SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 10, 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

PATRICIA L. MORGAN, CLERK

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

212

CA 10-01921

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

WILLIAM L. MCNAMARA, PLAINTIFF-RESPONDENT,

V ORDER

ANDREW MAGGITTI, DEFENDANT,
AND ANTHONY NICOSIA, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RYON D. FLEMING OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PELLETTER, MCKELVEY & PELLETTER, SILVER CREEK (JAMES J. PELLETTER OF COUNSEL), FOR DEFENDANT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered June 14, 2010 in a personal injury action. The order denied the motion of defendant Anthony Nicosia for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 9, 2011, and filed in the Chautauqua County Clerk’s Office on May 4, 2011,

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

467

CA 10-02240

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GORSKI, AND MARTOCHE, JJ.

KENNETH J. WILLIAMS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CHARLEE C. FETZNER, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

LATTIMORE ROAD SURGICENTER, INC., ET AL., DEFENDANTS, JOHN D. MARQUARDT, M.D. AND LATTIMORE ORTHOPAEDICS, P.C., DEFENDANTS-RESPONDENTS.

CARL L. FEINSTOCK, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 13, 2010. The order and judgment, inter alia, dismissed the complaint upon a jury verdict.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

488

KA 09-01288

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMIE PEREZ, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (MARSHALL A. KELLY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered June 4, 2009. The judgment convicted defendant, upon his plea of guilty, of promoting prison contraband in the first 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 promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant contends that he was denied due process based on the delay of 11½ months between the date of the incident and the date of the indictment. Applying the factors set forth in *People v Taranovich* (37 NY2d 442, 445), we reject that contention (*see People v Vernace*, 96 NY2d 886, 887-888). "There is no specific temporal period by which a delay may be evaluated or considered 'presumptively prejudicial' " (*People v Romeo*, 12 NY3d 51, 56, *cert denied* 130 S Ct 63), but a delay of 11½ months alone is insufficient to require dismissal of the indictment (*see People v Beyah*, 302 AD2d 981, *lv denied* 99 NY2d 626; *People v Irvis*, 301 AD2d 782, 784, *lv denied* 99 NY2d 655). The People explained that the delay was caused by staffing problems in the District Attorney's Office, and defendant does not contend that the delay was caused by any bad faith on the part of the People (*see Romeo*, 12 NY3d at 56-57). "The charge against defendant was serious, 'involv[ing] the safety and security of a correctional facility . . .' . . . Moreover, because defendant was already incarcerated on a prior felony conviction, 'the delay caused no further curtailment of his freedom' . . . Finally, we are unable to conclude on the record before us that the defense has been impaired by reason of the delay" (*People v Jenkins*, 2 AD3d 1390, 1391; *see People v Coggins*, 308 AD2d 635, 636; *People v Richardson*, 298 AD2d 711, 712).

Defendant further contends that County Court erred in refusing to suppress the statement that he made to the correction officer before that officer conducted a pat frisk. We reject that contention. At the *Huntley* hearing, the correction officer testified that, after a disturbance in the prison yard, he escorted defendant from the yard. Once inside the corridor of the prison, the correction officer asked defendant to face the wall "in the pat frisk position." Before frisking defendant, the correction officer asked him "if he had anything on him." Defendant answered affirmatively, and it is that answer that defendant contends should have been suppressed.

The Court of Appeals has clearly stated that "[w]hen . . . the circumstances of the detention and interrogation of a prison inmate are no longer analogous to those kinds of detentions found not custodial in nonprison settings[] but instead entail added constraint that would lead a prison inmate reasonably to believe that there has been a restriction on that person's freedom over and above that of ordinary confinement in a correctional facility, *Miranda* warnings are necessary" (*People v Alls*, 83 NY2d 94, 100, *cert denied* 511 US 1090). Although the correction officer admitted at the hearing that defendant was restrained to a greater degree than other inmates, that statement does not establish that defendant was restrained in a manner over and above that of ordinary confinement in a correctional facility.

Here, at the time defendant made his incriminating statement, the detention was the equivalent of a frisk for weapons. "There is a clear distinction between a stop and frisk inquiry and a forcible seizure [that] curtails a person's freedom of action to the degree associated with a formal arrest" (*People v Morales*, 65 NY2d 997, 998). "When a seizure of a person remains at the stop and frisk inquiry level and does not constitute a restraint on his or her freedom of movement of the degree associated with a formal arrest, *Miranda* warnings need not be given prior to questioning" (*People v Bennett*, 70 NY2d 891, 894; *see Morales*, 65 NY2d at 998). Although the Court of Appeals' decisions in *Bennett* and *Morales* concern situations in nonprison settings, we conclude that the underlying premise is the same for prison settings. A stop and frisk would not constitute custody pursuant to the *Miranda* rule in the nonprison setting, and we see no need to afford prison inmates any greater protection in a prison setting. Thus, "[t]he brief investigatory detention of defendant did not 'entail added constraint that would lead a prison inmate reasonably to believe that there has been a restriction on that person's freedom over and above that of ordinary confinement in a correctional facility' . . ., and the correction [officer's] single question to defendant did not constitute custodial interrogation" (*People v Douglas*, 12 AD3d 1174, quoting *Alls*, 83 NY2d at 100).

In the cases relied upon by the dissent, the seizures of the defendants were commensurate with a formal arrest, and the questioning went beyond routine questioning (*see People v Gause*, 50 AD3d 1392, 1393-1394; *People v Brown*, 49 AD3d 1345, 1346; *People v Hope*, 284 AD2d 560, 561-562).

In any event, we further conclude that the court properly refused to suppress the statement in question based on the public safety exception to the *Miranda* rule (*see generally New York v Quarles*, 467 US 649, 655-657). The correction officer testified at the hearing that it was his practice to ask inmates whether they "had anything on" them before any pat frisk so that he would not "get stuck or cut." Although the correction officer admitted that he asked the question in part to obtain information about a possible violation of inmate rules, the question was " 'reasonably prompted by a concern to secure the safety of the investigating officer[] . . . and was not *solely* motivated for the purpose of eliciting testimonial evidence' " (*People v Taylor*, 302 AD2d 868, 868-869, *lv denied* 99 NY2d 658 [emphasis added]).

We reject defendant's contention that he was improperly sentenced as a second felony offender. Contrary to defendant's contention, the felony conviction for which he was incarcerated at the time of the incident at issue qualified as the requisite predicate felony conviction for second felony offender status (*cf. People v Samms*, 95 NY2d 52, 55; *see generally People v Ross*, 7 NY3d 905, 906). Defendant was not denied effective assistance of counsel based on defense counsel's failure to move to vacate the second felony offender adjudication on that ground (*see People v Bell*, 259 AD2d 429, *lv denied* 93 NY2d 922). "Defendant failed to preserve for our review his further contention concerning the failure to comply with the procedural requirements of CPL 400.21 . . . [and, i]n any event, [he] waived strict compliance with [that statute] by admitting the prior felony conviction in open court" (*People v Vega*, 49 AD3d 1185, 1186, *lv denied* 10 NY3d 965). The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contention and conclude that it lacks merit.

All concur except CARNI, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent inasmuch as I disagree with the conclusion of my colleagues that defendant was not subject to custodial interrogation when he was questioned by a correction officer just prior to the discovery of a weapon in the waistband of defendant's pants.

I agree with defendant that reversal is required based on County Court's refusal to suppress the statement allegedly made by defendant to that correction officer. At the *Huntley* hearing, the correction officer testified that there was a disturbance in the prison yard and that he was instructed to escort defendant out of the yard and into a corridor because another officer had witnessed defendant place something in his pants. In the corridor, with several other correction officers present, the officer who had escorted defendant out of the yard instructed him to face the wall and asked defendant "if he had anything on him." Defendant responded that he had a weapon, and a pat frisk revealed "a pick[-]type weapon" in defendant's waistband. The correction officer further testified that defendant was not free to leave once he was escorted out of the yard and that he was subjected to greater restraint than that to which other inmates were subjected. I conclude that, "under those circumstances,

'defendant could have reasonably believed that his freedom was restricted over and above that of ordinary confinement' " (*People v Brown*, 49 AD3d 1345, 1346; *see People v Alls*, 83 NY2d 94, 100, *cert denied* 511 US 1090; *People v Hope*, 284 AD2d 560, 562), and thus the correction officer should have administered *Miranda* warnings (*see Alls*, 83 NY2d at 100).

I also respectfully disagree with the majority's determination to extend the public safety exception to the prison context under the facts presented here (*see People v Gause*, 50 AD3d 1392, 1394). The altercation that gave rise to the isolated custodial detention of defendant had fully dissipated when multiple correction officers surrounded defendant and he was escorted by a correction officer into a corridor in order to be pat frisked. The correction officer admitted that his question to defendant included an attempt to obtain information about a possible violation of inmate rules. "[I]t was likely that the inquiry would elicit evidence of a crime and, indeed, it did elicit an incriminating response" (*Brown*, 49 AD3d at 1346). Thus, I conclude that the public safety exception is inapplicable here (*see Gause*, 50 AD3d at 1394).

Inasmuch as I "cannot say with certainty that the erroneous suppression ruling played no part in defendant's decision to plead guilty," I conclude that the plea must be vacated (*People v Self*, 213 AD2d 998, 998; *see People v Coles*, 62 NY2d 908, 909-910). I would therefore vacate the plea, grant that part of the omnibus motion seeking to suppress defendant's statement to the correction officer and remit the matter to County Court for further proceedings on the indictment.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

497

CA 10-02234

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

TERRY JOHNSON, RICHARD JOHNSON AND PITTSFORD VISION, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

OPTOMETRIX, INC., DEFENDANT-APPELLANT.

IN THE MATTER OF TERRY JOHNSON, RICHARD JOHNSON AND PITTSFORD VISION, PETITIONERS-RESPONDENTS,

V

MONROE COUNTY TREASURER AND MONROE COUNTY CLERK, RESPONDENTS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS AND PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 20, 2010 in a breach of contract action. The order denied the motion of defendant to release certain escrow funds to it.

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

Memorandum: Plaintiffs commenced this breach of contract action seeking, inter alia, immediate possession of a retail eyewear store that defendant was operating pursuant to an agreement with plaintiffs. By order entered August 28, 2009, Supreme Court denied that part of plaintiffs' motion to direct the payment of $100,000 in escrow funds into the court and granted that part of defendant's cross motion to release those funds to its counsel (*Johnson v Optometrix, Inc.*, 75 AD3d 1073). The escrow funds were held by plaintiffs' counsel as a deposit for a corporate purchase transaction that subsequently failed (*id.*). Plaintiffs obtained a stay of the order pending their appeal therefrom by depositing those escrow funds with the Monroe County Clerk as an undertaking pursuant to CPLR 5519 (a) (2). After defendant objected to the use of the escrow funds for the undertaking

and following a conference with the court that resulted in a stipulation between the parties, the court communicated to the parties by e-mail that it had "assumed" that the escrow funds would be used to satisfy "the preconditions of [CPLR] 5519 (a) (2)." Defendant subsequently moved in this Court for an order vacating the stay on the ground that, inter alia, it was improper for plaintiffs to use the escrow funds as an undertaking to effectuate an automatic stay. By order entered September 15, 2009, this Court granted defendant's motion "to the extent that the automatic stay . . . is vacated effective November 13, 2009 unless [plaintiffs] perfect the appeal [from the August 28, 2009 order] on or before November 12, 2009 . . . ." Plaintiffs thereafter timely perfected their appeal and, by order entered July 2, 2010, we affirmed (*Johnson*, 75 AD3d 1073).

While that appeal was pending, however, the court granted plaintiffs' motion for summary judgment on the complaint, and judgment was entered against defendant in the sum of $78,940.51. Judgment was also entered against defendant in the sum of $26,548.75 for reasonable attorneys' fees and costs recoverable pursuant to the written agreement of the parties. By order to show cause in February 2010, plaintiffs commenced a special proceeding pursuant to CPLR 5225 (b) seeking an order directing the Monroe County Treasurer to pay over to plaintiffs the $100,000 undertaking in the event that, inter alia, the August 28, 2009 order was affirmed. By order entered May 3, 2010, the court granted plaintiffs' motion.

On July 30, 2010, shortly after we affirmed the August 28, 2009 order, defendant moved for an order directing the Monroe County Treasurer to pay the $100,000 undertaking to defendant. Defendant appeals from an order denying that motion. We affirm.

We reject defendant's contention that this Court should reexamine the propriety of plaintiffs' use of the escrow funds for the undertaking. We agree with the court that the issue was previously raised by defendant when it moved to vacate the automatic stay pending plaintiffs' appeal from the August 28, 2009 order and that the issue was determined by this Court's order entered September 15, 2009. The doctrine of law of the case "precludes this Court from reexamining an issue [that] has been decided against a party on a prior appeal where that party had a full and fair opportunity to address the issue" (*Frankson v Brown & Williamson Tobacco Corp.*, 67 AD3d 213, 217), and that is the case here.

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

All concur except FAHEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent. On the prior appeal, a majority of this Court determined that, pursuant to the escrow agreement between the parties, the $100,000 in escrow funds (funds) "were intended to be a deposit by defendant pending the negotiation of terms for the purchase of the corporation owned by plaintiffs" and, in view of the inability of the parties "to reach an agreement on the terms of the sale, defendant [was] entitled to the

return of the [funds]" (*Johnson v Optometrix, Inc.*, 75 AD3d 1073, 1074). I conclude that plaintiffs' attorney, as escrowee of the funds, did not comply with his " 'duty not to deliver the escrow [funds] to [anyone] except upon strict compliance with the conditions imposed' by the escrow agreement" (*Great Am. Ins. Co. v Canandaigua Natl. Bank & Trust Co.*, 23 AD3d 1025, 1027-1028, *lv dismissed* 7 NY3d 741, quoting *Farago v Burke*, 262 NY 229, 233), and plaintiffs should not have used the funds to give the undertaking essential to the stay of the order from which the prior appeal was taken (*see* CPLR 5519 [a] [2]). That stay allowed the funds to be withheld from defendant long enough for plaintiffs to commence the special proceeding pursuant to CPLR 5225 (b) in which this appeal had its genesis.

Even assuming, arguendo, that we considered and determined the propriety of plaintiffs' deposit of the funds with the Monroe County Clerk in the prior appeal (*Johnson*, 75 AD3d 1073), we are not precluded from reexamining the issue here. Indeed, "[e]very court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made" (*Aridas v Caserta*, 41 NY2d 1059, 1061; *see Faricelli v TSS Seedman's*, 94 NY2d 772, 774).

In my view, under the circumstances of this case, it would be inequitable to withhold the funds from defendant, and plaintiffs should not benefit from their attorney's breach of his obligation not to deliver the funds upon a condition other than one contemplated by the escrow agreement. Consequently, I would reverse the order and grant the motion for an order directing the Monroe County Treasurer to pay the funds to defendant.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

542

CA 10-02389

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

DEBORAH I. GRAVIUS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.

SABATINO C. SANTARPIA, BUFFALO, FOR PLAINTIFF-APPELLANT.

MARTIN POLOWY, ACTING COUNTY ATTORNEY, BUFFALO (BRIAN R. LIEBENOW OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered February 9, 2010. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

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

Memorandum: Supreme Court properly granted defendant's motion to dismiss the complaint based on the failure of plaintiff to comply with defendant's demand for an oral examination pursuant to General Municipal Law § 50-h. "It is well settled that a plaintiff who has not complied with General Municipal Law § 50-h (1) is precluded from maintaining an action against a municipality" (*McDaniel v City of Buffalo*, 291 AD2d 826) and, here, plaintiff failed to comply with defendant's demand pursuant to the statute.

On October 10, 2008, defendant served a demand for an oral examination to be conducted on November 19, 2008. Plaintiff's counsel indicated by letter dated October 14, 2008 that plaintiff was a resident of Florida and that he was uncertain whether she would be able to attend the examination on that date. Plaintiff's counsel also inquired whether the examination could be conducted by telephone. Defense counsel responded by letter dated October 20, 2008 that defendant would not conduct the examination by telephone and inquired whether plaintiff could attend the November 19, 2008 examination so that he could reschedule if necessary. Plaintiff's counsel responded in a letter dated November 14, 2008 and stated for the first time that plaintiff was incarcerated in Florida and unable to attend the examination. Several months later, on February 17, 2009, defendant requested an update on plaintiff's status and inquired whether the examination could be conducted by video conference if she was still incarcerated. Plaintiff failed to respond, but she filed the summons and complaint in this action on September 14, 2009, and defendant

moved to dismiss the complaint on or about October 5, 2009 for failure to comply with defendant's demand for an oral examination pursuant to General Municipal Law § 50-h.

"Under the circumstances, plaintiff had the burden of rescheduling the examination . . . and, because [she] failed to do so [prior to commencing this action], the court properly dismissed [it]" (*Donohue v County of Erie*, 226 AD2d 1083, 1084). "Although compliance with General Municipal Law § 50-h (1) may be excused in 'exceptional circumstances' " (*McDaniel*, 291 AD2d 826), we conclude that there were no such circumstances here.

We disagree with the dissent that exceptional circumstances were present based on the fact that the facility at which plaintiff was incarcerated in Florida did not have a video conferencing system and that her attorney attempted to reschedule the examination a short time after she was released. As noted earlier, plaintiff failed to respond to defendant's inquiry whether the examination could be conducted by video conference at the Florida facility. It was not until plaintiff responded to defendant's motion to dismiss that she averred for the first time that the facility in Florida was unable to conduct video conferencing. Defendant's counsel noted during oral argument on the motion that, had he been notified of the inability to conduct video conferencing in response to his inquiry, "there were other options that could have been implemented." In addition, it was not until after plaintiff commenced the action and defendant filed its motion to dismiss the complaint that plaintiff's counsel sent counsel for defendant a letter dated October 23, 2009 explaining that plaintiff had returned to New York and inquiring whether defendant wanted to reschedule the examination. Indeed, plaintiff indicated in opposition to the motion that she had been released from the Florida facility at the end of August 2009, which was prior to the filing of the summons and complaint, but she provided no explanation for why she did not attempt to reschedule the examination before she commenced the action.

All concur except FAHEY and GORSKI, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent and would reverse the order granting defendant's motion to dismiss the complaint and reinstate the complaint. "It is well settled that a plaintiff who has not complied with General Municipal Law § 50-h (1) is precluded from maintaining an action against a municipality" (*McDaniel v City of Buffalo*, 291 AD2d 826). However, "compliance with [that statute] may be excused in 'exceptional circumstances' " (*id.*) and, in our view, such exceptional circumstances are present in this case.

Here, plaintiff was prevented from attending an examination pursuant to General Municipal Law § 50-h based on her incarceration in Florida, and that examination could not have been conducted by video conference because the facility at which plaintiff was incarcerated did not have a video conference system. Even if plaintiff's attorney had provided a more expeditious response to defendant's inquiry whether that hearing could have been conducted by video conference while plaintiff was incarcerated in Florida, there is no indication in

the record concerning what, if any, "other options . . . could have been implemented" to conduct the hearing originally noticed for November 19, 2008 during plaintiff's incarceration (*cf. Donohue v County of Erie*, 226 AD2d 1083). Moreover, the record establishes that plaintiff was released from incarceration in Florida approximately three weeks before the expiration of the statute of limitations (*see* § 50-i [1]), and that she returned to New York, verified the complaint commencing this action and attempted to reschedule the examination before the statute of limitations period expired.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

558

CA 10-02406

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

DANIELLE WAGNER, PLAINTIFF,

V MEMORANDUM AND ORDER

ROBERT A. PLOCH, DEFENDANT.

ROBERT A. PLOCH, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

1680 ELMWOOD AVENUE, INC.,
THIRD-PARTY DEFENDANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JOHN R. CONDREN OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA B. BURKE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered June 25, 2010 in a personal injury action. The order denied the motion of third-party plaintiff for summary judgment and granted the cross motion of third-party defendant for summary judgment.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she sustained while working at a restaurant operated by third-party defendant on property owned by defendant-third-party plaintiff (defendant). Third-party defendant was leasing the property from defendant pursuant to an agreement that included an indemnification provision and, after plaintiff commenced the main action, defendant commenced the third-party action seeking contractual indemnification. Contrary to defendant's contention, Supreme Court properly granted third-party defendant's cross motion for summary judgment dismissing the third-party complaint. "Pursuant to General Obligations Law § 5-321, a lease provision which purports to exempt a lessor from liability for its own acts of negligence is void and unenforceable" (*Rego v 55 Leone Lane, LLC*, 56 AD3d 748, 749). The indemnification provision here required third-party defendant to indemnify defendant for "any and all liability . . . arising from injury . . . to person or property . . ., occasioned wholly or in part

by an act . . . of [third-party defendant or its employees]." We agree with third-party defendant that the indemnification provision is unenforceable under General Obligations Law § 5-321 because it "shifts the entire responsibility for damages to [third-party defendant] regardless of [defendant's] own negligence" (*Rego*, 56 AD3d at 749; *see Ben Lee Distribs., Inc. v Halstead Harrison Partnership*, 72 AD3d 715). Indeed, the indemnification provision improperly "contemplate[d] a complete rather than partial shifting of liability from [defendant] to [third-party defendant]" (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 793, *rearg denied* 90 NY2d 1008), inasmuch as it made no exception for defendant's own negligence (*see DeSabato v 674 Carroll St. Corp.*, 55 AD3d 656, 659; *cf. Lennard v Mendik Realty Corp.*, 43 AD3d 279).

Defendant's reliance on the insurance rider to the lease agreement is misplaced. Where a lease agreement, negotiated at arm's length between two sophisticated business entities or persons, includes a provision that the tenant is to obtain insurance naming the landlord as an additional insured, General Obligations Law § 5-321 will not prohibit an indemnification provision such as the one at issue in this case inasmuch as the parties to the lease agreement are using insurance to allocate between themselves the risk of liability to a third party (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 418-419; *Castano v Zee-Jay Realty Co.*, 55 AD3d 770, 772, *lv denied* 12 NY3d 701). In this case, however, the record establishes that the lease agreement was not negotiated at arm's length between two sophisticated business entities or persons (*see DeSabato*, 55 AD3d at 659). Moreover, although the insurance rider in this case required third-party defendant to obtain insurance on the property, there was no requirement that defendant be named as an additional insured on the policy. A landlord may not circumvent General Obligations Law § 5-321 "merely by inserting in the lease a requirement that the tenant obtain insurance" (*Graphic Arts Supply v Raynor*, 91 AD2d 827, 828; *see Ben Lee Distribs., Inc.*, 72 AD3d at 716).

