER-APPELLANT, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. –- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (912/11) CA 11-00639. -- MARGARET BEVAN, PLAINTIFF-APPELLANT, V DESMOND MURRAY, CHRISTINE MURRAY, AND MIKE WESTON, DOING BUSINESS AS MIKE WESTON CONTRACTING, DEFENDANTS-RESPONDENTS. DESMOND MURRAY AND CHRISTINE MURRAY, THIRD-PARTY PLAINTIFFS-RESPONDENTS, V GRAYWOOD PROPERTIES, LLC, THIRD-PARTY DEFENDANT-RESPONDENT. -- Motions for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (922/11) CA 11-00241. -- THE ONEIDA INDIAN NATION, A SOVEREIGN NATION, PLAINTIFF-APPELLANT, V HUNT CONSTRUCTION GROUP, INC., DEFENDANT-RESPONDENT. THE ONEIDA INDIAN NATION, A SOVEREIGN NATION, THIRD-PARTY PLAINTIFF, V BRENNAN BEER GORMAN/ARCHITECTS, LLP, THIRD-PARTY DEFENDANT. BRENNAN BEER GORMAN/ARCHITECTS, LLP, FOURTH-PARTY PLAINTIFF-RESPONDENT, V BERTINO & ASSOCIATES, INC., FOURTH-PARTY DEFENDANT-APPELLANT, STEVEN FELLER, P.E., STEVEN FELLER, P.E. INC., STEVEN FELLER, P.E., PL, S. DESIMONE CONSULTING ENGINEERS, PLLC, FOURTH-PARTY DEFENDANTS-RESPONDENTS, ET AL., FOURTH-PARTY DEFENDANTS. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (958/11) CA 11-00781. -- IN THE MATTER OF ANTHONY SCRO, PETITIONER-RESPONDENT, V BOARD OF EDUCATION OF JORDAN-ELBRIDGE CENTRAL

SCHOOL DISTRICT AND JOHN DOE, TREASURER OR ACTING TREASURER, JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT, RESPONDENTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, GORSKI, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (959/11) CA 10-02444. -- KAUFMANN'S CAROUSEL, INC., PLAINTIFF-APPELLANT, V CAROUSEL CENTER COMPANY LP AND CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS. (ACTION NO. 1.) -- LORD & TAYLOR CAROUSEL, INC., PLAINTIFF-APPELLANT, V CAROUSEL CENTER COMPANY LP AND CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS. (ACTION NO. 2.) -- LT PROPCO, LLC, PLAINTIFF-APPELLANT, V CAROUSEL CENTER COMPANY LP AND CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS. (ACTION NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (963/11) CA 11-00074. -- YVETTE HUFF, PLAINTIFF-RESPONDENT, V ANITA L. RODRIGUEZ, FORMERLY KNOWN AS ANITA L. ROSARIO, AND ENRIQUE RODRIGUEZ, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (994/11) KA 08-01129. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRIS HANKS, DEFENDANT-APPELLANT. -- Motion for reargument granted, and upon reargument, the memorandum and order entered September 30, 2011 (87 AD3d 1370) is amended by deleting the fifth sentence of the first paragraph of the memorandum and by deleting the first and second sentences of the second paragraph of the memorandum and substituting the following sentences: "Contrary to the contention of defendant in his main brief with respect to the first warrant and the contention of defendant in his main and pro se supplemental briefs with respect to the fifth amended and extended warrant, the record supports the court's finding that the applications for those warrants established that 'normal investigative procedures ha[d] been tried and ha[d] failed, or reasonably appear[ed] to be unlikely to succeed if tried, or to be too dangerous to employ' (CPL 700.15 [4]; *see People v Rabb*, 16 NY3d 145, 152). In affidavits supporting those warrant applications, a detective detailed the traditional investigative techniques, including but not limited to physical surveillance and the use of confidential informants, that were utilized by Task Force Members beginning four months prior to the issuance of the first warrant and continuing up to the date of the application for the fifth amended and extended warrant." PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND GORSKI, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1003/11) CA 10-02024. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V MARK DIEHL AND MELISSA SCHMIGEL,

DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND GORSKI, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1004/11) CA 10-02025. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V MARK DIEHL AND MELISSA SCHMIGEL, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND GORSKI, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1005/11) CA 10-02026. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V MARK DIEHL AND MELISSA SCHMIGEL, DEFENDANTS-RESPONDENTS. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND GORSKI, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1026/11) CA 11-00423. -- MICHAEL J. LOGRASSO AND PATRICIA A. LOGRASSO, PLAINTIFFS-RESPONDENTS, V CITY OF TONAWANDA, CITY OF TONAWANDA POLICE DEPARTMENT AND MICHAEL E. ROGERS, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, SCONIERS, GREEN, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1026.1/11) CA 11-00978. -- MICHAEL J. LOGRASSO AND PATRICIA A. LOGRASSO, PLAINTIFFS-RESPONDENTS, V CITY OF TONAWANDA, CITY OF TONAWANDA POLICE DEPARTMENT AND MICHAEL E. ROGERS, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, SCONIERS, GREEN, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1026.2/11) OP 11-01202. -- IN THE MATTER OF H.H. WARNER, LLC, PETITIONER, V ROCHESTER GENESEE REGIONAL TRANSPORTATION AUTHORITY, RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, SCONIERS, GREEN, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1051/11) CA 10-02273. -- JUAN MAZURETT AND THERESA MAZURETT, PLAINTIFFS-RESPONDENTS, V ROCHESTER CITY SCHOOL DISTRICT, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GREEN, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1205/11) CA 10-01587. -- IN THE MATTER OF JOSE A. FUENTES, PETITIONER-APPELLANT, V BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, GREEN, AND

GORSKI, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1248/11) KAH 10-02089. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. VICTOR WOODARD, PETITIONER-APPELLANT, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

MOTION NO. (1264/11) KA 10-01619. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JUAN TORRES, DEFENDANT-APPELLANT. –- Motion to dismiss granted. Memorandum: The appeal is dismissed as academic, and the matter is remitted to Erie County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application by the District Attorney or the attorney who appeared for appellant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

KA 09-02299. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHANE R. DUNNING, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, William F. Kocher, J. - Driving While Intoxicated). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)

KAH 10-01337. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. ERIC HARRIS, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Wyoming County, Mark H. Dadd, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed Dec. 23, 2011.)