All concur except CARNI, J., who concurs in the result in the following Memorandum: Although I concur in the result reached by my colleagues, I would affirm for a different reason. While I agree that the indemnification clause in the lease in question is unenforceable under General Obligations Law § 5-321, I cannot agree with my colleagues that it is unenforceable based on the clause requiring third-party defendant to indemnify defendant for "any and all liability . . . arising from injury . . . to person or property . . ., occasioned wholly or in part by an act . . . of [third-party defendant or its employees]." Contrary to the conclusion of my colleagues, that clause merely partially, rather than entirely, shifts the responsibility for damages to third-party defendant. Indeed, by its express language, the clause in question does not "indemnify the promisee[, i.e., defendant,] for losses attributable to the promisee's own negligence and therefore do[es] not run afoul of the statute" (*Ostuni v Town of Inlet*, 64 AD3d 854, 855; *see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207-211). Nevertheless, I concur with the majority in the result based on the further language of the indemnification

clause in question, which requires third-party defendant to indemnify defendant "also for any matter or thing growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto." That broad indemnification language shifts the entire responsibility for damages to third-party defendant regardless of defendant's own negligence, rendering the entire clause "void as against public policy and wholly unenforceable" (§ 5-321; *see Mendieta v 333 Fifth Ave. Assn.*, 65 AD3d 1097, 1100-1101*; Rego v 55 Leone Lane, LLC*, 56 AD3d 748, 749-750). Finally, I note my agreement with my colleagues that the insurance rider to the lease is insufficient to circumvent General Obligations Law § 5-321.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

588

KA 10-00187

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAD E. TOWSLEY, DEFENDANT-APPELLANT.

STEVEN J. GETMAN, OVID, FOR DEFENDANT-APPELLANT.

CHAD E. TOWSLEY, DEFENDANT-APPELLANT PRO SE.

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 September 29, 2009. The judgment convicted defendant, upon a jury verdict, of arson in the third degree, criminal mischief in the second degree, criminal mischief in the third degree, criminal mischief in the fourth degree and growing of the plant known as cannabis by unlicensed persons.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, arson in the third degree (Penal Law § 150.10 [1]) in connection with a fire at the leased residence he shared with his girlfriend, and criminal mischief in the third degree (§ 145.05 [2]) in connection with an incident that is unrelated to the fire. Defendant contends that the evidence is legally insufficient to support the conviction of criminal mischief in the third degree because the People failed to establish that the value of the property that he damaged exceeded $250. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). A contractor with 20 years of experience testified that the cost of the window he purchased to replace the window destroyed by defendant was between $250 and $270 and that defendant's girlfriend paid him for the window, along with $100 for the labor involved (*see People v Butler*, 70 AD3d 1509, *lv denied* 14 NY3d 886).

We reject defendant's further contention that he was deprived of a fair trial based upon County Court's refusal to permit defendant's arson expert to testify from Texas via closed-caption television. As the Court of Appeals explained in *People v Wrotten* (14 NY3d 33, 40), "[t]elevised testimony requires a case-specific finding of necessity

[based on clear and convincing evidence]; it is an exceptional procedure to be used only in exceptional circumstances." Here, defendant contended that the medical condition of the expert necessitated the televised testimony, but defendant failed to present any medical evidence to support that contention (*cf. id.* at 37). Defendant retained a second expert who also resided in Texas, and that expert advised defense counsel during the trial that he was unable to appear in court to testify because of a medical problem. Following repeated attempts by defense counsel and the court to ascertain when the expert would be available, defense counsel advised the court that the expert would not travel to New York to testify. We note that neither of those experts opined that the fire was caused by means that were other than intentional but, rather, they opined that the People's experts failed to rule out an electrical cause and thus that the cause of the fire should have been deemed to be "undetermined."

Contrary to defendant's contention, the court did not abuse its discretion in denying his motion for a continuance to attempt to locate another expert (*see generally People v Brink*, 57 AD3d 1484, 1485-1486, *lv denied* 12 NY3d 851). The record establishes that the court had adjourned the trial for five months to enable defendant to locate an expert, and defendant conceded that he was unable to locate a local expert who was willing to testify for defendant. Thus, contrary to defendant's further contention, he was not precluded from presenting witnesses in his defense (*cf. People v Hartman*, 64 AD3d 1002, 1005-1006, *lv denied* 13 NY3d 860). Moreover, because defense counsel utilized the information contained in the reports prepared by the two experts from Texas during his cross-examination of the People's experts, we conclude that defendant was not precluded from presenting a defense (*cf. id.*). For the same reasons, we conclude that the court did not abuse its discretion in denying defendant's motion for a mistrial on the ground that his experts were unavailable to testify (*see generally People v Ortiz*, 54 NY2d 288, 292; *People v Henry*, 9 AD3d 914, *lv denied* 3 NY3d 675).

Defendant further contends that he was deprived of a fair trial because the People failed to lay a proper foundation for testimony regarding canine tracking at the scene of the fire but the court nevertheless allowed the People to present that testimony. We reject that contention. Where, as here, the People "established that the dog and his trainer had received appropriate training in [flammable liquid] detection and the dog had previously been proven to be reliable, a proper foundation [was] laid for the introduction of [that] testimony and it was properly admitted at trial" (*People v Kennedy*, 78 AD3d 1233, 1235).

We also reject defendant's contention that the court erred in refusing to suppress his statements to police. A police officer testified that he placed defendant, who was intoxicated, in the back of his patrol vehicle after defendant attempted to enter the burning dwelling. According to the officer, he had no other location to place defendant both for defendant's safety and that of the fire personnel. Defendant was not handcuffed, and the door of the patrol vehicle was

open while the police and the fire investigator asked defendant merely investigatory questions. The court thus properly determined that defendant was not subjected to custodial interrogation (*see generally People v Paulman*, 5 NY3d 122, 129).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions, as well as those contentions raised in his pro se supplemental brief, and conclude that none requires reversal or modification of the judgment.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

590

KA 10-00161

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN L. AUCTER, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 12, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana in the second degree, criminal possession of stolen property in the third degree, criminal possession of a weapon in the fourth degree, possession of burglar's tools, resisting arrest and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of stolen property in the third degree (Penal Law § 165.50) and possession of burglar's tools (§ 140.35). Defendant contends that County Court erred in imposing restitution in the amount of $21,000 without conducting a restitution hearing pursuant to Penal Law § 60.27 (2). We reject that contention. Indeed, the record establishes that the court did not impose restitution but, instead, defendant agreed in writing to forfeit the funds in question to the Cayuga County District Attorney's Office pursuant to CPLR article 13-A (*see People v Concepcion*, 188 AD2d 483). In any event, even assuming, arguendo, that the funds constituted restitution, we conclude that defendant failed to preserve his contention for our review " 'inasmuch as he failed to object to the amount of restitution at sentencing or to request a hearing with respect thereto' " (*People v Wright*, 79 AD3d 1789, 1790; *see People v Hannig*, 68 AD3d 1779, 1780, *lv denied* 14 NY3d 801), 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]).

Entered: June 10, 2011

Patricia L. Morgan
Clerk of the Court

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

624

CA 10-00063

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, AND SCONIERS, JJ.

JOSEPH MATTELIANO AND CHRIS VOGELSANG,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOSEPH J. SKITKZI AND MELISSA NEAL,
DEFENDANTS-APPELLANTS.

MYERS, QUINN & SCHWARTZ, LLP, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK J. MACKEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 4, 2009. The order and judgment, inter alia, awarded plaintiffs money damages against defendants.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration regarding the nature and scope of an easement existing on their property for the benefit of the owners of a parcel of property that is currently owned by defendants. Plaintiffs also sought relief regarding the alleged private nuisance created by defendants' open overhead garage door facing the property owned by plaintiffs. Defendants appeal from an order and judgment entered March 5, 2009 (hereafter, March order and judgment). We note at the outset that defendants failed to appeal from the final order and judgment entered August 4, 2009 (hereafter, August order and judgment). By order entered November 8, 2010, this Court granted defendants' motion to vacate the dismissal of their appeal from the March order and judgment and deemed the appeal to be a premature appeal taken from the August order and judgment, "to the extent that it only brings up for review the [March] order and judgment" (*see* CPLR 5520 [c]).

Defendants contend that Supreme Court erred in determining that the open garage door constitutes a nuisance. "In order to prevail upon a cause of action for private nuisance, the plaintiff must demonstrate (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property

right to use and enjoy land, (5) caused by another's conduct" (*Vacca v Valerino*, 16 AD3d 1159, 1160 [internal quotation marks omitted]; *see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570; *Hitchcock v Boyack*, 277 AD2d 557, 558). Further, the interference "must not be fanciful, slight or theoretical, but certain and substantial, and must interfere with the physical comfort of the ordinarily reasonable person" (*Bove v Donner-Hanna Coke Corp.*, 236 App Div 37, 40; *see Balunas v Town of Owego*, 56 AD3d 1097, 1098, *lv denied* 12 NY3d 703). Under the circumstances of this case, we conclude that the court erred in determining that defendants' open garage door constituted a private nuisance.

We nevertheless conclude that defendants are not entitled to reversal or modification of the August order and judgment insofar as it brings up for review the March order and judgment. By order and judgment entered May 22, 2009, the court granted plaintiffs' cross motion seeking to re-erect a fence and gate along the line where their property meets that of defendants, but the court stayed enforcement of that order and judgment pending defendants' appeal from the March order and judgment. By order entered July 14, 2010, the court then permitted plaintiffs to re-erect the fence and gate. Thus, the court's determination in the March order and judgment that the open garage door constituted a private nuisance is moot (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714). In any event, we note that "a landowner burdened by an express easement of ingress and egress may . . . gate it or fence it off, so long as the easement holder's right of passage is not impaired" (*Lewis v Young*, 92 NY2d 443, 449), and thus the court's determination with respect to the private nuisance was not a necessary predicate to granting plaintiffs the right to re-erect the subject fence and gate.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

636

TP 10-02132

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

IN THE MATTER OF PIERRE WILLIAMS, PETITIONER,

V ORDER

B.F. MCAULIFFE, DEPARTMENT SUPERINTENDENT, CAPE VINCENT CORRECTIONAL FACILITY, ALBERT PRACK, ACTING DIRECTOR, INMATE DISCIPLINARY PROGRAM, CAPE VINCENT CORRECTIONAL FACILITY, PATRICIA LECONEY, SUPERINTENDENT, CAPE VINCENT CORRECTIONAL FACILITY, AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS.

ROBERT SCHUSTER, MOUNT KISCO (JOHN R. LEWIS OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI 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, Jefferson County [Hugh A. Gilbert, J.], entered October 20, 2010) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

637

KA 10-02036

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KYLE SESSIONS, ALSO KNOWN AS KYLE SESSION,
DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 15, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

638

KA 07-02086

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH BOYKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered September 17, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), assault in the first degree (two counts), assault in the second degree, burglary in the first degree (three counts) and attempted murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of attempted murder in the second degree and dismissing the ninth count of the amended indictment and by directing that the sentences on the remaining counts shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [2]) arising from a home invasion. We agree with defendant that the conviction of attempted murder in the second degree must be reversed. Although the ninth count of the amended indictment, charging defendant with that crime, refers to a single attempt to cause the death of the intended victim by shooting him, the People presented evidence at trial establishing that there were two distinct shooting incidents that may constitute the crime of attempted murder in the second degree. “Reversal [of that conviction and dismissal of the ninth count] is required because the jury may have convicted defendant of an unindicted [attempted murder], resulting in the usurpation by the prosecutor of the exclusive power of the [g]rand [j]ury to determine the charges” (*People v McNab*, 167 AD2d 858, 858; *see People v Comfort*, 31 AD3d 1110, 1111, *lv denied* 7 NY3d 847). In addition, because the trial evidence establishes two distinct acts that may constitute attempted murder, “[i]t is impossible to ascertain . . . whether different jurors convicted

defendant based on different acts" (*McNab*, 167 AD2d at 858; *see People v Jacobs*, 52 AD3d 1182, 1183, *lv denied* 11 NY3d 926). Although defendant failed to preserve his contention for our review, "[p]reservation is not required inasmuch as '[t]he right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable' " (*People v Bradford*, 61 AD3d 1419, 1420-1421, *affd* 15 NY3d 329), as is the right to a unanimous verdict (*see* CPL 310.80). We therefore modify the judgment by reversing that part convicting defendant of attempted murder in the second degree and dismissing the ninth count of the amended indictment. As the People correctly concede, the sentences imposed on the remaining counts must run concurrently with respect to each other, and we therefore further modify the judgment accordingly (*see generally People v Parks*, 95 NY2d 811, 814-815; *People v Davis*, 68 AD3d 1653, 1655, *lv denied* 14 NY3d 839, 841, 842).

We reject defendant's further contention that Supreme Court erred in denying his motion to sever his trial from that of his codefendant (*see People v Clark*, 66 AD3d 1489, *lv denied* 13 NY3d 906). Finally, defendant contends for the first time on appeal that the fifth count of the amended indictment, charging him with assault in the second degree (Penal Law § 120.05 [6] [felony assault]) is jurisdictionally defective because it fails to state that the underlying felony is not one "defined in [Penal Law article 130 that] requires corroboration for conviction" (§ 120.05 [6]). "Although . . . a jurisdictional defect in an indictment . . . may be raised for the first time on appeal" (*People v Iannone*, 45 NY2d 589, 600), we reject defendant's contention (*see generally People v D'Angelo*, 98 NY2d 733, 734-735).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

639

KA 09-01649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VIRGINIA RICHARDSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALEXANDER BOUGANIM, KRISTIN M. PREVE, 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 Erie County Court (Shirley Troutman, J.), rendered April 17, 2009. The judgment convicted defendant, upon a jury verdict, of arson in the third degree, insurance fraud in the third degree and making a false written statement.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, arson in the third degree (Penal Law § 150.10 [1]) and insurance fraud in the third degree (§ 176.20). Contrary to defendant's contention, County Court properly refused to suppress statements that she made to a fire marshall. Based on the record of the suppression hearing, we conclude that the totality of the circumstances at the time defendant was questioned by the fire marshalls establishes that defendant was not in custody prior to the administration of *Miranda* warnings (*see People v Regan*, 21 AD3d 1357, 1358; *People v Langlois*, 17 AD3d 772, 773-774). We further conclude that the court properly denied defendant's request for a circumstantial evidence charge, inasmuch as the proof of guilt at trial did not rest exclusively on circumstantial evidence (*see People v Roldan*, 88 NY2d 826, 827; *People v Whitfield*, 72 AD3d 1610, *lv denied* 15 NY3d 811). Defendant failed to preserve for our review her contention that the evidence is legally insufficient to support the conviction of arson in the third degree inasmuch as she failed to renew her motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Defendant also failed to preserve for our review her further contention that the court erred in omitting an element of insurance fraud in the third degree from the jury charge (*see People v Bermudez*,

38 AD3d 1244, *lv denied* 8 NY3d 981). 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, we dismiss the appeal to the extent that defendant contends that the sentence is harsh and excessive inasmuch as defendant has completed serving her sentence and thus that part of the appeal is moot (*see People v Mackey*, 79 AD3d 1680).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

640

KA 10-00470

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN C. RUDDUCK, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, 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 February 17, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree and predatory sexual assault against a child.

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 sexual act in the first degree (Penal Law § 130.50 [3]) and predatory sexual assault against a child (§ 130.96). His sole contention on appeal is that County Court erred in denying his motion to redact erroneous information contained in the presentence report (PSR). We reject that contention. "The purpose of a presentence investigation 'is to provide the court with the best available information upon which to render an individualized sentence' " (*People v Thomas*, 2 AD3d 982, 984, *lv denied* 1 NY3d 602, quoting *People v Perry*, 36 NY2d 114, 120). "To that end, presentence reports should include 'all information that may have a bearing upon' the court's sentencing determination . . ., even if such information does not meet the technical rules for admissibility at trial" (*id.*; *see* CPL 390.30 [3] [a]; 9 NYCRR 350.3; 350.6 [b]; *People v Paragallo*, 82 AD3d 1508). Although defendant correctly contends that erroneous information in a PSR "create[s] an unjustifiable risk of future adverse effects to [him] in other contexts" (*People v Freeman*, 67 AD3d 1202, 1203), we conclude that "defendant has made no showing that the information [in the PSR] was inaccurate" (*People v Anderson*, 184 AD2d 922, 923, *lv denied* 80 NY2d 901; *see People v Whalen*, 99 AD2d 883, 884).

Under the "Legal History" section of the PSR, the author of the report wrote that "defendant was accused but never charged with an incident in 2005 that involved the alleged sexual abuse of a 4[-

]year[-]old neighbor girl." Contrary to defendant's contention, that statement was properly included in the PSR. Pursuant to 9 NYCRR 350.6 (b) (1), the presentence investigation process "shall consist of the gathering of available, relevant and reliable information from . . . official records relative to: arrests; *previous conduct and complaints*; convictions; [and] adjudications . . ." (emphasis added). The regulation further provides, however, that "[f]or all investigations, the [probation] officer shall not gather information as to matters which have been terminated in favor of the [defendant] pursuant to [CPL] 160.50." Where, as here, no charges were ever filed with respect to the incident in question, there has been no matter terminated in the defendant's favor pursuant to CPL 160.50. Thus, the court properly denied defendant's request to redact the statement concerning the 2005 complaint. Although that "notation would not be admissible at a trial, it was permissible [in the PSR because] it was based on information gathered during the investigation and was relevant to sentencing" (*People v Jones*, 77 AD3d 1178, 1179).

We have reviewed defendant's remaining challenges to the PSR and conclude that they are without merit.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

643

KA 06-01978

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD KITHCART, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered February 1, 2006. 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: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [3] [felony murder]), defendant contends that the evidence is legally insufficient to establish the underlying felony of rape or attempted rape. Even assuming, arguendo, that defendant's motion for a trial order of dismissal was sufficiently specific to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19), we conclude that it is without merit (*see People v Washington*, 305 AD2d 433, *lv denied* 100 NY2d 588). 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 People v Bleakley*, 69 NY2d 490, 495). We reject defendant's contention that County Court erred in refusing to suppress statements that he made during a 1992 police interview. The deception used by the police was not " 'so fundamentally unfair as to deny [defendant] due process' " (*People v Camacho*, 70 AD3d 1393, 1394, *lv denied* 14 NY3d 886, 887, quoting *People v Tarsia*, 50 NY2d 1, 11), nor did it " 'create a substantial risk that the defendant might falsely incriminate himself' " (*People v Andrus*, 77 AD3d 1283, 1284, *lv denied* 16 NY3d 827).

Defendant failed to preserve for our review his further contention that the court erred in admitting evidence of his refusal to provide a blood sample for testing (*see generally People v Denison*, 300 AD2d 1060; *People v Hathaway*, 245 AD2d 1066), 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]). We reject the contention of defendant that the People's failure to call the officer who obtained his statement in 2005 as a witness at the *Huntley* hearing rendered the evidence establishing the voluntariness of that statement insufficient. The People met their "burden of going forward to show the legality of the police conduct in the first instance" (*People v Di Stefano*, 38 NY2d 640, 652), as well as their burden of establishing that the statement in question was voluntarily made, by presenting the testimony of another officer who was present when defendant was advised of his *Miranda* rights and validly waived them before making that statement (*see People v Witherspoon*, 66 NY2d 973, 973-974; *People v Drumm*, 15 AD3d 910, *lv denied* 4 NY3d 853).

Defendant failed to preserve for our review his further contention that the court erred in permitting the People to introduce evidence that defendant invoked his right to remain silent by terminating the 2005 interview (*see People v Murphy*, 79 AD3d 1451, 1453). Defendant also failed to preserve for our review his contention that the court erred in permitting the prosecutor to comment on such evidence during summation (*see People v Lombardi*, 68 AD3d 1765, *lv denied* 14 NY3d 802). "In any event, in light of the evidence presented, we [conclude] that any such errors [are] 'harmless beyond a reasonable doubt' inasmuch as there is 'no reasonable possibility that the error[s] might have contributed to defendant's conviction' " (*Murphy*, 79 AD3d at 1453, quoting *People v Crimmins*, 36 NY2d 230, 237). Defendant's remaining contentions with respect to the prosecutor's alleged misconduct during summation are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The court did not abuse its discretion in denying defendant's request to discharge defense counsel (*see People v Porto*, 16 NY3d 93, 99-101), and the record establishes that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, defendant failed to preserve for our review his further contention that the court erred in sentencing him without the benefit of an adequate presentence report, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Diaz*, 26 AD3d 768).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

644

KAH 10-00725

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ANTHONY BENNETT, PETITIONER-APPELLANT,

V ORDER

SIBATU KHAHAIFA, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered February 19, 2010 in a habeas corpus proceeding. The judgment denied the petition.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

645

CAF 10-00925

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

IN THE MATTER OF KEYON M., AARIONNA M.,
HIRAM S., AND LESTARIYAH A.
---------- MEMORANDUM AND ORDER
MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

KENYETTA M., RESPONDENT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR KEYON M., AARIONNA M., HIRAM S., AND LESTARIYAH A.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.), entered April 15, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent mother appeals from an order that, inter alia, revoked a suspended judgment and terminated her parental rights with respect to the minor children who are the subject of this proceeding. Contrary to the mother's contention, "[a] hearing on a petition alleging the violation of a suspended judgment is part of the dispositional phase of a permanent neglect proceeding," and thus Family Court properly permitted petitioner to introduce evidence at the hearing concerning the children's best interests (*Matter of Saboor C.*, 303 AD2d 1022, 1023; *see Matter of Christopher J.*, 60 AD3d 1402; *Matter of Seandell L.*, 57 AD3d 1511, *lv denied* 12 NY3d 708). "If [petitioner] establishes 'by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights' " (*Matter of Shad S.*, 67 AD3d 1359, 1360; *see* Family Ct Act § 633 [f]; *Matter of Terrance M.*, 75 AD3d 1147, 1147-1148). Here, contrary to the further contention of the mother, a preponderance of the evidence supports the court's determination that she violated numerous terms of the suspended judgment and that it is in the children's best interests to terminate her parental rights (*see*

Terrance M., 75 AD3d at 1148).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

646

CAF 09-02206

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

IN THE MATTER OF CURTIS P. HOWDEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NAOMI R. KEELER, RESPONDENT-APPELLANT.

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

DUKE LAW FIRM, P.C., LAKEVILLE (SUSAN K. DUKE OF COUNSEL), FOR PETITIONER-RESPONDENT.

BONITA STUBBLEFIELD, ATTORNEY FOR THE CHILD, PIFFARD, FOR GWYNETH H.

Appeal from an order of the Family Court, Allegany County (Lynn L. Hartley, J.H.O.), entered March 16, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the parties' child to petitioner.

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

Memorandum: Respondent mother appeals from an order granting the father's petition seeking sole custody of the parties' child. Contrary to the mother's contention, Family Court properly concluded that the father " 'ma[de] a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified' " (*Matter of Hughes v Davis*, 68 AD3d 1674, 1675). Here, the mother admitted that she withheld the child from the father, and the record establishes that she made numerous unfounded allegations of sexual abuse against the father (*see e.g. Matter of Tyrone W. v Dawn M.P.*, 27 AD3d 1147, *lv denied* 7 NY3d 705; *Matter of Darla N. v Christine N.* [appeal No. 2], 289 AD2d 1012).

We further conclude that the court properly determined that it was in the best interests of the child to award the father sole custody. The parties stipulated to the prior custody arrangement approximately two years and four months prior to the commencement of this proceeding. Although "a long-term custodial arrangement established by agreement should [continue] 'unless it is demonstrated that the custodial parent is unfit or perhaps less fit' " (*Fox v Fox*, 177 AD2d 209, 211), " '[a] concerted effort by one parent to interfere

with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127). In addition to the mother's admissions with respect to, inter alia, her unfounded allegations of sexual abuse against the father, the record establishes that the mother subjected the child to unnecessary medical examinations. Thus, the court's custody determination, "based upon [its] first-hand assessment of the credibility of the witnesses" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449 [internal quotation marks omitted]), has a sound and substantial basis in the record and should not be disturbed.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

648

CA 11-00300

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

KATHLEEN DOODY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH L. GOTTSHALL AND DIANE A. GOTTSHALL,
DEFENDANTS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), AND HAGELIN KENT LLC, FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered April 23, 2010 in a personal injury action. The order imposed sanctions on defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part disqualifying Hagelin Kent, LLC from representing defendants and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when she was struck by a vehicle operated by defendant Diane A. Gottshall and owned by both defendants. Following a jury trial on damages, Supreme Court set aside the verdict and ordered a new trial "on its own initiative . . . in the interest of justice" based upon the misconduct of defendants' attorney (CPLR 4404 [a]). In addition, the court disqualified defendants' attorney and his firm from representing defendants at the retrial and imposed upon defendants "the costs incurred in the trial for the live medical experts consisting of transportation, and time charged, which will need to be duplicated in the second damages trial." On a prior appeal, we modified the order by, inter alia, vacating those parts disqualifying defendants' attorney and his law firm and imposing costs upon defendants on the ground that defendants should have been afforded a reasonable opportunity to be heard on the issues of disqualification and costs (*Doody v Gottshall*, 67 AD3d 1347, 1349). Following a hearing on those issues, the court, inter alia, disqualified defendants' attorney and his law firm from representing defendants at the retrial and directed defendants to reimburse plaintiff for the costs incurred for her medical experts at the retrial.

We reject defendants' contention that the court lacked authority

to conduct the hearing absent an explicit remittal for that purpose on the prior appeal. Our prior decision contemplated that the court would not disqualify defendants' attorney and his law firm or impose costs upon defendants without affording them a reasonable opportunity to be heard (*id.*). Contrary to defendants' further contention, the court did not lack authority to conduct the hearing based upon its sua sponte recusal from the retrial. The court's recusal was limited to the retrial and, in any event, it was not required to recuse itself pursuant to Judiciary Law § 14. Thus, recusal was a matter for the court's discretion and the court properly exercised that discretion in denying defendants' request that the court recuse itself from the hearing (*see Matter of Rumsey v Niebel*, 286 AD2d 564; *Matter of Card v Siragusa*, 214 AD2d 1022, 1023). The court also properly exercised its discretion in determining that disqualification of defendants' attorney is warranted based upon the attorney's persistent and pervasive misconduct during the trial and his failure to recognize or take responsibility for such misconduct (*see generally Matter of Brian R.*, 48 AD3d 575; *Matter of Moxham v Hannigan*, 89 AD2d 300, 302). Under the circumstances of this case, we conclude that "to impose a sanction short of disqualification would be to treat the conduct at issue with a degree of lenity practically inviting its recurrence" (*Matter of Weinberg*, 129 AD2d 126, 144, *appeal dismissed* 71 NY2d 994). We reach a different conclusion, however, with regard to the attorney's law firm. "We discern nothing in the record before us which justified the sua sponte disqualification of the [defendants'] law firm from representing [them] in this action," and we therefore modify the order accordingly (*Bentz v Bentz*, 37 AD3d 386, 387; *cf. Weinberg*, 129 AD2d at 142-144). With respect to the imposition of costs, we perceive no "clear abuse of discretion" and thus defer to the court's determination (*Grozea v Lagoutova*, 67 AD3d 611). Finally, defendants do not challenge that part of the order striking their answer with respect to liability and the affirmative defense of comparative negligence, and we therefore deem any challenge with respect thereto abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

650

CA 11-00301

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

CITY OF SYRACUSE, PETITIONER-APPELLANT,

V ORDER

WILLIAM OSUCHOWSKI, RESPONDENT-RESPONDENT.

JUANITA PEREZ WILLIAMS, CORPORATION COUNSEL, SYRACUSE (NANCY J. LARSON OF COUNSEL), FOR PETITIONER-APPELLANT.

ZIMMER LAW OFFICE, PLLC, SYRACUSE (KIMBERLY M. ZIMMER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered April 8, 2010. The order affirmed orders of the Syracuse City Court (James H. Cecile, J.), entered May 7, 2008 and October 20, 2008, which, inter alia, granted the petitions in part.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

651

CA 10-02182

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

GRIFFITH ENERGY, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOANN EVANS, DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR DEFENDANT-APPELLANT.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered February 11, 2010 in a breach of contract action. The order and judgment awarded plaintiff money damages upon a nonjury verdict.

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

Memorandum: Plaintiff entered into a retailer-dealer agreement (agreement) and commercial lease (lease) with defendant's husband, Norman Evans, on July 1, 1997. Both contracts pertained to the operation of a gasoline station and automobile repair shop (gas station) in Geneseo. The agreement referred to defendant's husband as "Norm Evans d/b/a WINTON-HUMBOLDT SUNOCO) [*sic*] SOUTH" (hereafter, Winton South). After defendant's husband failed to adhere to his obligations under those contracts, plaintiff commenced an action against him with respect to each contract and obtained default judgments totaling $101,043.20. Plaintiff was unable to collect on its judgments against defendant's husband, and it subsequently commenced this action seeking to collect on those judgments from defendant, alleging, inter alia, that the gas station operated as a common-law partnership or joint venture between defendant and her husband. Following a nonjury trial, Supreme Court concluded that the gas station was such a partnership or joint venture and awarded plaintiff, inter alia, damages in the amount of the prior judgments against defendant's husband. We affirm.

Partnerships are governed by the law of agency (*see* Partnership Law § 4 [3]) and, pursuant to Partnership Law § 26 (a) (2), "all partners are liable . . . [j]ointly for all . . . debts and obligations of the partnership . . . ." As the agent of a partnership, a partner's " 'acts may be adopted and enforced by the

partnership as its own' " (*Beizer v Bunsis*, 38 AD3d 813, 814; *see* § 20 [1]). Partnership Law § 10 (1) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit . . . ."

Where, as here, "there is no written partnership agreement between the [individuals in question], the court must determine whether a partnership in fact existed from the conduct, intention[] and relationship between [them]" (*Czernicki v Lawniczak*, 74 AD3d 1121, 1124). "In deciding whether a partnership exists, 'the factors to be considered are the intent of [those individuals] (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses[] and whether there was a combination of property, skill or knowledge' . . . No one factor is determinative; it is necessary to examine the . . . relationship as a whole" (*Kyle v Ford*, 184 AD2d 1036, 1036-1037).

Viewing the evidence in the light most favorable to plaintiff, the prevailing party, we conclude that the court's determination is supported by a fair interpretation of the evidence (*see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170). With respect to the first factor to be considered in determining whether a partnership existed, i.e., the intent of defendant and her husband, the evidence presented at trial included their tax returns and bankruptcy filings. Those documents repeatedly referred to *defendant* as the proprietor of Winton South. Indeed, defendant testified at trial that she filed a certificate of doing business under an assumed name in June 1997, reflecting her intent to conduct a business in Geneseo so that her husband could operate that business. Moreover, defendant's husband testified that he had significant financial problems that prevented him from acquiring assets in his own name. Consequently, he admitted that Winton South was created in defendant's name and that he contributed his experience and labor to that business.

With respect to the second factor, i.e., whether there was joint control and management of the business, the evidence presented at trial by plaintiff established that defendant was involved in Winton South at least to the extent that she made the decision to close that business. The evidence presented by defendant demonstrated that her husband either ran or oversaw Winton South's day-to-day affairs and that defendant participated in the financial side of that business to the extent that her signature appeared on payroll and vendor checks.

With respect to the third factor, i.e., whether there was a sharing of the profits as well as a sharing of the losses, the record is unclear concerning the extent to which income and expenses were shared between defendant and her husband. Inasmuch as defendant and her husband concentrated their joint assets in defendant's name to avoid paying on the judgment entered in a civil action arising from an assault committed by her husband, we nevertheless conclude that the minimal evidence of profit and loss is not dispositive.

With respect to the fourth factor, i.e., whether there was a combination of property, skill or knowledge, we revisit our analysis with respect to the first factor. The explanation of defendant's financial contribution to Winton South and her husband's input of expertise and labor offered with respect to the first factor applies equally to this factor and demonstrates that the business functioned as a result of the combination of defendant's financial standing and the expertise of her husband.

Defendant contends that the statute of frauds bars enforcement of the agreement and the lease (*see* General Obligations Law § 5-701 [a] [1]). The statute of frauds is an affirmative defense (*see* CPLR 3018 [b]), and defendant waived that affirmative defense by not pleading it in the amended answer (*see generally Killeen v Crosson*, 284 AD2d 926). In any event, it is of no moment whether the agreement and lease are barred by the statute of frauds inasmuch as this action and appeal concern whether defendant and her husband had a partnership that bound defendant with respect to the agreement and the lease, not whether plaintiff can enforce an oral agreement with defendant.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

653

CA 11-00159

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

JULES R. OBOMSAWIN AND ROBBIN OBOMSAWIN, DOING BUSINESS AS BEAVER CREEK CONSTRUCTION SERVICES, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BAILEY, HASKELL & LALONDE AGENCY, INC., ALSO KNOWN AS BAILEY AND HASKELL ASSOCIATES, INC., DEFENDANT-RESPONDENT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFFS-APPELLANTS.

KEIDEL, WELDON & CUNNINGHAM LLP, SYRACUSE (HOWARD S. KRONBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered August 4, 2010. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiffs own a small business that they operate out of a barn on their residential property. Defendant procured commercial general liability insurance coverage and supplemental commercial inland marine insurance coverage for two pieces of heavy equipment used for the business, and another insurance agent obtained first-party property damage coverage for plaintiffs' personal and business property. A fire thereafter destroyed the barn and its contents, including the property of plaintiffs' customers. The loss sustained by plaintiffs was not fully covered under the commercial general liability or property damage policies, and they commenced this action alleging negligence, breach of contract and negligent misrepresentation based upon defendant's alleged failure to provide appropriate advice with respect to their insurance needs and to secure sufficient coverage for their business property and the property of their customers.

Supreme Court properly granted defendant's motion seeking summary judgment dismissing the complaint. "[A]n insurance agent's duty to its customer is generally defined by the nature of the customer's request for coverage" (*M & E Mfg. Co. v Frank H. Reis, Inc.*, 258 AD2d 9, 11; *see Madhvani v Sheehan*, 234 AD2d 652, 654). "Absent a specific request for coverage not already in a client's policy or the existence

of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide[] or direct a client to obtain additional coverage" (*Loevner v Sullivan & Strauss Agency, Inc.*, 35 AD3d 392, 393, *lv denied* 8 NY3d 808; *see Murphy v Kuhn*, 90 NY2d 266, 270; *Chaim v Benedict*, 216 AD2d 347). Here, defendant met its initial burden on the motion by submitting evidence establishing that plaintiffs never made a specific request for additional coverage and that the services it provided to plaintiffs did not give rise to a special relationship (*see Loevner*, 35 AD3d at 393; *M & E Mfg. Co.*, 258 AD2d at 12-13). The affidavit of plaintiff Robbin Obomsawin submitted in opposition to the motion is insufficient to raise a triable issue of fact (*see generally Loevner*, 35 AD3d at 393).

In view of our determination, we do not address the alternative ground upon which the court granted defendant's motion, i.e., that the action is time-barred.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

654

CA 11-00243

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

EUGENE C. ARMANI, PLAINTIFF-APPELLANT,

V ORDER

GERALDINE C. ARMANI, DEFENDANT-RESPONDENT.

MEGGESTO, CROSSETT & VALERINO, LLP, SYRACUSE (JAMES A. MEGGESTO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered May 24, 2010. The order granted the motions of defendant for summary judgment and denied the cross motions of plaintiff for summary judgment.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

655

KA 09-02538

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES GRODEM, ALSO KNOWN AS JAMES N. GRODEM,
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 November 6, 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.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

656

KA 08-01432

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RODRECIUS L. JENKINS, ALSO KNOWN AS RODRIGUEZ JENKINS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM PIXLEY 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 (John R. Schwartz, A.J.), rendered May 5, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

657

KA 10-00600

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RYAN KRUPP, ALSO KNOWN AS RYAN L. KRUPP,
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 January 25, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and escape in the second degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

658

KA 10-01414

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAQUAN O., 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 17, 2010. Defendant was adjudicated a youthful offender upon his plea of guilty to attempted robbery in the second degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

659

KA 10-01622

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAY D. POTTER, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN 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 (Matthew J. Murphy, III, J.), rendered July 12, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted sexual abuse in the first degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

660

KA 07-02376

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINCY GOODSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK 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 (Alex R. Renzi, J.), rendered September 19, 2007. The judgment convicted defendant, upon his plea of guilty, 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: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that County Court erred in refusing to suppress the handgun found on his person. Defendant correctly concedes that the police properly stopped the vehicle in which he was a passenger based on a traffic infraction, but he contends that the handgun should have been suppressed because the officers lacked reasonable suspicion to order him to exit the vehicle or frisk him. We reject that contention.

It is well settled that, "out of a concern for safety, 'officers may . . . exercise their discretion to require a driver who commits a traffic violation to exit the vehicle *even though they lack any particularized reason for believing [that] the driver possesses a weapon*' " (*People v Robinson*, 74 NY2d 773, 774, *cert denied* 493 US 966, quoting *New York v Class*, 475 US 106, 115). "Inasmuch as the risks in . . . police/civilian vehicle encounters are the same whether the occupant is a driver or a passenger, '[the] police may [also] order [passengers] out of an automobile during a stop for a traffic violation' " (*id.* at 775, quoting *Michigan v Long*, 463 US 1032, 1047-1048). In addition, police officers may frisk passengers in a lawfully stopped vehicle to the extent necessary to guard their safety, provided that they act on " 'reasonable suspicion that

criminal activity is afoot and on an articulable basis to fear for [their] own safety' " (*People v Jones*, 39 AD3d 1169, 1170-1171, quoting *People v Torres*, 74 NY2d 224, 226). Here, the officer observed defendant reach towards his waistband while he was sitting in the vehicle and then quickly pull his hand away. The officer also had been informed that another passenger in the vehicle matched the description of the suspect in a series of recent robberies in the area where the vehicle was stopped, and the officer observed additional furtive gestures by that passenger. Thus, "[c]onsidering the totality of the circumstances . . ., [we conclude that] there was an ample measure of reasonable suspicion necessary to justify" the officer's limited frisk for weapons (*People v Benjamin*, 51 NY2d 267, 271; *see People v Flemming*, 59 AD3d 1004, *lv denied* 12 NY3d 816; *People v Crespo*, 292 AD2d 177, *lv denied* 98 NY2d 709).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

661

KA 10-01390

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LASZLO BIRO, DEFENDANT-APPELLANT.

TERRENCE BAXTER, BATH, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered September 30, 2009. The judgment convicted defendant, upon a jury verdict, of felony aggravated driving while intoxicated, felony driving while intoxicated, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of felony aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [former (2-a)]; § 1193 [1] [c] [former (ii)]), felony driving while intoxicated (§ 1192 [3]; § 1193 [1] [c] [former (ii)]), and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [iii]). We reject the contention of defendant that he was denied effective assistance of counsel based upon defense counsel's alleged failure to conduct an adequate cross-examination of the arresting officer and the officer who administered the breathalyzer test. "To prevail on a claim of ineffective assistance, defendant[] must demonstrate that [he was] deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" (*People v Flores*, 84 NY2d 184, 187). Although defense counsel did not cross-examine the officers concerning administration of the field and chemical sobriety tests, defendant fails to identify a single error in those tests with respect to which defense counsel should have inquired. Moreover, the record establishes that defense counsel's strategy was to challenge the People's allegation that defendant was operating the vehicle in question, an element of the charges against him (*see* § 511 [3] [a] [iii]; § 1192 [former (2-a)], [3]). In accordance with that strategy, defense counsel elicited testimony during cross-examination of the officers that the vehicle was stopped

and the engine was off when they approached it, that the vehicle appeared to be disabled and that the vehicle may have been operated by defendant's father, who was sitting in the passenger seat thereof.

We reject the further contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to request a hearing pursuant to *People v Ingle* (36 NY2d 413) to challenge the legality of the vehicle stop or a probable cause hearing to challenge the legality of defendant's arrest. It is well settled that "a showing that [defense] counsel failed to make a particular pretrial motion generally does not, by itself, establish ineffective assistance of counsel" (*People v Rivera*, 71 NY2d 705, 709; *see also People v Webster*, 56 AD3d 1242, *lv denied* 11 NY3d 931). Here, the record establishes that the police had the authority to approach the vehicle and request identification from defendant inasmuch as the vehicle was parked partially in the traffic lane of a roadway, thereby creating a traffic hazard (*see generally People v Richardson*, 27 AD3d 1168, 1169; *People v Dunnigan*, 1 AD3d 930, 931, *lv denied* 1 NY3d 627). The record also establishes that the police had probable cause to arrest defendant based on, inter alia, the odor of alcohol and the open container of alcohol in the vehicle, defendant's admission that he had been drinking and his failure to pass field sobriety tests (*see People v D'Augustino*, 272 AD2d 914, *lv denied* 95 NY2d 851; *People v Schroeder*, 229 AD2d 917). Thus, defendant was not denied effective assistance of counsel based on defense counsel's failure to "make . . . motion[s] . . . that ha[d] little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

We have reviewed the remaining instances of alleged ineffective assistance of counsel raised by defendant and conclude that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of felony driving while intoxicated under Vehicle and Traffic Law § 1192 (2), and it must therefore be amended to reflect that he was convicted of felony aggravated driving while intoxicated under Vehicle and Traffic Law § 1192 (former [2-a]) (*see People v Saxton*, 32 AD3d 1286).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

664

KA 08-00320

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHESTER J. THOMAS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Ellen M. Yacknin, A.J.), rendered December 14, 2007. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree, criminal contempt in the first degree and assault 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, inter alia, criminal sexual act in the first degree (Penal Law § 130.50 [1]). The victim was defendant's long-time girlfriend and the mother of his three children. Defendant failed to preserve for our review his contention that County Court's *Molineux* ruling deprived him of a fair trial (*see generally People v Parkinson*, 268 AD2d 792, 794, *lv denied* 95 NY2d 801). In any event, that contention lacks merit. The court properly admitted evidence of three prior instances in which defendant engaged in physical abuse against the victim, inasmuch as such evidence was relevant to establish defendant's intent and motive, as well as to provide appropriate background (*see People v Meseck*, 52 AD3d 948, 950; *People v Westerling*, 48 AD3d 965, 966-968).

Defendant further contends that he was deprived of a fair trial when the court sustained the People's objection to the remark made by defense counsel on summation, urging the jury to draw a negative inference from the failure of a certain police officer to testify. We reject that contention. The victim testified that the officer who responded following her 911 call informed her that "no judge would ever believe" that her live-in boyfriend had sodomized her. Consequently, the victim's written statement to the police did not include an allegation of sodomy. At trial, defense counsel attacked

the victim's credibility and emphasized that her story had changed from when she initially reported the incident to when she testified at trial and alleged that defendant sodomized her. Defense counsel thereby suggested that the sodomy never occurred because, if it had, the victim would have reported it to the responding officer. On summation, defense counsel reiterated that point and further suggested that the victim lied when she testified that the officer's statement that a judge would not believe her allegations dissuaded her from reporting the sodomy in her written statement. Defense counsel then argued that, in the event that the officer had in fact made such a statement to the victim, the officer should have been called to testify with respect thereto. The objection of the People to defense counsel's statement was sustained and the jury was instructed to disregard the statement.

"A defendant not necessarily entitled to a missing witness charge may nonetheless try to persuade the jury to draw inferences from the People's failure to call an available witness with material, noncumulative information about the case" (*People v Williams*, 5 NY3d 732, 734). In the event that the officer would have merely confirmed the victim's story, such testimony would have been cumulative of the victim's testimony, and the People were not required to call him as a witness (*see People v Ramos*, 305 AD2d 115, *lv denied* 100 NY2d 586). Moreover, defendant never made an offer of proof with respect to the officer's prospective testimony, and thus there was no good faith basis to comment on the People's failure to call him as a witness (*see People v Pepe*, 262 AD2d 7, *lv denied* 93 NY2d 1019, 1024; *see also People v Barton*, 19 AD3d 304; *People v Holland*, 221 AD2d 947, *lv denied* 87 NY2d 922).

Defendant failed to preserve for our review his contention that the People improperly bolstered the testimony of a witness (*see People v Brown*, 82 AD3d 1698, 1700), 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]). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

665

CAF 10-00207

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

IN THE MATTER JAMES R. CAREY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SARAH L. WINDOVER, RESPONDENT-APPELLANT.

IN THE MATTER OF SARAH L. WINDOVER,
PETITIONER-APPELLANT,

V

JAMES R. CAREY, RESPONDENT-RESPONDENT.

PAUL M. DEEP, UTICA, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

WILLIAM H. GETMAN, WATERVILLE, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

DOREEN M. ST. THOMAS, ATTORNEY FOR THE CHILDREN, CLARK MILLS, FOR IOANNA C. AND SHAYA C.

Appeal from an order of the Family Court, Oneida County (John E. Flemma, J.H.O.), entered December 22, 2009 in proceedings pursuant to Family Court Act articles 6 and 8. The order, among other things, transferred physical custody of the parties' children to petitioner-respondent, James R. Carey.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, granted the petition of petitioner-respondent father seeking to modify the prior order of custody by awarding him primary physical custody of the parties' children and dismissed the mother's family offense petition. We affirm. We note at the outset that the mother failed to include in the record on appeal the prior order awarding her primary physical custody of the children and visitation to the father. Although "omission from the record on appeal of the order sought to be modified ordinarily would result in dismissal of the appeal [with respect to that order] . . ., there is no dispute [concerning] the access awarded [the mother] under the prior order and, as such, we elect to reach the merits" (*Matter of Dann v Dann*, 51 AD3d 1345, 1346-1347).

We reject the mother's contention that Family Court erred in determining that the father established the requisite change in circumstances to warrant modification of the existing custody arrangement. " 'It is well established that alteration of an established custody arrangement will be ordered only upon a showing of a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225; *see Matter of Chrysler v Fabian*, 66 AD3d 1446, *lv denied* 13 NY3d 715). We conclude that the father met that burden by introducing evidence establishing that the mother moved four times in the year prior to the filing of his petition and that she sometimes stayed in a residence for only two or three weeks (*see Matter of Moore v Moore*, 78 AD3d 1630, *lv denied* 16 NY3d 704). Furthermore, the father presented evidence, including testimony from a court-appointed special advocate, establishing that the conditions in the mother's new residence were not suitable for the children. In contrast, the evidence in the record establishes that the father had a stable residence with appropriate beds for the children, and he was fully employed. Consequently, "according due deference to [the c]ourt's assessment of witness credibility" (*Matter of Graves v Stockigt*, 79 AD3d 1170, 1171), we conclude that the court's determination to award primary physical custody of the children to the father is supported by a sound and substantial basis in the record and will not be disturbed (*see Matter of McLeod v McLeod*, 59 AD3d 1011).

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

666

CAF 10-01554

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

IN THE MATTER OF SEAN S., JOSEPH S. AND KALEY S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT.

CHARLES D. HALVORSEN, ATTORNEY FOR THE CHILDREN, APPELLANT.

MEMORANDUM AND ORDER

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), APPELLANT PRO SE.

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered May 20, 2010 in a proceeding pursuant to Family Court Act article 10-A. The order, among other things, adjudged that the permanency goal for the subject children is adoption.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts of the order modifying the permanency goal for Sean S. and Joseph S. to placement for adoption and approving the permanency goal of placement in another planned permanent living arrangement and as modified the order is affirmed without costs.

Memorandum: On appeal from an order in this proceeding pursuant to Family Court Act article 10-A, the Attorney for the Children contends that Family Court erred in determining that the permanency goal of placement for adoption for the three subject children, two brothers and their sister, is in their best interests. We agree with the Attorney for the Children that the court's determination with respect to the two brothers lacks a sound and substantial basis in the record (*see generally Matter of Telsa Z.*, 74 AD3d 1434; *Matter of Jennifer R.*, 29 AD3d 1003, 1004-1005). We therefore modify the order by vacating those parts modifying the permanency goal for the two brothers to placement for adoption and approving the permanency goal of placement in another planned permanent living arrangement (APPLA).

Petitioner met its burden of establishing by a preponderance of the evidence that its determination to change the permanency goals of the brothers from adoption to APPLA was in the children's best

interests (*see generally Matter of Michael D.*, 71 AD3d 1017; *Matter of Cristella B.*, 65 AD3d 1037, 1039). At the time of the permanency hearing, the brothers were 16 years old and 15 years old, respectively. Petitioner submitted uncontroverted evidence that both brothers had adamantly opposed adoption for many years, despite the substantial efforts of counselors, caseworkers, their foster parent and an adult sibling to encourage them to consider adoption. Indeed, the brothers executed adoption waivers after consultation with the Attorney for the Children. Petitioner's caseworker for the children testified that the brothers are very loyal to their birth family, enjoy a significant connection with their biological siblings and had recently been reintroduced to their birth mother. In addition, a psychological evaluation report recommended that petitioner honor the brothers' wishes not to be adopted.

Further, the record establishes that the brothers have a "significant connection to an adult willing to be a permanency resource for [them]," as required for an APPLA placement (Family Ct Act § 1089 [d] [2] [i] [E]). The brothers' foster parent signed permanency pacts with each of them, in which he "agree[d] to be a permanent resource for the boys for as long as they need him." Indeed, the foster parent has assisted the brothers with independent living skills by, inter alia, assigning household chores and helping them open savings accounts.

In determining that a permanency goal of placement for adoption was in the best interests of the brothers, the court adopted the report and recommendation of the Referee, which appears to be based largely on the length of the hearing and the absence of the foster parents and the children from the hearing. With respect to the brothers, the Referee determined that she "was unable to assess whether the children or foster parent had changed their positions because they were not present." We conclude that, under the circumstances of this case, the absence of the children from the hearing was not a rational basis for rejecting the permanency goal of APPLA where the Referee had sufficient information to determine the best interests of the children (*see generally Veronica S. v Philip R.S.*, 70 AD3d 1459, 1460; *Matter of Tonjaleah H.*, 63 AD3d 1611; *Matter of Alyshia M.R.*, 53 AD3d 1060, 1061-1062, *lv denied* 11 NY3d 707). Indeed, the brothers were represented at the hearing by their longtime Attorney for the Children, the evidence is undisputed that they opposed adoption and both brothers were nearing the age of majority.

With respect to the sister, however, the record establishes that neither petitioner nor the Attorney for the Children requested a change in the permanency goal at any time during the proceedings in question. The sister's permanency hearing report lists both her current permanency planning goal and anticipated permanency planning goal as "[p]lacement for [a]doption," and petitioner's caseworker confirmed at the hearing that the sister's goal had not changed. Thus, the contention of the Attorney for the Children that the sister's permanency goal should be changed to APPLA is not properly before us inasmuch as it is raised for the first time on appeal (*see*

generally Matter of Shania S., 81 AD3d 1380).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

669

CA 10-01671

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

IN THE MATTER OF RANDY M. KRAJKOWSKI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CYNTHIA A. BIANCO, AS SUPERINTENDENT OF SCHOOLS OF CITY SCHOOL DISTRICT OF CITY OF NIAGARA FALLS, RUSSELL PETROZZI, AS PRESIDENT OF NIAGARA FALLS BOARD OF EDUCATION, NIAGARA FALLS BOARD OF EDUCATION, AND SCHOOL DISTRICT OF CITY OF NIAGARA FALLS,
RESPONDENTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

REDEN & O'DONNELL, LLP, BUFFALO (TERRY M. SUGRUE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 25, 2010 in a proceeding pursuant to CPLR article 78. The judgment granted the petition for reinstatement with back pay and benefits.

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

Memorandum: In this CPLR article 78 proceeding, petitioner sought, inter alia, to annul the determination terminating his employment as a network engineer with respondent School District of City of Niagara Falls (District) based on his failure to comply with the District's residency policy. That policy requires District employees to be domiciliaries of the City of Niagara Falls. Supreme Court properly granted the petition.

As we set forth in *Matter of Gigliotti v Bianco* (82 AD3d 1636), it is well established that "domicile means living in [a] locality with intent to make it a fixed and permanent home" (*Matter of Newcomb*, 192 NY 238, 250). Further, "[a]n existing domicile . . . continues until a new one is acquired, and a party . . . alleging a change in domicile has the burden to prove the change by clear and convincing evidence" (*Matter of Hosley v Curry*, 85 NY2d 447, 451, *rearg denied* 85 NY2d 1033; *see Matter of Larkin v Herbert*, 185 AD2d 607, 608). "For a change to a new domicile to be effected, there must be a union of

residence in fact and an 'absolute and fixed intention' to abandon the former and make the new locality a fixed and permanent home" (*Hosley*, 85 NY2d at 451).

Here, the evidence presented to respondent Niagara Falls Board of Education established that petitioner owned properties in Niagara Falls and Lewiston, New York. He resided, however, in Niagara Falls. Petitioner's vehicle was registered in Niagara Falls, he paid utility bills for his residence there, he had a driver's license listing that address and he was registered to vote in Niagara Falls. Petitioner's wife lived at the couple's Lewiston residence, and the surveillance conducted by respondents on five separate occasions during a three-month period indicated that petitioner spent two nights at the Lewiston residence. We conclude, however, that the evidence obtained by that surveillance and the fact that petitioner owns multiple properties does not establish that petitioner evinces a "present, definite and honest purpose to give up the old and take up the new place as [his] domicile" (*Newcomb*, 192 NY at 251; *see Hosley*, 85 NY2d at 452). We thus conclude that the determination that petitioner changed his domicile from Niagara Falls to Lewiston was arbitrary and capricious (*see Gigliotti*, 82 AD3d 1636).

In addition, as in *Gigliotti*, this proceeding does not involve a substantial evidence issue requiring transfer to this Court (*see* CPLR 7803 [4]; 7804 [g]). A substantial evidence issue " 'arises only where a quasi-judicial hearing has been held and evidence taken pursuant to *law*' " (*Matter of Bonded Concrete v Town Bd. of Town of Rotterdam*, 176 AD2d 1137, 1137-1138 [emphasis added]). Here, the District did not conduct a hearing before terminating petitioner's employment, nor was such a hearing "required by statute or law" (*Matter of Colton v Berman*, 21 NY2d 322, 329).

Finally, we reject respondents' further contention that the court erred in awarding petitioner costs and disbursements (*see* CPLR 8101; 8301 [a]; *see generally Matter of Birnbaum v Birnbaum*, 157 AD2d 177, 191-192).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

672.1

CA 11-00160

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

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

AND ORDER

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.,
RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO (JULIE P. APTER OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 20, 2010 in a proceeding pursuant to CPLR article 75. The order denied the petition for a stay of arbitration.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first ordering paragraph and dismissing the petition and as modified the order is affirmed without costs.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

672

CA 10-02265

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

IN THE MATTER OF ROBERT P. MEEGAN, JR.,
INDIVIDUALLY AND AS PRESIDENT OF BUFFALO
POLICE BENEVOLENT ASSOCIATION AND
BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.,
PETITIONERS-RESPONDENTS,

V ORDER

BYRON W. BROWN, AS MAYOR OF CITY OF BUFFALO,
DANIEL DERENDA, AS ACTING COMMISSIONER OF
POLICE, AND CITY OF BUFFALO,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO (JULIE P. APTER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 3, 2010 in a proceeding pursuant to CPLR article 75. The order granted petitioners' application for a preliminary injunction.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

673

CA 10-01799

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND MARTOCHE, JJ.

JOSEPH MORAN AND ROSE MARIE MORAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOSEPH L. MUSCARELLA, JR., D.O., ET AL.,
DEFENDANTS,
KALEIDA HEALTH, BUFFALO GENERAL HOSPITAL,
MELINDA S. BARONE, RNFA, SINISA MARKOVIC, M.D.,
AND BUFFALO ANESTHESIA ASSOCIATES, P.C.,
DEFENDANTS-RESPONDENTS.

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK D. ARCARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KALEIDA HEALTH, BUFFALO GENERAL HOSPITAL, AND MELINDA S. BARONE, RNFA.

BROWN & TARANTINO, LLC, BUFFALO (SUSAN A. EBERLE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SINISA MARKOVIC, M.D. AND BUFFALO ANESTHESIA ASSOCIATES, P.C.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered May 19, 2010 in a medical malpractice action. The order granted the motions of defendants Kaleida Health, Buffalo General Hospital, Melinda S. Barone, RNFA, Sinisa Markovic, M.D., and Buffalo Anesthesia Associates, P.C. for summary judgment dismissing the complaint and all cross claims against them.

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

Memorandum: Plaintiffs commenced this medical malpractice action to recover damages for injuries sustained by Joseph Moran (plaintiff) while he was undergoing a total thyroidectomy, central node dissection and right lateral node dissection. Defendant Joseph L. Muscarella, Jr., D.O., plaintiff's private physician, performed the surgery at defendant Buffalo General Hospital (Hospital), which was owned, operated and controlled by defendant Kaleida Health (Kaleida). Dr. Muscarella was assisted by, inter alia, defendant Melinda S. Barone, RNFA, who was employed by the Hospital. Dr. Muscarella was also assisted by defendant Sinisa Markovic, M.D., who was employed by defendant Buffalo Anesthesia Associates, P.C. (collectively, Markovic defendants). According to plaintiffs, defendants improperly

positioned him using two positioning devices during the surgery, causing him to sustain injuries to his back and right arm. We conclude that Supreme Court properly granted the motion of Barone, the Hospital and Kaleida (collectively, Hospital defendants), as well as the motion of the Markovic defendants, for summary judgment dismissing the complaint and all cross claims against them.

We conclude that the Hospital defendants established their entitlement to judgment as a matter of law. It is well settled that, "[i]n general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee, and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of [his or her orders]" (*Toth v Bloshinsky*, 39 AD3d 848, 850). Here, it is undisputed that Dr. Muscarella was a private physician chosen by plaintiff. It is also undisputed that the Hospital's employees were following the orders of Dr. Muscarella and that he had the ultimate responsibility in positioning plaintiff with the positioning devices used during the surgery. There is also no evidence that Dr. Muscarella's orders "were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of [his orders]" (*id.*; *see Lorenzo v Kahn*, 74 AD3d 1711, 1712-1713).

We further conclude that the Markovic defendants established their entitlement to judgment as a matter of law. In support of their motion, the Markovic defendants submitted, inter alia, Dr. Markovic's expert affirmation in which he opined that the care and treatment of plaintiff was at all times within the standard of care. Dr. Markovic also averred that it was Dr. Muscarella's responsibility to position plaintiff using the positioning devices (*see generally Graziano v Cooling*, 79 AD3d 803, 804).

Once the Hospital defendants and the Markovic defendants established their entitlement to judgment as a matter of law, "[t]he burden then shifted to plaintiffs to raise triable issues of fact by submitting a physician's affidavit both attesting to a departure from accepted practice and containing the attesting [physician's] opinion that [those] defendant[s'] omissions or departures were a competent producing cause of the injury" (*O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1141, *lv dismissed* 13 NY3d 834 [internal quotation marks omitted]). Contrary to plaintiffs' contention, the expert affidavits submitted in opposition to the motions "are speculative [and] unsupported by any evidentiary foundation" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544), and thus they are insufficient to raise triable issues of fact. We have reviewed plaintiffs' remaining contention and conclude that it is without merit.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

675

CA 08-01301

PRESENT: SMITH, J.P., FAHEY, CARNI, AND MARTOCHE, JJ.

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KARL MUENCH, AN INMATE IN THE CUSTODY OF
NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered May 8, 2008 in a proceeding pursuant to Mental Hygiene Law article 10. The appeal was held by this Court by order entered December 30, 2009, decision was reserved and the matter was remitted to Supreme Court, Oneida County, for further proceedings (68 AD3d 1677). The proceedings were held and completed.

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

Memorandum: Respondent previously appealed from an order pursuant to Mental Hygiene Law article 10 committing him to a secure treatment facility designated by the Commissioner of Mental Health based upon a jury finding that he is a detained sex offender with a mental abnormality that, inter alia, predisposes him to commit further sex offenses. We concluded that the record was insufficient for us "to determine whether Supreme Court erred in relinquish[ing] control over the proceedings by permitting" the discharge of prospective jurors outside the presence of the trial judge (*Matter of State of New York v Muench*, 68 AD3d 1677). We therefore held the case, reserved decision and remitted the matter to Supreme Court for a reconstruction hearing. Upon remittal, the parties stipulated to an order concluding that 22 prospective jurors were excused upon the authority of a commissioner of jurors without knowledge or input from the trial court, prior to the commencement of jury selection in court.

Although this Mental Hygiene Law article 10 proceeding is civil in nature and primarily governed by CPLR article 41 (*see* § 10.07 [b]), the Criminal Procedure Law governs challenges to prospective jurors in

such proceedings (*see id.*; CPL 270.20, 270.25 [1]). The relevant section of the Criminal Procedure Law provides that the court must determine all issues of fact and, "[i]f [a] challenge [to a prospective juror] is allowed, the court must exclude the person challenged from service" (CPL 270.20 [2]). Further, respondent's challenge with respect to the discharge of certain prospective jurors implicates his fundamental right to a jury trial (*see Matter of State of New York v Kalchthaler*, 82 AD3d 1672). We note that "[t]he presence of and supervision by a [j]udge constitutes an integral component of the right to a jury trial . . . [Inasmuch as] the selection of the jury is part of the . . . trial . . ., a [respondent] has a fundamental right to have a [j]udge preside over and supervise the voir dire proceedings while prospective jurors are being questioned regarding their qualifications. A [j]udge who relinquishes control over the proceedings or delegates the duty to supervise deprives a [respondent] of the right to a trial by jury, requiring reversal" (*People v Toliver*, 89 NY2d 843, 844; *see People v Bosa*, 60 AD3d 571, 572, *lv denied* 12 NY3d 923). Here, based on the procedures employed by the Fifth Judicial District Coordinating Commissioner of Jurors, 22 prospective jurors were excluded by that Commissioner rather than by the court. Petitioner therefore correctly concedes that respondent's "fundamental right to have a [j]udge preside over and supervise the voir dire proceedings while prospective jurors are being questioned regarding their qualifications" was violated (*Toliver*, 89 NY2d at 844). We therefore reverse the order and grant a new trial.

Respondent failed to preserve for our review his further contentions concerning the constitutionality of Mental Hygiene Law article 10 (*see generally People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408, *rearg denied* 7 NY3d 742; *People v Stuart*, 100 NY2d 412, 425-426 n 11; *People v Davidson*, 98 NY2d 738, 739-740), the comments made by the Assistant Attorney General during his opening statement (*see People v Freeman*, 46 AD3d 1375, 1376, *lv denied* 10 NY3d 840), and the use of hearsay testimony (*see People v Qualls*, 55 NY2d 733, 734; *People v Bertone*, 16 AD3d 710, 712, *lv denied* 5 NY3d 759). We decline to exercise our power to review those contentions in the interest of justice (*see generally Matter of State of New York v Campany*, 77 AD3d 92, 101, *lv denied* 15 NY3d 713).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

676

KA 09-00525

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIMOTHY TURNER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM PIXLEY 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 (Alex R. Renzi, J.), rendered February 4, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

677

KA 07-02647

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDDIE AMARO, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 19, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree, 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

678

KA 08-01839

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

NATALIE HALL, DEFENDANT-RESPONDENT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR APPELLANT.

FIANDACH & FIANDACH, ROCHESTER (TIMOTHY C. RATH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (John J. Connell, J.), dated July 10, 2007. The order granted the motion of defendant to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the motion seeking to dismiss the indictment is denied, the indictment is reinstated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of the omnibus motion of defendant seeking to dismiss the indictment against her. The People's contentions are the same as those raised in *People v East* (78 AD3d 1680) and *People v Jeffery* (70 AD3d 1512) and, for reasons stated in our decisions therein, we reverse the order, deny that part of defendant's omnibus motion seeking to dismiss the indictment, reinstate the indictment and remit the matter to County Court for further proceedings on the indictment.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

679

KA 10-01789

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON ABRON, 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 (Thomas G. Leone, J.), rendered July 22, 2010. Defendant was resentenced pursuant to Corrections Law § 601-d.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

680

KA 09-00087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN M. AYERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered November 19, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress evidence is granted, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his arrest was not supported by probable cause. We agree. At approximately 3:19 A.M. on a winter day, the police responded to the report of an attempted burglary by a homeowner who had discovered the door of his back porch ajar and one fresh snow footprint inside the house. The homeowner also reported that his wife's vehicle had been opened. One to two inches of snow had fallen early that morning. The first officer to respond began following a footprint trail in the fresh snow, leading away from the house. The officer reported the direction of the footprint trail to two other officers who were in patrol vehicles, canvassing the neighborhood for a suspect. Approximately one hour after the attempted burglary occurred, one of the officers in a patrol vehicle observed defendant running across the street and up the driveway of a house in proximity to the location of the attempted burglary. The officer got out of his vehicle and instructed defendant to stop. The officer then approached defendant and placed him under arrest, and defendant was immediately handcuffed. When defendant asked the officer why he had been arrested, the officer responded, "for breaking into cars." Defendant was pat-searched, and a stolen

credit card was found in one of his pockets. In addition, a rifle was found during an inventory search of defendant's vehicle, which was located on the same street as the house at which the attempted burglary took place.

Later that morning at the jail, defendant waived his *Miranda* rights and gave a written statement to the police, apologizing for his crime. Subsequently, while in jail on the present charges, defendant made telephone calls to his girlfriend, which were monitored by the police. The police used the information from those telephone conversations to obtain evidence that defendant possessed weapons. Defendant was indicted on 12 counts, three of which included criminal possession of a weapon.

It is undisputed that defendant was arrested immediately upon his encounter with the police. The arresting officer so acknowledged, and we conclude based on the record before us that a reasonable person in defendant's position would have believed that, under all of the circumstances, he or she was under arrest (*see People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). The police, however, lacked probable cause to arrest defendant (*see People v Russell*, 269 AD2d 771). The officer who arrested defendant had observed him running on the same street where the reported attempted burglary occurred, sometime between 3:30 A.M. and 4:30 A.M. Although those facts tied defendant to the crime that was being investigated, they justified, at most, a stop based on reasonable suspicion, not an arrest requiring probable cause (*see People v De Bour*, 40 NY2d 210, 222-223). Furthermore, "the police cannot rely on evidence obtained after an arrest to provide probable cause" (*People v Young*, 202 AD2d 1024, 1026; *see People v Williams*, 191 AD2d 989, *lv denied* 82 NY2d 729).

We further conclude that the police obtained additional evidence against defendant that flowed directly from defendant's illegal arrest, and it cannot be said that such evidence was "sufficiently attenuated from the illegal arrest to be purged of the taint created by the illegality" (*Russell*, 269 AD2d at 772). Thus, the court erred in refusing to suppress the evidence obtained as a result of defendant's illegal arrest as fruit of the poisonous tree (*see generally People v Christianson*, 57 AD3d 1385, 1388; *People v Parris*, 136 AD2d 882, 883-884, *appeal dismissed* 71 NY2d 1031). " '[I]nasmuch as the erroneous suppression ruling may have affected defendant's decision to plead guilty' " (*People v Glanton*, 72 AD3d 1536, 1537-1538), the plea must be vacated.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

681

KA 07-02340

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMILLO DOUGLAS, DEFENDANT-APPELLANT.

MICHAEL G. CONROY, KENMORE, 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 September 27, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of assault in the second degree (Penal Law § 120.05 [3]). The conviction arises from an incident in which four correction officers attempted to restrain defendant in order to conduct a "strip frisk" for suspected contraband and three of those officers sustained injuries. By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish that each of the victims sustained a physical injury (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we conclude that defendant's contention is without merit. The evidence, which included testimony from the respective treating orthopedic surgeons of two of the victims and the treating chiropractor of the third victim, established that each of the victims required medical treatment for his injuries. One of the victims continued treatment for an injured elbow for more than two years following the incident, and another victim required arthroscopic surgery to repair the damage to his knee that resulted from the incident. The third victim's treating chiropractor testified that the injury sustained by that victim as a result of the incident "greatly exacerbated" his preexisting lower back injury. We note that the victims each were on medical leave for several weeks following the incident. We therefore conclude that the evidence established that each of the victims sustained a physical injury within the meaning of Penal Law § 10.00 (9), i.e., impairment of a physical condition or

substantial pain (*see People v Bowen*, 17 AD3d 1054, 1055-1056, *lv denied* 5 NY3d 759; *People v Liggins*, 2 AD3d 1325, 1326; *cf. People v Velasquez*, 202 AD2d 1037, *lv denied* 83 NY2d 1008, 84 NY2d 940), and thus that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

682

CAF 10-02106

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

IN THE MATTER OF JANE H.

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

SUSAN H., RESPONDENT-APPELLANT.

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHRISTOPHER E. BURKE, ATTORNEY FOR THE CHILD, SYRACUSE, FOR JANE H.

Appeal from an order of the Family Court, Onondaga County (Bryan R. Hedges, J.), entered September 29, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights to the subject child.

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

Memorandum: On appeal from an order terminating her parental rights with respect to the child at issue, respondent mother contends that Family Court abused its discretion in refusing to issue a suspended judgment. We reject that contention. The record supports the court's determination that a suspended judgment, i.e., "a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311), was not in the child's best interests (*see Matter of Shadazia W.*, 52 AD3d 1330, *lv denied* 11 NY3d 706; *Matter of Danielle N.*, 31 AD3d 1205). "The court's assessment that [the mother] was not likely to change [her] behavior is entitled to great deference" (*Matter of Philip D.*, 266 AD2d 909). The mother correctly concedes that she failed to request that the court consider post-termination contact and, in any event, we conclude that the mother failed to establish that such contact would be in the best interests of the child (*see Matter of Andrea E.*, 72 AD3d 1617, *lv denied* 15 NY3d 703; *Matter of Christopher J.*, 60 AD3d 1402). The child has resided with her foster family for almost her entire life, and the evidence established that there was no bond

between the mother and the child.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

684

CAF 10-02092

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

IN THE MATTER OF MINDY L. HOWARD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STEVE W. HOWARD, RESPONDENT,
AND SHIRLEY MCLOUGHLIN, RESPONDENT-RESPONDENT.

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

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR RESPONDENT-RESPONDENT.

STEPHANIE N. DAVIS, ATTORNEY FOR THE CHILD, OSWEGO, FOR APRIL H.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered September 17, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of custody.

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, Oswego County, for further proceedings in accordance with the following Memorandum: Petitioner mother appeals from an order dismissing her pro se petition to modify an order of custody entered upon consent. That prior order, inter alia, awarded the mother and respondent grandmother joint legal custody of the child and awarded the grandmother primary physical custody of the child. We agree with the mother that Family Court erred in dismissing her petition without first receiving a report from the Referee and providing the mother an opportunity to object to it (*see* CPLR 4320 [b]; 22 NYCRR 202.44 [a]; *see also Matter of Wilder v Wilder*, 55 AD3d 1341). The record establishes that the Referee was authorized only to hear the matter and issue a report inasmuch as there is no evidence that the parties consented to referral to the Referee for a final determination on the petition (*see Wilder*, 55 AD3d 1341). We further agree with the mother that the Referee's failure to advise her of the right to counsel pursuant to Family Court Act § 262 (a) (v) constitutes reversible error (*see Matter of Arlene R. v Wynette G.*, 37 AD3d 1044). "The deprivation of a party's right to counsel guaranteed by [that] statute 'requires reversal, without regard to the merits of the unrepresented party's position' " (*Matter of Collier v Norman*, 69 AD3d 936, 937). We therefore reverse the order, reinstate the mother's petition and remit the matter to Family

Court for further proceedings on the petition.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

685

CAF 10-00547

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

IN THE MATTER OF BETHANY F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL F., RESPONDENT-APPELLANT.

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

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR BETHANY F.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered February 24, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed respondent under the supervision of petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, placed him under the supervision of petitioner based on a finding that he sexually abused his daughter. Contrary to the father's contention, the finding of sexual abuse is supported by the requisite preponderance of the evidence (*see* § 1046 [b] [i]; *Matter of Tammie Z.*, 66 NY2d 1, 3).

Contrary to the father's further contention, Family Court did not abuse its discretion in denying his motion for a *Frye* hearing with respect to the admissibility of validation testimony of a court-appointed mental health counselor. "Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered[, and courts] may take judicial notice of [its] reliability" (*People v Hopkins*, 46 AD3d 1449, 1450, *lv denied* 10 NY3d 812 [internal quotation marks omitted]; *see People v LeGrand*, 8 NY3d 449, 458). Here, the court-appointed counselor utilized the Sgroi method to interview the child and make a determination with respect to the veracity of her allegations. The Court of Appeals has cited to Dr. Sgroi's "Handbook of Clinical Intervention in Child Sexual Abuse" (*see Matter of Nicole V.*, 71 NY2d 112, 120-121, *rearg*

denied 71 NY2d 890), and other courts in New York State have admitted validation testimony of experts who have utilized the Sgroi method (*see e.g. Matter of Thomas N.*, 229 AD2d 666, 668; *Matter of Nassau County Dept. of Social Servs. v Steven K.*, 176 AD2d 326, 327-328). Further, the court-appointed counselor testified at the hearing that the Sgroi method was used by "all" counselors in the field to validate allegations of sexual abuse. Inasmuch as a *Frye* hearing is required only where a party seeks to introduce testimony on a novel topic (*see People v Garrow*, 75 AD3d 849, 852), and there is no indication in the record that the methods used by the court-appointed counselor to validate the allegations of sexual abuse in this case were novel, the father's motion for a *Frye* hearing was properly denied.

We further conclude that the court properly determined that the out-of-court statements of the child were sufficiently corroborated (*see Nicole V.*, 71 NY2d at 118-119). We have reviewed the father's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

686

CAF 10-02101

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

IN THE MATTER OF JODI M. BEDWORTH-HOLGADO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH M. HOLGADO, RESPONDENT.

ALLEN & O'BRIEN, RESPONDENT.

MAUREEN A. PINEAU, ROCHESTER, FOR PETITIONER-APPELLANT.

STUART L. LEVISON, ROCHESTER, FOR RESPONDENT ALLEN & O'BRIEN.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered September 13, 2010 in a proceeding pursuant to Family Court Act article 6. The order directed counsel for petitioner to pay attorneys' fees of $1,600 to respondent Allen & O'Brien.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by directing petitioner's attorney, Maureen A. Pineau, Esq., to pay respondent Allen & O'Brien the sum of $1,600 in attorneys' fees by July 22, 2011 and as modified the order is affirmed without costs.

Memorandum: This is an appeal from an order directing petitioner's attorney to pay attorneys' fees to respondent Allen & O'Brien pursuant to 22 NYCRR 130-1.1 (a). Family Court determined that petitioner's attorney engaged in frivolous conduct by serving a subpoena for Allen & O'Brien's client, a licensed clinical social worker (LCSW), to provide testimony regarding her knowledge of petitioner mother and respondent father. The court's order was stayed by this Court pending the appeal.

We conclude that the court properly set forth in writing "the conduct on which the . . . imposition [of attorneys' fees] is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount . . . imposed to be appropriate" (22 NYCRR 130-1.2; *cf. Matter of Gigliotti v Bianco*, 82 AD3d 1636, 1638; *Ikeda v Tedesco*, 70 AD3d 1498, 1499). The court determined that the subpoena sought testimony protected by the privilege set forth in CPLR 4508 and thus that it was "completely without merit in law" (22 NYCRR 130-1.1 [c] [1]). The court further determined that the parents had an agreement with the LCSW that she would not testify for any purpose and that the parents had stipulated

on the record that the LCSW would not be required to testify at the hearing. Inasmuch as there is no clear abuse of discretion, we will not disturb the court's determination that the conduct in question was frivolous and that it warranted the imposition of costs in the form of attorneys' fees (*see Grozea v Lagoutova*, 67 AD3d 611; *Pickens v Castro*, 55 AD3d 443). We modify the order in the exercise of discretion, however, by directing petitioner's attorney to comply with the directive contained in the order by July 22, 2011, rather than the date set forth in the order, because that date has since passed.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

687

CAF 10-01544

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

IN THE MATTER OF MICHAEL BENTLEY,
PETITIONER-APPELLANT,

V ORDER

DEBRA BENTLEY, RESPONDENT-RESPONDENT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

DEBORAH WALKER-DEWITT, ATTORNEY FOR THE CHILDREN, LOCKPORT, FOR AMANDA B. AND MELISSA B.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered May 27, 2010 in a proceeding pursuant to Family Court Act article 6. The order modified a prior order of visitation of the court.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Hess v Flint*, 5 AD3d 1079; *Matter of Cherilyn P.*, 192 AD2d 1084, *lv denied* 82 NY2d 652).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

688

CA 11-00282

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

LINDA A. FARNHAM, PLAINTIFF-APPELLANT,

V ORDER

SIDNEY S. WEINSTEIN, DEFENDANT-RESPONDENT.

FINUCANE AND HARTZELL, LLP, PITTSFORD (LEO G. FINUCANE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered June 15, 2010. The order granted the motion of defendant for summary judgment dismissing the claim of plaintiff for punitive damages.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

693

CA 10-02317

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

GLACIAL AGGREGATES LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF YORKSHIRE, DEFENDANT-APPELLANT.

JOHN J. FLAHERTY, TOWN ATTORNEY, WILLIAMSVILLE, DAVID J. SEEGER, BUFFALO, SPECIAL COUNSEL FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (SEAN J. MACKENZIE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered June 15, 2010. The judgment awarded plaintiff attorneys' fees and disbursements in the amount of $69,822.89.

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

Memorandum: Defendant appeals from a judgment awarding plaintiff, inter alia, attorneys' fees pursuant to 42 USC § 1988 (b) as the prevailing party on the cause of action seeking damages pursuant to 42 USC § 1983. We affirm. According to plaintiff, defendant violated its due process rights pursuant to the Fourteenth Amendment of the United States Constitution by depriving plaintiff of its vested right to mine the property in question. Following a jury trial, plaintiff was awarded damages. This Court reversed the judgment, granted defendant's motion for a directed verdict and dismissed the 42 USC § 1983 cause of action (*Glacial Aggregates LLC v Town of Yorkshire*, 57 AD3d 1362, *revd* 14 NY3d 127). The Court of Appeals, however, determined that plaintiff had established a vested right to mine the property, and it therefore reversed our order and remitted the matter to this Court for consideration of the issues raised but not determined on the appeal to this Court (*Glacial Aggregates LLC v Town of Yorkshire*, 14 NY3d 127, *rearg denied* 14 NY3d 920). Upon remittitur from the Court of Appeals, we rejected defendant's remaining contentions and affirmed the judgment (*Glacial Aggregates LLC v Town of Yorkshire*, 72 AD3d 1644, *appeal dismissed* 16 NY3d 760). Thus, contrary to defendant's contention, plaintiff is a prevailing party pursuant to 42 USC § 1988 (*see generally Matter of Johnson v Blum*, 58 NY2d 454, 457-459).

Contrary to the further contention of defendant, we conclude that

plaintiff's motion for attorneys' fees pursuant to 42 USC § 1988 was timely inasmuch as it was filed approximately 2½ months after the judgment on the verdict was filed and approximately two months after Supreme Court denied defendant's motion to set aside the verdict (*see generally Felder v Foster*, 86 AD2d 766).

We note that plaintiff filed the judgment for, inter alia, attorneys' fees with the Cattaraugus County Clerk more than two years following the court's decision on the motion (*see* 22 NYCRR 202.48 [a]). We nevertheless further conclude that plaintiff did not abandon its motion seeking attorneys' fees. We take judicial notice of the fact that the appeal process continued until approximately six weeks before the judgment was filed (*Glacial Aggregates LLC*, 72 AD3d 1644), and we note that plaintiff was not entitled to the fees as a prevailing party pursuant to 42 USC § 1988 until that process was concluded. We therefore conclude that plaintiff had good cause for its delay in filing the judgment (*see* 22 NYCRR 202.48 [b]; *see generally Farkas v Farkas*, 11 NY3d 300, 308-309). In any event, we note that "the matter involves . . . [a] simple judgment for a sum of money [that] speaks for itself . . . [and was properly] 'entered by the [County C]lerk without prior submission to the court' " (*Funk v Barry*, 89 NY2d 364, 367), and there is no time limit to file a judgment for a sum of money (*see Farkas*, 11 NY3d at 309).

We reject defendant's contention that the award of attorneys' fees should be reduced. The amount of reasonable attorneys' fees awarded pursuant to 42 USC § 1988 lies within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion (*see Deep v Clinton Cent. School Dist.*, 48 AD3d 1125, 1126), and that is not the case here.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

694

CA 10-02130

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

LORI MURPHY AND SECOND CHANCE THERAPEUTIC SERVICES, PLAINTIFFS-APPELLANTS,

V ORDER

COUNTY OF OSWEGO, BARBARA SCHULER, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS DIRECTOR OF OSWEGO COUNTY DEPARTMENT OF PROBATION, GEORGE B. MARTURANO, IN HIS OFFICIAL CAPACITY WITH OSWEGO COUNTY DEPARTMENT OF PROBATION, AND MARY MARTURANO, IN HER OFFICIAL CAPACITY WITH OSWEGO COUNTY DEPARTMENT OF PROBATION, JOINTLY AND SEVERALLY, DEFENDANTS-RESPONDENTS.

BRICKWEDDE LAW FIRM, SYRACUSE (RICHARD J. BRICKWEDDE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (J. RYAN HATCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered July 22, 2010. The order dismissed the complaint.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

696

CA 11-00319

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

IN THE MATTER OF ALFONS J. POHOPEK,
PETITIONER-APPELLANT,

V ORDER

TOWN OF WESTERN ZONING BOARD OF APPEALS AND
DONALD CROFT, RESPONDENTS-RESPONDENTS.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PETITIONER-APPELLANT.

CHARLES W. ENGELBRECHT, ROME, FOR RESPONDENT-RESPONDENT TOWN OF WESTERN ZONING BOARD OF APPEALS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered June 29, 2010 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

698

KA 08-00022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GABRIEL S. WADE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 (Anthony F. Aloi, J.), rendered August 14, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

699

KA 08-00021

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GABRIEL S. WADE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 (Anthony F. Aloi, J.), rendered August 14, 2007. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

700

KA 10-00604

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLES BRYANT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES 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 10, 2010. 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.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

701

KA 09-02357

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RORY KYLER, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN 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 (Matthew J. Murphy, III, J.), rendered October 6, 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 (*see People v Lococo*, 92 NY2d 825, 827).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

702

KA 10-00759

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALEXANDER E. TIGG, DEFENDANT-APPELLANT.

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 (M. William Boller, A.J.), rendered August 28, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

703

KA 09-01467

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SAMUEL L. HODGES, ALSO KNOWN AS COUNTRY,
DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, 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 (John L. Michalski, A.J.), rendered June 25, 2009. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

704

KA 09-01959

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN O. COOPER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRIAN SHIFFRIN 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 (Alex R. Renzi, J.), rendered July 8, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that his waiver of the right to appeal was not valid because the record does not establish that he understood that right and waived it voluntarily, knowingly, and intelligently. We agree. Although "there is no requirement that [County C]ourt engage in any particular litany in order to satisfy itself that [those] standards have been met, a knowing and voluntary waiver cannot be inferred from a silent record" (*People v Callahan*, 80 NY2d 273, 283). The record establishes that the court instructed defendant to execute a written waiver of the right to appeal and that defendant did as instructed, but there was no colloquy between the court and defendant regarding the waiver (*see id.*; *cf. People v Ramos*, 7 NY3d 737, 738). Thus, defendant's further contention that the court erred in refusing to suppress the cocaine found on his person and his statements to the police because he was arrested and searched without probable cause is not encompassed by his invalid waiver of the right to appeal.

We conclude, however, that defendant forfeited any right to challenge the court's suppression ruling. Pursuant to CPL 710.70 (2), an "order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of

guilty." Here, the court issued a bench decision with respect to those parts of defendant's omnibus motion seeking to suppress the cocaine and his statements, but defendant pleaded guilty before the court issued an order, and thus CPL 710.70 (2) is not applicable (*see People v Ellis*, 73 AD3d 1433, *lv denied* 15 NY3d 851; *People v Releford*, 73 AD3d 1437, 1438, *lv denied* 15 NY3d 808).

In any event, we conclude that defendant's contention that he was arrested and searched without probable cause is without merit. The evidence at the suppression hearing established that the stop of defendant's vehicle was lawful inasmuch as the police officers observed defendant violating two provisions of the Vehicle and Traffic Law (*see People v Mundo*, 99 NY2d 55, 58). During that stop, an officer observed in plain view a "dime baggie" with "white residue." The officer testified at the suppression hearing that, based on his experience, he recognized the baggie as a type commonly used to package drugs for sale and the residue as crack cocaine residue. That evidence, together with the officers' additional plain view observation that defendant had a grocery bag "stuffed with money," gave the officers probable cause to arrest defendant (*see People v Schell*, 261 AD2d 422, *lv denied* 94 NY2d 829; *People v Lumpkins*, 157 AD2d 804, *lv denied* 75 NY2d 967). Because defendant was lawfully arrested based on probable cause, the subsequent search of his person was permissible as a search incident to arrest (*see generally People v Ralston*, 303 AD2d 1014, *lv denied* 100 NY2d 565; *People v Taylor*, 294 AD2d 825, 826).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

705

KA 09-02631

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. GANDY, 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 (JAHARR S. PRIDGEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered December 22, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, criminal possession of a controlled substance in the fourth degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Supreme Court properly refused to suppress evidence seized from the vehicle in which defendant was a passenger. We reject defendant's contention that the police illegally stopped the vehicle. The record of the suppression hearing establishes that the vehicle was parked when the officers approached it in their patrol car and that the patrol car stopped alongside the vehicle and did not block its ability to move forward or backward (*see People v Ocasio*, 85 NY2d 982, 984; *People v Black*, 59 AD3d 1050, *lv denied* 12 NY3d 851). Further, in view of the prior drug activity that had occurred in the house near where the vehicle was parked and citizen complaints of drug activity in that area, the officers possessed an objective, credible reason to approach the vehicle and ask the occupants "what['s] up?" (*see People v Ramos*, 60 AD3d 1317, *lv denied* 12 NY3d 928; *People v Robinson*, 309 AD2d 1228, *lv denied* 1 NY3d 579; *see generally Ocasio*, 85 NY2d at 984-985). One of the officers then exited the patrol car and approached the subject vehicle on foot, whereupon he observed a handgun on the floor in between defendant's feet. Contrary to defendant's further contention, "the court was entitled to credit [the officer's] testimony" at the suppression hearing that he was standing outside of the vehicle when

he made that observation (*People v Washington*, 50 AD3d 1590, 1591), and the court therefore properly determined that the weapon was seized pursuant to the plain view doctrine (*see generally People v Brown*, 96 NY2d 80, 88-89; *People v Stein*, 306 AD2d 943, *lv denied* 100 NY2d 599, 1 NY3d 581).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

706

KA 08-00157

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IRASELL GUERRA, DEFENDANT-APPELLANT.

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

IRASELL GUERRA, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered November 14, 2007. 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: 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]). We reject defendant's contention that he was denied a fair trial when a police officer testified that defendant, after being taken into custody and confessing to the crime, said that he had "been through this before." The officer's comment was potentially prejudicial inasmuch as it permitted the inference that defendant had a prior criminal record (*see People v Carter*, 40 AD3d 1310, 1312-1313, *lv denied* 9 NY3d 873, 879; *People v Butler*, 258 AD2d 368, 369). Viewing the brief, singular comment in light of the officer's entire testimony, however, we conclude that County Court mitigated any prejudice by striking that comment and giving a curative instruction directing the jury to disregard it (*see Carter*, 40 AD3d at 1313; *People v Hawkes*, 39 AD3d 1209, 1210, *lv denied* 9 NY3d 844, 845; *People v McCombs*, 18 AD3d 888, 890). Contrary to defendant's further contention, the record fails to demonstrate that the officer intentionally violated the court's pretrial ruling limiting testimony regarding defendant's criminal history (*see McCombs*, 18 AD3d at 890; *People v Greene*, 250 AD2d 547, *lv denied* 92 NY2d 925). We therefore conclude that the court did not abuse its discretion in denying defendant's motion for a mistrial and various alternative relief based on the testimony in question (*see Carter*, 40 AD3d at 1312-1313;

Hawkes, 39 AD3d at 1210; *see also People v Santiago*, 52 NY2d 865, 866). In any event, any error with respect to the officer's testimony is harmless inasmuch as the proof of defendant's guilt was overwhelming and there is no significant probability that he would have been acquitted but for the error (*see Greene*, 250 AD2d 547; *see generally People v Crimmins*, 36 NY2d 230, 241–242).

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 reject the contention of defendant in his pro se supplemental brief that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

708

KA 09-00483

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELVIN QUINONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered January 13, 2009. The judgment convicted defendant, upon his plea of guilty, of identity theft 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 identity theft in the first degree (Penal Law § 190.80 [3]), defendant contends that the superior court information is jurisdictionally defective inasmuch as it fails to specify the "class D felony or higher level crime" that he committed or attempted to commit (*id.*). We reject that contention. "A superior court information is subject to the same rules as an indictment . . ., and an indictment that states no more than the bare elements of the crime charged and, in effect, parrots the Penal Law is legally sufficient; the defendant may discover the particulars of the crime charged by requesting a bill of particulars" (*People v Price*, 234 AD2d 978, 978, *lv denied* 90 NY2d 862; *see People v Mackey*, 49 NY2d 274, 278). Here, the superior court information charging defendant with identity theft in the first degree in the language of the statute is legally sufficient (*see People v Fitzgerald*, 45 NY2d 574, 580, *rearg denied* 46 NY2d 837; *People v Iannone*, 45 NY2d 589, 598-599). The sentence is not unduly harsh or severe.

Entered: June 10, 2011

Patricia L. Morgan
Clerk of the Court

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

709

CAF 10-00959

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

IN THE MATTER OF SHAWN A., JR., SHANE A., ZACHARY A., AND LENA A.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MILISA C.B., RESPONDENT-APPELLANT.

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

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

KENNETH W. GIBBONS, ATTORNEY FOR THE CHILD, BUFFALO, FOR SHAWN A., JR.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR SHANE A., ZACHARY A. AND LENA A.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered April 8, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights and freeing her children for adoption. The mother failed to appear at the dispositional hearing and her attorney, although present, elected not to participate in her absence. "Under those circumstances, we conclude that . . . the mother's unexplained failure to appear constituted a default" (*Matter of Tiara B.* [appeal No. 2], 64 AD3d 1181, 1182; *see Matter of Vanessa M.*, 263 AD2d 542, 543; *Matter of Amy Lee P.*, 245 AD2d 1136). We therefore dismiss this appeal (*see* CPLR 5511; *Tiara B.*, 64 AD3d at 1182; *Amy Lee P.*, 245 AD2d 1136).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

710

CAF 10-00666

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

IN THE MATTER OF THE ADOPTION OF ETHAN S.

TARRA C. AND TROY C., PETITIONERS-RESPONDENTS; MEMORANDUM AND ORDER

JASON S., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

EFTIHIA BOURTIS, ROCHESTER, FOR RESPONDENT-APPELLANT.

JAMES S. HINMAN, P.C., ROCHESTER (JAMES S. HINMAN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR ETHAN S.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered July 24, 2009 in an adoption proceeding. The order, among other things, permitted the adoption of the subject child to proceed without respondent's consent.

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

Memorandum: In appeal No. 1, respondent, the biological father of the child in question, appeals from an order determining, following an evidentiary hearing, that he forfeited his right to consent to the adoption of the child. In appeal No. 2, the biological father appeals from an order dismissing his petition for modification of a prior order of custody and visitation based on Family Court's determination in appeal No. 1 that the adoption proceeding was to proceed without the biological father's consent. Contrary to the biological father's contention in appeal No. 1, the court properly determined that the adoption could proceed without his consent. Although not addressed by the court, the threshold issue in such an adoption proceeding is "whether the consent of the biological father is required, i.e., whether he 'maintained substantial and continuous or repeated contact with the child as manifested by' paying support for the child and either visiting the child at least monthly or regularly communicating with the child" or with the person having custody of the child (*Matter of Adreona C.*, 79 AD3d 1768, 1769, quoting Domestic Relations Law § 111 [1] [d]; *see Matter of Andrew Peter H. T.*, 64 NY2d 1090, 1091). We note, however, that " 'a biological [father]'s failure to visit and pay support, although significant, are not determinative factors where they are properly explained' " (*Matter of Jonna H.*, 252 AD2d 839, 839; *see Matter of Corey L. v Martin L.*, 45 NY2d 383, 390).

Here, the biological father failed to meet his burden of establishing his right to consent to the adoption (*see* Domestic Relations Law § 111 [1] [d]). The biological father did not provide any financial support to petitioner mother during the three years preceding the filing of the adoption petition in February 2009, had not seen the child since September 2006, and failed to communicate with the child or the mother from September 2006 to May 2008. Although the biological father sent two letters to the mother, one in May 2008 and another in June 2008, and the biological father's counselor called the mother once in May 2008, such insubstantial and infrequent attempts to contact the mother and the child do not constitute "substantial and continuous or repeated contact" necessary to require the biological father's consent for the adoption (*id.*; *see Matter of Jaleel E.F.*, 81 AD3d 1302, 1303). Contrary to the biological father's further contention, his substance abuse treatment did not provide an adequate explanation for his failure to maintain substantial contact with the child (*cf. Jonna H.*, 252 AD2d at 840). The biological father entered substance abuse treatment in October 2007 and chose not to contact the mother or the child, despite the fact that he had a cell phone, as well as access to the mail service and the Internet.

In view of our determination in appeal No. 1, we conclude that the court properly dismissed the biological father's petition in appeal No. 2.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

711

CAF 10-00734

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

IN THE MATTER OF JASON S., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TARRA M., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

EFTIHIA BOURTIS, ROCHESTER, FOR PETITIONER-APPELLANT.

JAMES S. HINMAN, P.C., ROCHESTER (JAMES S. HINMAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR ETHAN S.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered March 4, 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.

Same Memorandum as in *Matter of Ethan S.* (___ AD3d ___ [June 10, 2011]).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

712

CAF 10-01325

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

IN THE MATTER OF LA'DERRICK J.W. AND
QUENTIN T.W.
---------- MEMORANDUM AND ORDER
JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ASHLEY W., RESPONDENT-APPELLANT.

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

CARACCIOLI & NELSON, PLLC, WATERTOWN (KEVIN C. CARACCIOLI OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA A. PROVEN, ATTORNEY FOR THE CHILDREN, WATERTOWN, FOR LA'DERRICK J.W. AND QUENTIN T.W.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered June 10, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent on the ground of permanent neglect.

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 children who are the subject of this proceeding on the ground of permanent neglect and transferring guardianship and custody of the children to petitioner. The children were originally removed from the mother's care and placed in foster care after her paramour suffocated and killed another of her children. A permanent neglect petition with respect to the children was filed, hearings were held and Family Court, inter alia, terminated the mother's parental rights. We reversed that order, however, and remitted the matter for reassignment of counsel and a new hearing on the petition because the court abused its discretion in granting the motion of the mother's attorney to withdraw as counsel without notice to her (*Matter of La'Derrick W.*, 63 AD3d 1538). Upon remittal, the court conducted further hearings and, inter alia, terminated the mother's parental rights with respect to the children. We affirm.

Contrary to the mother's contention, petitioner established by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the mother's relationship with the children (*see Matter of Sheila G.*, 61 NY2d 368, 373). " 'Diligent

efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child[ren], providing services to the parent[] to overcome problems that prevent the discharge of the child[ren] into [his or her] care, and informing the parent[] of [the children's] progress' " (*Matter of Whytnei B.*, 77 AD3d 1340, 1341; *see* Social Services Law § 384-b [7] [f]). "Petitioner is not required, however, to 'guarantee that the parent succeed in overcoming his or her predicaments' . . . but, rather, the parent must 'assume a measure of initiative and responsibility' " (*Whytnei B.*, 77 AD3d at 1341). The record establishes that, although the mother moved to Louisiana shortly after the children were placed in foster care, petitioner regularly updated the mother on the children's progress, encouraged her to return to New York where she could receive required services at the expense of Jefferson County and to maintain contact with the children, and provided her with contact information for, inter alia, grief counseling in Louisiana. Petitioner also facilitated phone contact between the mother and the children at regularly scheduled times. Petitioner thus fulfilled its duty to exercise diligent efforts to encourage and strengthen the mother's relationship with her children during the relevant time period (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 142). Petitioner further established that, despite those efforts, the mother "failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the child[ren] although . . . able to do so" (*id.*; *see Matter of Justin Henry B.*, 21 AD3d 369, 370; *see also Matter of Marchesia W.*, 267 AD2d 1095, *lv denied* 95 NY2d 755).

We reject the mother's further contention that termination of her parental rights and freeing the children for adoption was not in the best interests of the children (*see Matter of Eleydie R.*, 77 AD3d 1423; *see generally Star Leslie W.*, 63 NY2d at 147-148). The record establishes that the mother made minimal efforts to contact or to visit the children either preceding or subsequent to this proceeding and that the children had been in the custody of the same foster mother, who was prepared to adopt the children, for several years.

Contrary to the mother's contention, she was not denied due process when the dispositional hearing was held in her absence. The court initially adjourned the dispositional hearing when the mother was unable to appear. At that time, the mother provided documentation from a doctor establishing that one of her other children had suffered a brain aneurism and underwent surgery. The hearing was rescheduled for several weeks later, and the mother was again absent therefrom. Although the mother's attorney appeared, he relayed only that the mother felt she could not travel because of the medical condition of the other child and that she had provided no documentation to justify her absence. "[A] parent's right to be present for fact-finding and dispositional hearings in termination cases is not absolute" (*Matter of James Carton K.*, 245 AD2d 374, 377, *lv denied* 91 NY2d 809). In light of the amount of time that the children had spent in foster care and the fact that the mother's attorney vigorously represented her interests at the dispositional hearing, we conclude that the court did not abuse its discretion in conducting the hearing in her absence (*see*

Matter of Lillian D.L., 29 AD3d 583, 584).

We have considered the mother's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

714

CA 11-00108

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

IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION.

KEVIN KLAS, AS EXECUTOR OF THE ESTATE OF NORMAN WILLIAM KLAS, DECEASED, PLAINTIFF-RESPONDENT,

V

A.O. SMITH WATER PRODUCTS, ET AL., DEFENDANTS, AND CRANE CO., DEFENDANT-APPELLANT.

ORDER

K&L GATES, LLP, NEW YORK CITY (KIRSTEN ALFORD KNEIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

BELLUCK & FOX, LLP, NEW YORK CITY (JOSEPH W. BELLUCK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John P. Lane, J.H.O.), entered October 19, 2010. The order denied the motion of defendant Crane Co. for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 16, 2011, and filed in the Erie County Clerk’s Office on March 28, 2011,

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

715

CA 10-01070

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

IN THE MATTER OF JAMES ROBERT MOORE,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE BOARD OF APPEALS,
RESPONDENT-RESPONDENT.

JAMES R. MOORE, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered July 17, 2009 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

719

CA 10-00412

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

IN THE MATTER OF JOHN HOGAN,
PETITIONER-APPELLANT,

V 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 (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered December 17, 2009 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

721

TP 11-00211

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ.

IN THE MATTER OF NANCY GARZON, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT AND NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

ROBERT M. RESTAINO, NIAGARA FALLS, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENTS NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, AND NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT.

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, Niagara County [Ralph A. Boniello, III, J.], entered January 10, 2011) to review a determination of respondents. The determination found, inter alia, that petitioner's maltreatment of her child is reasonably related to her employment in child care.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination following a fair hearing finding that the indicated report of maltreatment against her is reasonably related to her employment in child care or her provision of foster or adoptive care (*see* Social Services Law § 422 [8] [c] [ii]). We conclude that the determination is supported by substantial evidence (*see Matter of Castilloux v New York State Off. of Children & Family Servs.*, 16 AD3d 1061, *lv denied* 5 NY3d 702; *see also Matter of Richard R. v Carrion*, 67 AD3d 915; *Matter of Mary P. v Helfer*, 17 AD3d 1013, *amended on rearg* 20 AD3d 943). The evidence presented at the hearing established that petitioner hit her 12-year-old child in the leg, head and arm and then kicked the passenger door of a vehicle while the child was sitting in the passenger seat. Petitioner testified at the hearing that she was acting in self-defense, and she therefore failed to take responsibility for her actions or appreciate the seriousness of the incident. Based upon the evidence presented at the hearing, we conclude that there is no reason to disturb the finding that

petitioner's act of maltreatment is relevant and reasonably related to, inter alia, her employment in child care.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

724

KA 08-00331

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PORCHIA SWEARENGIN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (Jeffrey R. Merrill, A.J.), rendered January 15, 2008. The judgment convicted defendant, upon her 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.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

730

KA 10-02506

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHAUN JOHNSON, DEFENDANT-APPELLANT.

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

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from an order of the Seneca County Court (Dennis F. Bender, J.), dated October 1, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 2000 conviction of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that said appeal is unanimously dismissed as moot (*see People v Orta*, 73 AD3d 452, *lv denied* 15 NY3d 755).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

731

KA 09-01752

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ARMEAL J. WHITFIELD, DEFENDANT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered April 28, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree, criminal contempt in the first degree, endangering the welfare of a child, attempted criminal possession of a weapon in the second degree and resisting arrest.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

732

CAF 10-00926

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ.

IN THE MATTER OF ANTHONY J. BARROS,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ELIZABETH A. BARROS,
RESPONDENT-PETITIONER-RESPONDENT.

BETZJITOMIR & BAXTER, LLP, BATH (TERRENCE BAXTER OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-PETITIONER-RESPONDENT.

BONITA STUBBLEFIELD, ATTORNEY FOR THE CHILDREN, PIFFARD, FOR HANNAH B. AND DESTINY B.

Appeal from an order of the Family Court, Steuben County (Timothy K. Mattison, J.H.O.), entered March 15, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition of petitioner-respondent for modification of a prior order of custody and visitation.

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

Memorandum: Petitioner-respondent father appeals from an order that, inter alia, denied his petition seeking to modify a prior order of custody and visitation by awarding him sole custody of the parties' children. We affirm. Contrary to the father's contention, the continuation of the joint custody arrangement is in the best interests of the children (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171, 173-174).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

733

CA 11-00137

PRESENT: SMITH, J.P., CARNI, LINDLEY, AND GORSKI, JJ.

ESTELLE GAFTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BUFFALO MEDICAL GROUP, P.C. AND TOWN OF AMHERST INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (MICHAEL L. AMODEO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered July 15, 2010 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly tripped and fell on the sidewalk in front of property owned by defendant Town of Amherst Industrial Development Agency and leased by defendant Buffalo Medical Group, P.C. According to plaintiff, her toe hit the divider between cement slabs, causing her to fall and sustain injuries. Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint. " 'Whether a particular height difference between sidewalk slabs constitutes a dangerous or defective condition depends on the peculiar facts and circumstances of each case, including the width, depth, elevation, irregularity, and appearance of the defect as well as the time, place, and circumstances of the injury' " (*Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361, 1362; *see Trincere v County of Suffolk*, 90 NY2d 976, 977-978). "Based on the record before us, we conclude that defendant[s] failed to meet [their] burden of establishing as a matter of law that the alleged defect 'was too trivial to constitute a dangerous or defective condition' " (*Cuebas*, 55 AD3d at 1362; *see Schaaf v Pork Chop, Inc.*, 24 AD3d 1277; *Stewart v 7-Eleven, Inc.*, 302 AD2d 881). "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Trincere*, 90 NY2d at 977), and we conclude under the circumstances of this case that there is an issue

of fact whether the alleged defect is indeed actionable.

We further conclude that defendants failed to establish their entitlement to judgment as a matter of law by demonstrating that the cause of the fall was speculative (*see Nolan v Onondaga County*, 61 AD3d 1431; *cf*. *McGill v United Parcel Serv., Inc.*, 53 AD3d 1077). Inasmuch as defendants failed to meet their initial burden on the motion, we need not consider the sufficiency of plaintiff's opposing papers (*see generally Alvarez v Prospect Hosp*., 68 NY2d 320, 324).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

735

CA 10-01491

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ.

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LERRYL SMITH, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (KEVIN S. DOYLE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MICHAEL CONNOLLY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered April 30, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. We reject respondent's contention that petitioner failed to establish by clear and convincing evidence at the dispositional hearing that "respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.07 [f]). We are "[m]indful that Supreme Court was in the best position to evaluate the weight and credibility of the conflicting psychiatric testimony presented . . ., [and] we defer to the court's decision to credit [the testimony of petitioner's] expert" (*Matter of State of New York v Pierce*, 79 AD3d 1779, 1781, *lv denied* 16 NY3d 712 [internal quotation marks omitted]; *see Matter of State of New York v Motzer*, 79 AD3d 1687, 1688).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

737

CA 10-01767

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ.

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID BOUTELLE, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (MARGOT S. BENNETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered July 8, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. Respondent consented to a finding of mental abnormality and, contrary to his contention, petitioner established by clear and convincing evidence at the dispositional hearing that respondent is a dangerous sex offender requiring confinement (*see* § 10.07 [f]). In determining whether petitioner met that burden, a court may "rely on all the relevant facts and circumstances" (*Matter of State of New York v Motzer*, 79 AD3d 1687, 1688). Here, petitioner established that respondent victimized three children, including his half brother, within three weeks of his release on parole. Respondent previously admitted to being sexually attracted to prepubescent boys, and he also admitted that he required further treatment. Although respondent testified at the dispositional hearing that he is no longer sexually attracted to children, petitioner's expert psychologists diagnosed respondent with pedophilia and testified that respondent is unable to control his behavior. Supreme Court's determination to discount the testimony of respondent in light of petitioner's contrary evidence "was within the court's province as the factfinder, and we see no basis to disturb that determination" (*Matter of State of New York v Flagg* [appeal No. 2], 71 AD3d 1528, 1530). Respondent's further contention that the court failed to consider alternatives to

confinement is belied by the record.

We reject respondent's contention that the court failed to issue its decision in a timely manner and to state in its decision the facts that it deemed essential in determining respondent to be a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.07 [b]; CPLR 4213 [b]-[c]). Although the decision was not issued within 60 days after the matter was finally submitted (*see* Mental Hygiene Law § 10.07 [b]; CPLR 4213 [c]), that defect is not jurisdictional and thus the decision is valid (*see generally Matter of Jonathan D.*, 297 AD2d 400, 402). Further, if respondent desired a decision sooner, his remedy was to request a decision informally or to commence a CPLR article 78 proceeding to compel the court to issue a decision (*see generally Miller v Lanzisera*, 273 AD2d 866, 867, *appeal dismissed* 95 NY2d 887, *rearg denied* 96 NY2d 731).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

738

CA 11-00217

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ.

DORETHA WILLIAMS, AS ADMINISTRATRIX OF THE ESTATE OF STEVEN K. WILLIAMS, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RONALD M. MOSCATI, JR., M.D., ET AL., DEFENDANTS, AND ERIE COUNTY MEDICAL CENTER CORPORATION, DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered September 17, 2010 in a medical malpractice action. The order, insofar as appealed from, denied in part the motion of defendant Erie County Medical Center Corporation for summary judgment.

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

Memorandum: Plaintiff, as administratrix of the estate of her son (decedent), commenced this action seeking damages for his wrongful death and conscious pain and suffering allegedly caused by defendants' medical malpractice. Defendant Erie County Medical Center Corporation (ECMCC) appeals from an order insofar as it denied those parts of its motion seeking summary judgment dismissing the wrongful death claims against it. We affirm.

ECMCC correctly concedes that it may be held vicariously liable for the negligent acts of defendant Ronald M. Moscati, Jr., M.D., a private attending physician who treated decedent in ECMCC's emergency department (*see generally Henderson v Marx*, 251 AD2d 988; *Mduba v Benedictine Hosp.*, 52 AD2d 450, 453). ECMCC contends, however, that Supreme Court erred in denying its motion with respect to its liability for the acts of defendant Erum Ansari, M.D., a fellow in pediatric emergency medicine who treated decedent under the supervision of Dr. Moscati. We reject that contention. Even assuming, arguendo, that ECMCC met its initial burden with respect to Dr. Ansari, plaintiff submitted an expert affidavit raising a triable

issue of fact whether Dr. Ansari exercised medical judgment independent from that of Dr. Moscati (*see generally Lorenzo v Kahn*, 74 AD3d 1711, 1713; *Soto v Andaz*, 8 AD3d 470, 471; *Pearce v Klein*, 293 AD2d 593). ECMCC further contends that the court erred in denying its motion with respect to its liability for the acts of ECMCC's staff. We reject that contention inasmuch as plaintiff has asserted no direct claims against ECMCC's staff.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

741

TP 10-02283

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

IN THE MATTER OF SUSAN KRUSE, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES/COLLINS CORRECTIONAL FACILITY, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, AND NEW YORK STATE, OFFICE OF STATE COMPTROLLER, RESPONDENTS.

LAW OFFICE OF LINDY KORN, BUFFALO (LINDY KORN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENT NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES/COLLINS CORRECTIONAL FACILITY.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Joseph R. Glownia, J.], entered November 10, 2010) to review a determination of respondent New York State Division of Human Rights. The determination found that respondent New York State Department of Correctional Services/Collins Correctional Facility did not engage in unlawful discriminatory practices.

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 of respondent New York State Division of Human Rights that respondent New York State Department of Correctional Services/Collins Correctional Facility (DOCS), her employer, did not engage in unlawful discrimination and retaliation with respect to her. We note at the outset that, contrary to petitioner's contention, the doctrine of collateral estoppel does not apply to preclude DOCS from defending its actions as a result of a prior arbitration award. First, there was no identity of issue necessary for application of that doctrine because the arbitration proceeding concerned whether the allegedly unlawful actions by DOCS violated the collective bargaining agreement between petitioner's union and the State of New York (*see generally Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349). Second, the arbitrator

determined that certain adverse actions were not legitimate because petitioner had not been afforded her right to procedural due process, and he specifically declined to address the merits of the reasons advanced by DOCS for those actions. "In properly seeking to deny a litigant two 'days in court,' courts must be careful not to deprive him [or her] of one" (*Matter of Reilly v Reed*, 45 NY2d 24, 28). Inasmuch as the arbitrator did not address the legitimacy of the reasons for the actions of DOCS, collateral estoppel does not apply (*see e.g. SF Holdings Group, Inc. v Kramer Levin Naftalis & Frankel LLP*, 56 AD3d 281, 282; *Tak Shing David Tong v Hang Seng Bank*, 210 AD2d 99, 99-100; *Matter of Valentino v American Airlines*, 131 AD2d 6, 9; *Lewis v Bendet*, 71 AD2d 913, 914). Contrary to petitioner's remaining contentions, we conclude that the determination is supported by substantial evidence and thus must be confirmed (*see generally Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

742

TP 11-00091

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

IN THE MATTER OF DARIEN PAIGE, PETITIONER,

V ORDER

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

DARIEN PAIGE, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [James P. Punch, A.J.], entered January 12, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

745

TP 11-00114

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

IN THE MATTER OF EDWARD KOEHL, PETITIONER,

V ORDER

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

EDWARD KOEHL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered January 13, 2011) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

746

KA 10-00385

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JUAN O. SMITH, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, 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 January 26, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted 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).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

747

KA 10-01083

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIMOTHY P. GRADY, SR., DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (BARRY L. PORSCH OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Yates County Court (W. Patrick Falvey, J.), entered March 17, 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.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

749

KA 09-00194

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME T. CISSON, 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 (Barry M. Donalty, J.), rendered November 19, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the seventh degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and three counts of criminal possession of a controlled substance in the seventh degree (§ 220.03). We reject defendant's contention that County Court erred in granting his request to proceed pro se. The request was unequivocal, and the court engaged in the requisite searching inquiry to ensure that defendant's waiver of the right to counsel was knowing, voluntary and intelligent (*see People v Herman*, 78 AD3d 1686, 1686-1687, *lv denied* 16 NY3d 831; *People v Clark*, 42 AD3d 957, 957-958, *lv denied* 9 NY3d 960). Indeed, we note that "[d]efendant's age, experience, education, prior exposure to the criminal justice system, firmness in his decision to represent himself, and performance in representing himself all indicate a knowing waiver" (*People v Edwards*, 140 AD2d 959, 960, *lv denied* 72 NY2d 915, 918, 1043, 1045). In addition, the record establishes that "[d]efendant had the benefit of standby counsel throughout the proceedings and proceeded at his own peril, fully aware of the consequences of his chosen course" (*People v Cusamano*, 22 AD3d 427, 428, *lv denied* 6 NY3d 775).

Defendant failed to preserve for our review his contentions that the court erred in admitting in evidence the expert testimony of an undercover narcotics officer and in failing to issue a limiting

instruction with respect to that testimony (*see* CPL 470.05 [2]; *People v Recore*, 56 AD3d 1233, 1234-1235, *lv denied* 12 NY3d 761), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant further contends that his conviction of criminal possession of a controlled substance in the third degree is not supported by legally sufficient evidence because the People failed to establish his intent to sell. Defendant also failed to preserve that contention for our review, inasmuch as he made only a general motion for a trial order of dismissal at the close of evidence (*see People v Salaam*, 46 AD3d 1130, 1131, *lv denied* 10 NY3d 816). Finally, the record does not support defendant's contention that he was denied his right to present a defense, and we conclude that the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

750

KA 07-00875

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

THEODORE PRICE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered January 18, 2007. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at Supreme Court.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

751

KAH 10-01840

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ELBERT WELCH, PETITIONER-APPELLANT,

V ORDER

JAMES HESSEL, ACTING SUPERINTENDENT, GOWANDA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

ELBERT WELCH, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered April 30, 2010. The judgment, insofar as appealed from, denied the petition for a writ of habeas corpus.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

753

CAF 10-02220

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

IN THE MATTER OF RHEA L.W.,
RESPONDENT-APPELLANT.

NIAGARA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

ARDETH L. HOUDE, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered October 19, 2010 in a proceeding pursuant to Family Court Act article 3. The order, among other things, found that respondent had willfully violated an order of conditional discharge and placed her in the custody of the New York State Office of Children and Family Services.

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

Memorandum: Respondent contends that Family Court erred in revoking an order of conditional discharge based on its finding that she violated a condition directing her to enroll in a specified private facility for troubled youth. We agree with respondent that petitioner failed to meet its burden of establishing that she willfully violated that condition (*see generally* Family Ct Act § 360.3 [1]; *Matter of Anthony M.*, 81 AD3d 1205, 1206). Indeed, petitioner's own evidence at the hearing on the petition established that respondent took the steps required of her but was unable to enroll in the facility because her mother could not afford the fees. The court, therefore, should have dismissed the petition.

In view of our decision, we do not address respondent's challenge to the dispositional portion of the order.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

754

CA 11-00207

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

JAMES M. ROBERTS, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT OUTHOUSE, SHERIFF OF COUNTY OF CAYUGA
AND COUNTY OF CAYUGA, A MUNICIPAL CORPORATION,
DEFENDANTS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered December 6, 2010. The order, insofar as appealed from, denied the motion of defendants for summary judgment and to preclude plaintiff's expert testimony.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

755

CA 11-00107

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

GRAY-LINE OF NIAGARA FALLS, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CINCINNATI INSURANCE COMPANIES,
DEFENDANT-APPELLANT,
AND ANN MARIE TRUSSO, DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (ANNA FALICOV OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered October 28, 2010 in a declaratory judgment action. The order and judgment granted plaintiff's motion for summary judgment and denied the cross motion of defendant Cincinnati Insurance Companies for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied, the cross motion is granted and judgment is granted in favor of defendant Cincinnati Insurance Companies as follows:

> It is ADJUDGED and DECLARED that defendant Cincinnati Insurance Companies has no duty to defend or indemnify plaintiff in the underlying action in federal court.

Memorandum: Plaintiff commenced this action seeking judgment declaring that Cincinnati Insurance Companies (defendant) is obligated to defend and indemnify it in the underlying action commenced in federal court by defendant Ann Marie Trusso, one of plaintiff's employees. In that underlying action, Trusso sought damages for, inter alia, injuries sustained by her when she was sexually assaulted by a person also employed by plaintiff. We agree with defendant that Supreme Court erred in granting plaintiff's motion for summary judgment against defendant. The commercial liability policy issued by defendant to plaintiff excludes coverage where "[a]n 'employee' of the insured sustain[s a bodily injury] in the 'workplace.' " There is no dispute that Trusso was plaintiff's employee at the time of the

incident and that she was working at the tour booth pursuant to plaintiff's directive when the incident occurred. Thus, the exclusion applies as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff and Trusso argue that coverage is nonetheless available because Trusso's injuries were unrelated to the performance of employment duties. We note that there is also a separate policy exclusion for bodily injuries to "[a]n 'employee' of the insured arising out of the performance of duties related to the conduct of the insured's business." Inasmuch as the policy separately excludes coverage for injuries that occur in the workplace as well as injuries that are work-related, the fact that Trusso's injuries were unrelated to the performance of employment duties is of no moment (*see generally Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162, *rearg denied* 5 NY3d 825; *Progressive Halcyon Ins. Co. v Giacometti*, 72 AD3d 1503, 1506).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

756

CA 10-01280

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

IN THE MATTER OF LARRY BROWN AND SHANNON MARTINEK, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

DONALD SAWYER, EXECUTIVE DIRECTOR, CENTRAL NEW YORK PSYCHIATRIC CENTER, AND MICHAEL F. HOGAN, COMMISSIONER OF THE NEW YORK STATE OFFICE OF MENTAL HEALTH, RESPONDENTS-RESPONDENTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (STEPHEN C. CLARK OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (David A. Murad, J.), entered May 17, 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: Petitioners, who are civilly confined at the Central New York Psychiatric Center (CNYPC) pursuant to article 10 of the Mental Hygiene Law, commenced this CPLR article 78 proceeding seeking to annul the determination that denied their objections to a CNYPC policy banning them from receiving all outside food packages. Supreme Court properly denied the petition.

We note at the outset that, contrary to petitioners' contention, the doctrine of collateral estoppel does not apply to preclude respondents from defending their policy as a result of the decision in *Hirschfeld v Carpinello* (12 Misc 3d 749). First, we agree with respondents that there was no identity of issue necessary for the application of that doctrine because the type of facility at issue in *Hirschfeld* was different from the one in this proceeding (*see generally Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349). Second, the regulation relied upon by the court in *Hirschfeld* has since been repealed. The prior regulation, 14 NYCRR former 21.5, prohibited any restriction of incoming packages for patients, except for those patients with a condition that in the opinion of the treatment team warranted "some selectivity." Here, however, the

regulation in question permits restrictions where the packages are "reasonably suspected to contain contraband or . . . otherwise implicate significant security or safety concerns" (14 NYCRR 527.11 [c] [1]).

We reject petitioners' contentions that the CNYPC policy violates Mental Hygiene Law § 33.05 and 14 NYCRR 527.11. We further conclude that the determination that denied petitioners' objections to the policy banning their receipt of all outside food packages is not arbitrary and capricious (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*id.* at 231). Here, the affidavit of the director of the sex offender treatment program at CNYPC, which was submitted in opposition to petitioners' CPLR article 78 petition, establishes that the decision to ban all outside food packages has a sound basis in reason and is supported by legitimate concerns regarding the security of the institution and the welfare of the residents therein. Contrary to petitioners' contention, we may properly consider that affidavit despite the fact that it was not submitted during the administrative process "because there was no administrative hearing and the issue here is not one of substantial evidence but, rather, [the issue is] whether the [agency's] determination has a rational basis" (*Matter of Kirmayer v New York State Dept. of Civ. Serv.*, 24 AD3d 850, 852; *see Matter of Humane Socy. of U.S. v Empire State Dev. Corp.*, 53 AD3d 1013, 1018 n 3, *lv denied* 12 NY3d 701; *Matter of Poster v Strough*, 299 AD2d 127, 142-143).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

757

CA 10-01894

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

MYRNA WALKER, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT WALKER, DEFENDANT-APPELLANT.

SHANLEY LAW OFFICES, MEXICO (P. MICHAEL SHANLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN M. MURPHY, JR., PHOENIX, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered March 8, 2010 in a divorce action. The order determined the scope of an equitable distribution hearing.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

759

CA 10-02170

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

KEITH MCDAY, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 116701.)

KEITH MCDAY, 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 July 1, 2010. The order denied the motion of claimant for partial summary judgment.

Now, upon reading and filing the stipulation of settlement and discontinuance signed by claimant on April 5, 2011 and by the attorney for defendant on April 8, 2011,

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

760

CA 10-02319

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

BARBARA MILLER AND RICHARD HUGO MILLER,
PLAINTIFFS-APPELLANTS,

V ORDER

LAURIEANN BUCK, ET AL., DEFENDANTS,
AND TOWN OF CHEEKTOWAGA, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LOTEMPIO & BROWN, P.C., BUFFALO (PATRICK J. BROWN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 6, 2010 in a personal injury action. The order granted the motion of defendant Town of Cheektowaga for summary judgment dismissing the complaint and all cross claims against it.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

761.1

CA 10-02058

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

DOMMER CONSTRUCTION CORPORATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SAVARINO CONSTRUCTION SERVICES CORP.,
AND THE CINCINNATI INSURANCE COMPANY,
DEFENDANTS-RESPONDENTS.

DAMON MOREY LLP, BUFFALO (ERIC A. BLOOM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WESTERMANN SHEEHY KEENAN SAMAAN & AYDELOTT, LLP, UNIONDALE (CAROLYN K. FIORELLO OF COUNSEL), FOR DEFENDANT-RESPONDENT THE CINCINNATI INSURANCE COMPANY.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR DEFENDANT-RESPONDENT SAVARINO CONSTRUCTION SERVICES CORP.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered January 5, 2010. The judgment granted defendants' motions for summary judgment, dismissed the complaint and denied plaintiff's cross motion for summary judgment.

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

Memorandum: Defendant Savarino Construction Services Corp. (Savarino) contracted with Niagara Falls Memorial Medical Center (Medical Center) to construct a new emergency room and heart center (Project) at the Medical Center. Defendant The Cincinnati Insurance Company issued a payment bond to Savarino, and Savarino subcontracted with plaintiff to perform an extensive portion of the construction. After completing its work on the Project, one of the officers of plaintiff corporation signed a conditional interim waiver of lien and claim (Release). Pursuant to the terms of the Release, plaintiff waived, released and relinquished "any and all claims, demands and rights of lien to the extent of the amount shown hereon and previously paid, for all work, labor materials, machinery or other goods, equipment or services done, performed or furnished for the construction located at the [P]roject." Plaintiff accepted payment of the amounts set forth in the Release, but thereafter commenced this action seeking payment for overtime and extra work allegedly not encompassed by the terms of the Release.

Defendants each moved for summary judgment dismissing the complaint, contending, inter alia, that the Release barred plaintiff's complaint, and plaintiff cross-moved for, inter alia, summary judgment on the complaint. Supreme Court initially denied the motions and cross motion on the ground that there were triable issues of fact requiring a trial, but the parties thereafter stipulated to permit the court to rule on all issues of fact and law based on the papers before it. We conclude that the court properly granted defendants' motions and dismissed the complaint.

It is well settled that "a general release is governed by principles of contract law" (*Mangini v McClurg*, 24 NY2d 556, 562; *see Litvinov v Hudson*, 74 AD3d 1884, 1885; *Kaminsky v Gamache*, 298 AD2d 361, 361) and that, where "a release is unambiguous, the intent of the parties must be ascertained from the plain language of the agreement" (*Kaminsky*, 298 AD2d at 361). Here, according to the unambiguous language of the Release, plaintiff waived, released and relinquished any and all claims and demands for, inter alia, all work, materials and services performed on the Project, and thus "the fact that [plaintiff] may have intended something else is irrelevant" (*Booth v 3669 Del.*, 242 AD2d 921, 922, *affd* 92 NY2d 934 [internal quotation marks omitted]). The Release, on its face, constitutes a complete bar to any action on the subcontract between plaintiff and Savarino (*see Diontech Consulting, Inc. v New York City Hous. Auth.*, 78 AD3d 527, 528; *Littman v Magee*, 54 AD3d 14, 17). "Although a party may, by its conduct, implicitly recognize that a right to additional payment has not been extinguished by the release[] in question . . ., there is simply no course of conduct here that could conceivably be construed as an acknowledgment by [defendants] of plaintiff's right to further payment," particularly in view of the fact that plaintiff's officer signed the Release after the applications for the additional payment sought in this action had been submitted (*Diontech Consulting, Inc.*, 78 AD3d at 528). There is no support in the record for plaintiff's contention that the overtime and extra work were performed pursuant to separate and distinct contracts with Savarino.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

761

CA 10-02320

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

BARBARA MILLER AND RICHARD HUGO MILLER,
PLAINTIFFS-APPELLANTS,

V ORDER

LAURIEANN BUCK, ET AL., DEFENDANTS,
SALVATORE SPINUZZA AND LABELLA SICILIA, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LOTEMPIO & BROWN, P.C., BUFFALO (PATRICK J. BROWN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (PAMELA S. SCHALLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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 granted the motion of defendants Salvatore Spinuzza and LaBella Sicilia, Inc. for summary judgment and dismissed the complaint and all cross claims against them.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

762

KA 10-00814

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY CARRASQUILLO, DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered March 2, 2010. The judgment convicted defendant, upon a jury verdict, of rape in the second degree, criminal sexual act in the second degree, sexual abuse in the third degree (four counts), endangering the welfare of a child, rape in the third degree and perjury in the first 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 orders of protection and as modified the judgment is affirmed, and the matter is remitted to Wayne County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the second degree (Penal Law § 130.30 [1]). The sexual crimes of which defendant was convicted arose from acts that he committed in 2007 and 2009. Defendant contends that County Court erred in denying his motion in limine seeking to introduce evidence to explain the presence of DNA material found on the rape kit performed on the victim after the sexual conduct that occurred in 2009. In denying the motion, County Court stated that it could not rule upon the issue until a question was asked and an objection interposed, thus implicitly indicating that it would reconsider the issue. We therefore conclude that defendant abandoned that contention, because he failed to renew his motion to admit the excluded testimony at the appropriate time specified by the court (*see People v Graves*, 85 NY2d 1024, 1027; *People v Midura*, 54 AD3d 877, *lv denied* 11 NY3d 856). In any event, we conclude that defendant's contention lacks merit inasmuch as "the connection between the proffered evidence and the victim's motive or ability to fabricate [the] charges against defendant was so tenuous that the evidence was entirely irrelevant" (*People v Segarra*, 46 AD3d 363, 364, *lv denied* 10 NY3d 816).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of sexual abuse in the third degree (Penal Law § 130.55) under count six of the indictment because his motion for a trial order of dismissal was not " 'specifically directed' " at the alleged deficiency in the evidence (*People v Gray*, 86 NY2d 10, 19). In addition, defendant failed to renew his motion 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 Sene*, 66 AD3d 427, *lv denied* 13 NY3d 941).

As defendant contends and the People correctly concede, the court erred in fixing the duration of the orders of protection because they exceed the eight-year period following the expiration of the maximum sentences imposed (*see People v Whitfield*, 50 AD3d 1580, 1581, *lv denied* 10 NY3d 965). In addition, it appears from the record before us that the court failed to take into account the jail time credit to which defendant is entitled. Although defendant failed to preserve his contentions for our review (*see People v Nieves*, 2 NY3d 310, 315-317), we nevertheless exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We therefore modify the judgment by amending the orders of protection to render them in compliance with CPL 530.13 (4) and to take into account the jail time credit to which defendant may be entitled, and we remit the matter to County Court to make the appropriate calculations.

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. We note, however, that the amended certificate of conviction incorrectly reflects that all of the sentences are to be served consecutively to each other, and the People correctly concede that the court directed that the sentences imposed on certain counts are to be served concurrently with each other. The amended certificate of conviction must therefore be further amended to reflect that the sentences imposed on counts one through four are to be served concurrently with each other, and that the sentences imposed on counts five through eight are to be served concurrently with each other but consecutively to counts one through four, and that the sentence imposed on count nine is to be served consecutively both to counts one through four and to counts five through eight (*see People v Martinez*, 37 AD3d 1099, 1100, *lv denied* 8 NY3d 947).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

763

KA 08-01130

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT A. CRAWFORD, JR., DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered February 21, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31). Because defendant did not contend at the time of sentencing that he was entitled to an adjudication of his youthful offender status, he waived his present contention that County Court erred in failing to state on the record at sentencing whether he was eligible for such status (*see People v McGowen*, 42 NY2d 905, *rearg denied* 42 NY2d 1015; *People v Cunningham*, 238 AD2d 350, *lv denied* 90 NY2d 857; *see generally* CPL 720.20 [1]). In addition, defendant failed to preserve for our review his contention that the court's failure to adjudicate him a youthful offender constitutes an abuse of discretion "inasmuch as he failed to seek that status either at the time of the plea proceedings or at sentencing" (*People v Fowler*, 28 AD3d 1183, 1184, *lv denied* 7 NY3d 788), 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]). We also decline to grant defendant's request to exercise our interest of justice jurisdiction to afford him such status (*see People v Jock*, 68 AD3d 1816, *lv denied* 14 NY3d 801).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

767

KA 09-01513

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHARON HAYWARD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO 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 (Shirley Troutman, J.), rendered July 20, 2009. The judgment convicted defendant, upon her plea of guilty, of forgery in the second degree and identity theft.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

768

KA 09-01514

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHARON HAYWARD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO 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 (Shirley Troutman, J.), rendered July 20, 2009. The judgment convicted defendant, upon her plea of guilty, of forgery in the second degree (three counts).

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

772

KA 11-00184

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON BURYTA, DEFENDANT-APPELLANT.

MUSCATO, DIMILLO & VONA, L.L.P., LOCKPORT (A. ANGELO DIMILLO 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 (Matthew J. Murphy, III, J.), rendered July 6, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]), defendant contends that County Court abused its discretion in denying his request for youthful offender status. "Defendant's responses to County Court's questions unequivocally established that defendant understood the proceedings and was voluntarily waiving the right to appeal" (*People v Gilbert*, 17 AD3d 1164, 1164, *lv denied* 5 NY3d 762; *see People v Lopez*, 6 NY3d 248, 256), and "[t]he valid waiver of the right to appeal encompasses defendant's contention concerning the denial of his request for youthful offender status" (*People v Elshabazz*, 81 AD3d 1429, 1429). In any event, upon our review of the record, we conclude that the court did not abuse its discretion in denying defendant's request for youthful offender status (*see People v Bell*, 56 AD3d 1227, *lv denied* 12 NY3d 781; *People v Potter*, 13 AD3d 1191, *lv denied* 4 NY3d 889; *see generally* CPL 720.20 [1] [a]), and we decline his request to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*cf. People v Shrubsall*, 167 AD2d 929, 929-930).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

773

KA 10-00700

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY D. MCCLARY, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (FRANK A. SEMINERIO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered January 11, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and as a matter of discretion in the interest of justice and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). We agree with defendant that reversal is required on the ground that County Court improperly removed a sworn juror who was not shown to be grossly unqualified to serve in the case (CPL 270.35 [1]; *see generally People v Buford*, 69 NY2d 290, 297-298). Here, a prosecution witness indicated that he had met the juror in question on two prior occasions, i.e., at a party at someone's home and at the apartment of the witness, when the juror was performing maintenance work there. The court questioned the juror with respect to the circumstances of those alleged meetings, but the juror could not recall having had any prior connection with the witness. The court nonetheless dismissed the juror, over defendant's objection, on the ground that the juror "may or may not know that [the juror] ha[s] had some kind of contact with one of the witnesses, and so [the juror was] not put in any kind of spot and we are not put in any kind of spot, we'll just excuse [him]." "[W]hile a trial court should lean toward disqualifying a prospective juror of dubious impartiality when [such prospective] juror is challenged for cause under CPL 270.20 (1) (b) . . ., the standard for disqualifying a sworn juror over defendant's objection

(i.e., grossly unqualified) is satisfied only when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict" (*Buford*, 69 NY2d at 298 [internal quotation marks omitted]). We are unable to conclude on this record that there was a basis for the court to have been "convinced" that the juror was grossly unqualified to serve in the case (*id.* at 299; *see* CPL 270.35 [1]; *People v Telehany*, 302 AD2d 927, 928). Inasmuch as the erroneous dismissal of a sworn juror is not subject to harmless error analysis, reversal is required (*see People v Anderson*, 70 NY2d 729, 730-731).

Defendant further contends that reversal is also warranted based upon specified instances of prosecutorial misconduct. We agree with defendant that the cumulative effect of those instances requires reversal. As defendant correctly notes, the prosecutor improperly "elicited testimony from [detectives] who vouched for the credibility of the confidential informant by testifying that the confidential informant had provided reliable information to the police in the past" (*People v Fredrick*, 53 AD3d 1088, 1088; *see People v Slaughter*, 189 AD2d 157, 160, *lv denied* 81 NY2d 1080). He also improperly elicited testimony regarding defendant's postarrest silence during the People's case-in-chief, in violation of defendant's right against self-incrimination, an error that he compounded by explicitly referencing defendant's postarrest silence during summation (*see generally People v Basora*, 75 NY2d 992, 993-994). Finally, the prosecutor further engaged in misconduct by "forcing defendant on cross-examination to characterize [the] prosecution witnesses as liars" (*People v Holden*, 244 AD2d 961, 961, *lv denied* 91 NY2d 926; *see People v Edwards*, 167 AD2d 864, *lv denied* 77 NY2d 877). Although defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Fredrick*, 53 AD3d at 1088). In light of our determination that reversal is required on two separate grounds, we need not address defendant's remaining contentions.

Entered: June 10, 2011 Patricia L. Morgan

Clerk of the Court

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

774

CAF 10-00757

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF KEVON S.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEFFREY S., RESPONDENT-APPELLANT.

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

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (ROBIN UNWIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA J. MASLOW, ATTORNEY FOR THE CHILD, ROCHESTER, FOR KEVON S.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.), entered March 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.

Memorandum: Respondent father appeals from an order terminating his parental rights on the ground of abandonment, pursuant to Social Services Law § 384-b (5) (a). Petitioner established that, for the relevant period of six months before the filing of the petition, the father failed to visit the child and to communicate with the child or petitioner although able to do so and not prevented or discouraged from doing so by petitioner. We agree with the father that Family Court erred in its order when it applied a disjunctive reading of the statute by referring to the father's "failure to visit with *or* communicate" with the child or petitioner (emphasis added), but we conclude that the error is of no moment inasmuch as the evidence establishes that petitioner met its burden under the statute (*see Matter of Catholic Child Care Socy. Diocese of Brooklyn*, 112 AD2d 1039, 1040).

Entered: June 10, 2011

Patricia L. Morgan
Clerk of the Court

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

775

CAF 10-00316

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF LORI M. THILLMAN,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CHARLES R. MAYER,
RESPONDENT-PETITIONER-RESPONDENT.

PETER O. EINSET, GENEVA, FOR PETITIONER-RESPONDENT-APPELLANT.

CHARLES GUTTMAN, ITHACA, FOR RESPONDENT-PETITIONER-RESPONDENT.

ANNE S. GALBRAITH, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR LILY E.M.

Appeal from an order of the Family Court, Seneca County (Dennis F. Bender, J.), entered November 6, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted sole custody of the subject child to respondent.

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

Memorandum: Petitioner mother appeals from an order that, inter alia, granted respondent father's cross petition seeking joint custody of the parties' child. The mother had sought modification of the existing joint custody arrangement, pursuant to which she had primary physical custody of the child upon the agreement of the parties. Contrary to the mother's contention, the record establishes that there was no prior court order determining custody. Thus, this proceeding involves an initial court determination with respect to custody and, "[a]lthough the parties' informal arrangement is a factor to be considered, [the father] is not required to prove a substantial change in circumstances in order to warrant a modification thereof" (*Matter of Smith v Smith*, 61 AD3d 1275, 1276; *see Matter of Morrow v Morrow*, 2 AD3d 1225). In addition, contrary to the mother's further contention, Family Court properly granted the father sole custody of the parties' child. The court's determination following a hearing that the best interests of the child would be served by such an award is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173), particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses (*see Matter of Paul C. v Tracy C.*, 209 AD2d 955). We will not disturb that determination inasmuch as the record establishes that it is the product of the court's "careful weighing of [the] appropriate factors"

(*Matter of Pinkerton v Pensyl*, 305 AD2d 1113, 1114), and it has a sound and substantial basis in the record (*see Betro v Carbone*, 5 AD3d 1110; *Matter of Thayer v Ennis*, 292 AD2d 824).

The mother's contentions concerning visitation are not properly before this Court on appeal, because "they raise issues not determined by the order" on appeal (*Matter of Joseph A.*, 78 AD3d 826, 827). The mother did not request a *Lincoln* hearing and thus failed to preserve for our review her further contention that the court abused its discretion in failing to conduct such a hearing (*see Matter of Lopez v Robinson*, 25 AD3d 1034, 1037; *Matter of Picot v Barrett*, 8 AD3d 288, 289). In any event, based on the child's young age, we perceive no abuse of discretion in the court's failure to conduct a *Lincoln* hearing (*see Matter of Graves v Stockigt*, 79 AD3d 1170, 1171). We have considered the mother's further contentions and conclude that they are without merit.

Entered: June 10, 2011

Patricia L. Morgan
Clerk of the Court

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

776

CAF 10-01628

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF DOMINIQUE M.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

ROBERT A. DINIERI, ATTORNEY FOR THE CHILD, CLYDE, FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (KELLY G. BARTUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered June 15, 2010 in a proceeding pursuant to Family Court Act article 3. The order adjudicated respondent a juvenile delinquent.

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

Memorandum: Respondent appeals from an order adjudging her to be a juvenile delinquent based on findings that she committed the crime of unlawful possession of weapons by persons under 16 (Penal Law § 265.05), which expressly states that a person who violates that statute shall be adjudged a juvenile delinquent, and committed an act that, if committed by an adult, would constitute the crime of assault in the second degree (§ 120.05 [4]). Respondent contends that the petition against her should have been dismissed because the alleged acts were not committed within the State of New York and thus that Family Court lacked jurisdiction over her. We reject that contention inasmuch as the evidence established that the acts in question were committed at a gas station at a specified intersection in Monroe County (*see People v Perryman*, 178 AD2d 916, 917, *lv denied* 79 NY2d 1005; *see also People v Bize*, 30 Misc 3d 68).

Respondent failed to preserve for our review her further contention that the court acted as a "second prosecutor" in questioning witnesses (*see Matter of Aron B.*, 46 AD3d 1431), and that contention is without merit in any event. Although the court questioned several witnesses, such questioning was nonadversarial and served only to clarify prior testimony (*cf. Matter of Yadiel Roque C.*, 17 AD3d 1168, 1169; *see generally People v Arnold*, 98 NY2d 63, 67; *People v Yut Wai Tom*, 53 NY2d 44, 56-57). Finally, even assuming, arguendo, that respondent is correct that certain evidence was

improperly admitted in evidence or excluded therefrom, we conclude that any such errors are harmless (*see generally People v Ayala*, 75 NY2d 422, 431, *rearg denied* 76 NY2d 773; *People v Crimmins*, 36 NY2d 230, 241-242).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

779

CA 09-02485

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF JAMES D. JOHNSON,
PETITIONER-APPELLANT,

V ORDER

ONONDAGA COUNTY SHERIFF'S DEPARTMENT, NEW YORK STATE DIVISION OF PAROLE AND NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES OFFICE OF SENTENCING AND REVIEW,
RESPONDENTS-RESPONDENTS.

JAMES D. JOHNSON, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS NEW YORK STATE DIVISION OF PAROLE AND NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES OFFICE OF SENTENCING AND REVIEW.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered October 22, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

780

CA 11-00224

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

YANNA DING, AS ADMINISTRATRIX OF THE ESTATE OF WEIXING CAI, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

COSIMO ZAVAGLIA, EUGENE D. TAROLLI, RICHARD J. TAROLLI, REMINGTON GARDENS, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (MICHAEL G. DONNELLY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 10, 2010. The order denied the motion of defendants Cosimo Zavaglia, Eugene D. Tarolli, Richard J. Tarolli and Remington Gardens for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties and filed on May 17, 2011,

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

781

CA 10-02357

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

JACK D. LIFFITON, PLAINTIFF-APPELLANT,

V ORDER

NEW YORK 212, INC., DEFENDANT-RESPONDENT.

JACK D. LIFFITON, PLAINTIFF-APPELLANT PRO SE.

DAVID S. WIDENOR, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered November 25, 2009. The order partially granted the summary judgment motion of defendant by dismissing plaintiff's first cause of action.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

782

CA 10-01353

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

RONALD C. ROSS, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL ROSS ROSA, DEFENDANT-APPELLANT-RESPONDENT.

CAMARDO LAW FIRM, P.C., AUBURN (JOSEPH A. CAMARDO, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

MILLER MAYER, LLP, ITHACA (JOHN MOSS HINCHCLIFF OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered March 31, 2010. The order denied each of the parties' cross motions for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's cross motion insofar as it seeks to dismiss those parts of the counterclaims sounding in fraud and as modified the order is affirmed without costs.

Memorandum: Plaintiff, who owns property adjoining property owned by defendant, commenced this action pursuant to RPAPL article 15 seeking, inter alia, a determination with respect to the common boundary line between those properties. Defendant initially moved for a protective order, plaintiff cross-moved to dismiss the counterclaims and for summary judgment on the complaint, and defendant then cross-moved for summary judgment "with respect to the portions of the land being claimed by Plaintiff." Both parties now contend that Supreme Court erred in denying their respective cross motions. We conclude that the court properly denied the cross motion of defendant and that part of the cross motion of plaintiff for summary judgment inasmuch as there are triable issues of fact precluding that relief (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We further conclude, however, that those parts of the counterclaims sounding in fraud are time-barred (*see* CPLR 213 [8]). Consequently, we conclude that the court erred in denying those parts of plaintiff's cross motion seeking dismissal of the counterclaims insofar as they sound in fraud, and we thus modify the order by granting those parts of plaintiff's cross motion and dismissing the counterclaims only to the extent that they sound in fraud. Finally, we note that defendant has withdrawn his fourth counterclaim, alleging that plaintiff violated the Zoning Law

of the Town of Fleming.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

783

CA 11-00281

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

SHAWN STENGLEIN, PLAINTIFF-RESPONDENT,

V ORDER

JOHN REIGLE, DEFENDANT,
AND QUALITY HOMES OF ROCHESTER, INC.,
DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

RINERE & RINERE, LLP, ROCHESTER (JOSEPH D. RINERE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 5, 2010 in a personal injury action. Insofar as appealed from, the order, inter alia, granted the motion of plaintiff for partial summary judgment against defendant Quality Homes of Rochester, Inc. pursuant to Labor Law § 240 (1) and denied that part of the cross motion of defendant Quality Homes of Rochester, Inc. for summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

784

CA 11-00280

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

LAURA BARRES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID C. RIKER, DEFENDANT-APPELLANT.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (JEFFREY E. HURD OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID M. GIGLIO AND ASSOCIATES LLC, UTICA (ALYSSA O'NEIL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered October 18, 2010 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for summary judgment dismissing the complaint insofar as the complaint alleges that plaintiff sustained a serious injury under the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and dismissing the complaint to that additional extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained while she was a passenger in a vehicle that was struck by a vehicle driven by defendant. It is undisputed that, at the time of the accident, plaintiff was recovering from surgery to her left shoulder, which had been performed approximately one month before the accident. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under any of the categories of Insurance Law § 5102 (d) set forth in the complaint, and Supreme Court granted only that part of the motion with respect to the significant disfigurement category of serious injury. We note at the outset that the only injury addressed by the parties in their motion papers before Supreme Court and on appeal is the alleged injury to plaintiff's left shoulder, despite the fact that the complaint also alleges that plaintiff's hips, legs and cervical spine also were affected. We thus address on appeal only the alleged injury to plaintiff's left shoulder (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984).

With respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury allegedly

sustained by plaintiff, we conclude that the court properly denied those parts of defendant's motion. Whether a limitation of use or function is consequential or significant, that is, important, "relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, 798). Those categories require limitations that are more than " 'minor, mild or slight' " (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353, quoting *Licari v Elliott*, 57 NY2d 230, 236), and the permanency of an injury alone is not sufficient to render it a permanent consequential limitation of use (*see Paolini v Sienkiewicz*, 262 AD2d 1020). Here, there are issues of fact on the record before us with respect to those two categories of serious injury relating to plaintiff's left shoulder. We note in particular that plaintiff testified at her deposition that her left shoulder is dislocated twice a week and that the dislocations are painful, and her treating physician stated in an affidavit that the condition was permanent and that the injury significantly limited her activity level. We reject defendant's conclusory contention that a person experiencing two shoulder dislocations a week suffers only a minor, mild, or slight inconvenience.

We agree with defendant, however, that the court erred in denying that part of his motion with respect to the 90/180-day category of serious injury, and we therefore modify the order accordingly. Plaintiff testified at her deposition that she missed only a few days of school and that her injuries did not affect her school work, and we note in addition that plaintiff's first reported shoulder dislocation after the accident occurred more than 180 days after the accident at issue on appeal (*see generally Chmiel v Figueroa*, 53 AD3d 1092, 1093).

Entered: June 10, 2011 Patricia L. Morgan
Clerk of the Court

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

786

KA 05-01321

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GUSTAVO ROMAN, DEFENDANT-APPELLANT.

PHILLIP R. HURWITZ, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered December 3, 2004. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of rape in the first degree (Penal Law § 130.35 [1], [4]), defendant contends that the evidence is legally insufficient to support the conviction. Defendant failed to preserve that contention for our review, however, both "because his motion for a trial order of dismissal 'was not specifically directed at the ground[s] advanced on appeal' " (*People v Johnson*, 78 AD3d 1548, *lv denied* 16 NY3d 743; *see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19), and because he failed to renew his motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to object to the alleged repugnancy of the verdict before the jury was discharged and thus failed to preserve for our review his contention that the verdict is repugnant insofar as the jury found him guilty of two counts of rape in the first degree and acquitted him of two counts of rape in the first degree with respect to the same victim (*see People v Alfaro*, 66 NY2d 985, 987; *People v Henderson*, 78 AD3d 1506, 1507, *lv denied* 16 NY3d 743). In any event, that contention likewise is without merit inasmuch as County Court's initial and supplemental charges, viewed both as a whole and together with the summations and the trial testimony, adequately informed the jury that the acts underlying the charges in the fifth and sixth counts of which defendant was convicted were alleged to have occurred

subsequent to the charges in the counts of which he was acquitted. Thus, the charges were adequately linked sequentially to the victim's testimony (*see generally People v Hutchinson*, 213 AD2d 1048, 1048-1049, *lv denied* 86 NY2d 736; *People v Drayton*, 198 AD2d 770). Contrary to defendant's further contention, he was not denied effective assistance of counsel based on defense counsel's failure to object to the verdict on repugnancy grounds. Because we have concluded herein that the verdict is not repugnant, it cannot be said that, if such an objection had been made, it would have been successful (*see generally People v Caban*, 5 NY3d 143, 152; *People v Wright*, 41 AD3d 1221, *lv denied* 9 NY3d 928; *People v Phelps*, 4 AD3d 863, *lv denied* 2 NY3d 804).

Defendant failed to preserve his further contention that the court's *Allen* charge coerced a verdict (*see People v Al-Kanani*, 33 NY2d 260, 265, *cert denied* 417 US 916; *People v White*, 75 AD3d 109, 125, *lv denied* 15 NY3d 758; *People v Gaffney*, 299 AD2d 922, 923, *lv denied* 99 NY2d 582). In any event, the court's *Allen* charge, "when read as a whole, . . . was neutral and balanced" (*People v Miller*, 292 AD2d 165, *lv denied* 98 NY2d 678), and was not coercive (*see People v Harrington*, 262 AD2d 220, *lv denied* 94 NY2d 823; *People v Gonzalez*, 259 AD2d 631, 631-632, *lv denied* 93 NY2d 970). 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" (*People v McKenzie*, 48 AD3d 594, 595, *lv denied* 10 NY3d 867).

With respect to defendant's further contention that he was deprived of a fair trial by prosecutorial misconduct during summations, "[a]s defendant . . . concede[s] . . ., he did not object to all of the cited alleged improprieties. Thus, most of his claims have not been preserved for [our] review" (*People v Overlee*, 236 AD2d 133, 136, *lv denied* 91 NY2d 976). We decline to exercise our power to review those claims that are not preserved for our review (*see* CPL 470.15 [6] [a]), and we reject defendant's contention with respect to the remaining claims. Importantly, we note that "the prosecutor [did not] vouch for the credibility of the People's witnesses. Faced with defense counsel's focused attack on their credibility, the prosecutor was clearly entitled to respond by arguing that the witnesses had, in fact, been credible . . . An argument by counsel that his [or her] witnesses have testified truthfully is not vouching for their credibility" (*Overlee*, 236 AD2d at 144). Furthermore, even assuming, arguendo, that defendant preserved for our review his contention that a juror engaged in misconduct by failing to disclose that she had read newspaper coverage of this incident, we conclude that "the court's inquiry of the juror[] at issue sufficiently established that [she] had not engaged in 'misconduct of a substantial nature' " (*People v Fernandez*, 269 AD2d 167, 168, *lv denied* 95 NY2d 796, quoting CPL 270.35 [1]).

The sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly recites that, under count six of the indictment, defendant was convicted of rape in the

first degree under Penal Law § 130.35 (3), and it must therefore be amended to reflect that he was convicted under Penal Law § 130.35 (4) (*see People v Martinez*, 37 AD3d 1099, 1100, *lv denied* 8 NY3d 947). We have considered defendant's remaining contentions, including his additional contentions concerning the sentence and ineffective assistance of counsel not expressly addressed herein, and conclude that they are without merit.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

787

KA 10-01042

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL J. DIFALCO, 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 an order of the Genesee County Court (Robert C. Noonan, J.), entered April 7, 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.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

788

KA 10-00703

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN GROSSMAN, 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 February 22, 2010. The order denied defendant's petition to modify the determination that he 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 denying his petition pursuant to Correction Law § 168-*o* (2) seeking to modify the prior determination that he is a level three risk pursuant to the Sex Offender Registration Act (§ 168 *et seq.*). As County Court properly determined, "defendant failed to meet his 'burden of proving the facts supporting the requested modification by clear and convincing evidence' " (*People v Higgins*, 55 AD3d 1303, quoting § 168-*o* [2]; *see People v McCollum*, 83 AD3d 1504; *People v Cullen*, 79 AD3d 1677, *lv denied* 16 NY3d 709).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

789

KA 10-00660

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES WISSERT, DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, WEST VALLEY, 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 February 1, 2010. 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 felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2]; § 1193 [1] [c] [former (i)]). Contrary to defendant's contentions, he "validly waived [his] right to be prosecuted by indictment and consented to be prosecuted by superior court information" (*People v Schultz*, 258 AD2d 879, 879, *lv denied* 93 NY2d 929; *see Matter of Peterson v Becker*, 72 AD3d 1250, 1252, *lv dismissed* 15 NY3d 816), and the written instrument signed by defendant and the District Attorney satisfies the requirements of CPL 195.20 (*see generally People v Sterling*, 27 AD3d 950, *lv denied* 6 NY3d 898). Also contrary to defendant's contention, the record establishes that the conditions of interim probation and the consequences of violating those conditions were adequately explained to him (*see People v Holmes*, 67 AD3d 1069, 1070-1071). Defendant failed to preserve for our review his further contention that County Court erred in failing to conduct a hearing to determine whether he violated the conditions of his interim probation (*see People v Saucier*, 69 AD3d 1125; *People v Dissottle*, 68 AD3d 1542, 1544, *lv denied* 14 NY3d 799). In any event, we conclude that the court's inquiry into the matter "was 'of sufficient depth' to enable the court to determine that defendant failed to comply with the terms and conditions of his interim probation" (*People v Rollins*, 50 AD3d 1535, 1536, *lv denied* 10 NY3d 939). By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that his plea was not knowingly, voluntarily and

intelligently entered (*see People v Mackey*, 79 AD3d 1680), and this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665). Finally, 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).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

790

KA 09-01205

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY L. ANTHONY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM PIXLEY 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 (Alex R. Renzi, J.), rendered January 21, 2009. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, County Court properly refused to suppress his statement made to the police despite the fact that he had not yet been advised of his *Miranda* rights. The record of the suppression hearing establishes that a police officer approached defendant in the parking lot of his place of employment following the officer's receipt of a report that defendant possessed a handgun. Defendant denied that he possessed a weapon and, following a pat-down search of his person (*see* CPL 140.50 [1], [3]; *People v De Bour*, 40 NY2d 210, 223), he consented to a search of his lunch box and his vehicle. Following the discovery of the weapon in the vehicle, an officer asked defendant whether he knew what had been found, to which defendant replied that the weapon belonged to his brother and that defendant carried it for protection.

It is axiomatic that "both the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33). Although the officer's question was accusatory rather than investigatory in nature inasmuch as it was likely to elicit an incriminating response (*see People v Brown*, 49 AD3d 1345, 1346), we nevertheless conclude that the court properly determined that

defendant was not in custody when he made the incriminating response. "The standard for assessing a suspect's custodial status is whether a reasonable person innocent of any wrongdoing would have believed that he or she was not free to leave" (*People v Paulman*, 5 NY3d 122, 129; *see People v Taylor*, 82 AD3d 1133). Here, defendant voluntarily consented to the search of his vehicle and stood, unrestrained, in the parking lot of his place of employment while the search was conducted (*see generally Taylor*, 82 AD3d at 1133-1134). Under these circumstances, we conclude that the court properly determined that defendant was not in custody when he made the statement and thus that the police were not obligated to advise him of his *Miranda* rights at that time.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

791

KA 10-00462

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE NEASON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (VANESSA S. GUITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 9, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and criminal possession of stolen property 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 a jury verdict of burglary in the third degree (Penal Law § 140.20) and criminal possession of stolen property in the fifth degree (§ 165.40). Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable based on the credible evidence presented at trial, we nevertheless conclude that, upon " 'weigh[ing] the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*id.*), the jury did not fail to give the evidence the weight that it should be accorded (*see People v Williams*, 295 AD2d 915; *see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his further contention that this Court should "presume" that he previously had paid a DNA databank fee in connection with a prior felony conviction and that, based on that presumption, Supreme Court erred in imposing such a fee in this case (*see People v Ramos*, 60 AD3d 1317, *lv denied* 12 NY3d 928; *People v Pierre*, 41 AD3d 1267). In any event, we reject that contention. The acts underlying "that prior felony conviction predated the enactment of the legislation establishing such fee (*see*

Penal Law § 60.35, as amended by L 2003, ch 62, part F, § 1)" (*People v Nelson*, 77 AD3d 973, 973, *lv denied* 15 NY3d 954), and there otherwise is no basis in the record for this Court to "presume" that defendant previously paid such a fee.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

793

KA 09-01773

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOE N. SMITH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 6, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

794

CAF 10-00537

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

IN THE MATTER OF JOHN FANNING,
PETITIONER-APPELLANT,

V ORDER

ALISA FANARA, RESPONDENT-RESPONDENT.

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

ALISA FANARA, RESPONDENT-RESPONDENT PRO SE.

FAUNA M. PAPPALARDO, ATTORNEY FOR THE CHILD, FAIRPORT, FOR CARLY F.

Appeal from an order of the Family Court, Monroe County (Maija C. Dixon, A.J.), entered February 2, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner visitation on a schedule mutually agreed to by the parties.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

795

CAF 11-00208

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

IN THE MATTER OF WILLIAM J. STRONG,
PETITIONER-APPELLANT,

V ORDER

LINDA A. STRONG, RESPONDENT-RESPONDENT.

ROBERT A. DINIERI, CLYDE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered July 12, 2010 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to the order of the Support Magistrate dismissing his petition for a modification of support.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

796

CAF 10-01520

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

IN THE MATTER OF ANGEL L.H.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MELISSA H., RESPONDENT-APPELLANT,
AND MATTHEW H., RESPONDENT.

MEMORANDUM AND ORDER

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

NANCY A. DIETZEN, ATTORNEY FOR THE CHILD, FREDONIA, FOR ANGEL L.H.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered June 18, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Melissa H. had neglected her daughter.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order determining that she derivatively neglected the subject child. Because the mother did not object to the admission of postpetition evidence, her present challenge to that evidence is unpreserved for our review (*see Matter of Darren HH.*, 68 AD3d 1197, 1198, *lv denied* 14 NY3d 703). In any event, although "petitioner should have moved to amend the petition, [inasmuch as] this evidence was received without objection by [either] respondent, we exercise our power, in the interest of justice, to sua sponte conform the petition to the evidence" (*Matter of Amanda RR.*, 293 AD2d 779, 780).

Contrary to the mother's further contention, Family Court's finding of derivative neglect is supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). It is well settled that a derivative finding of neglect is warranted where, as here, the mother's neglect of the subject child " 'is so closely connected with the care of another child as to indicate that the [subject] child is equally at risk' " (*Matter of A.R.*, 309 AD2d 1153, 1153, quoting *Matter of Marino S.*, 100 NY2d 361, 374, *cert denied* 540 US 1059). We agree with the court that the nature, duration, and circumstances surrounding the neglect of the mother's

other children " 'can be said to evidence fundamental flaws in the [mother's] understanding of the duties of parenthood' " (*Matter of Cadejah AA.*, 33 AD3d 1155, 1157), justifying the finding that the mother derivatively neglected the subject child.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

797

CA 11-00006

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

ALI AHMED ALI, PLAINTIFF-RESPONDENT,

V ORDER

TONYA S. HUNT, ANTHONY RANTIN AND NATIONAL GRID (FORMERLY NIAGARA MOHAWK POWER CORP.), DEFENDANTS-APPELLANTS.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT TONYA S. HUNT.

HISCOCK & BARCLAY LLP, BUFFALO (NICHOLAS J. DICESARE OF COUNSEL), FOR DEFENDANTS-APPELLANTS ANTHONY RANTIN AND NATIONAL GRID (FORMERLY NIAGARA MOHAWK POWER CORP.).

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (EUGENE C. TENNEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 9, 2010 in a personal injury action. The order denied defendants' motions for summary judgment and granted plaintiff's cross motion for leave to serve an amended bill of particulars.

Now, upon reading and filing the stipulation withdrawing appeals signed by the attorneys for the parties on May 2 and 19, 2011 and filed on May 23, 2011,

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

800

CA 11-00203

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

PENELOPE R. COLECHIO-THOMAS,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF CATTARAUGUS, DEFENDANT-APPELLANT.

BRADY & SWENSON, P.C., SALAMANCA (ERIN M. BRADY SWENSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS M. LETRO, BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Gerald J. Whalen, J.), entered July 13, 2010 in a personal injury action. The order denied defendant's motion and amended motion to compel deposition testimony.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the amended motion to compel the deposition of plaintiff's stepfather and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Cattaraugus County, in accordance with the following Memorandum: Plaintiff commenced this personal injury action seeking damages for injuries she sustained when she fell in the parking lot of a facility owned and operated by defendant. According to defendant, plaintiff's stepfather is the only witness who observed her fall. In its amended motion seeking, inter alia, to compel the deposition testimony of that witness, defendant sought to depose him at his residence with any accommodations or restrictions deemed by Supreme Court to be appropriate to protect his needs. Although plaintiff provided the affirmation of her stepfather's primary care physician stating that the witness is not physically or psychologically able to "endure" a deposition, we nevertheless agree with defendant that the court abused its discretion in denying its amended motion to compel the deposition of the witness with any necessary restrictions and accommodations because defendant was thereby deprived of discovery of his observations of the incident (*cf. Button v Guererri*, 298 AD2d 947). Defendant demonstrated that, as the only witness to the incident, the deposition of plaintiff's stepfather is material and necessary to the defense of the action (*see* CPLR 3101 [a]; *White v Tutor Time*, 71 AD3d 761, 761-762; *cf. Balla v Jones*, 300 AD2d 1076). Defendant further demonstrated that the witness is "so sick or infirm as to afford reasonable grounds of belief that he . . .

will not be able to attend the trial" and thus that a deposition is necessary to secure his testimony (CPLR 3101 [a] [3]). We therefore modify the order by granting that part of the amended motion to compel the deposition of plaintiff's stepfather, and we remit the matter to Supreme Court to determine the location and duration of the deposition and any necessary accommodations or restrictions required to protect his needs.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

801

CA 11-00155

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

CONTINENTAL INDUSTRIAL CAPITAL, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LIGHTWAVE ENTERPRISES, INC., ET AL., DEFENDANTS,
AND STEPHEN C. ARNOLD, DEFENDANT-RESPONDENT.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GARY J. GIANFORTI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ELLIOTT STERN CALABRESE LLP, ROCHESTER (IRVING PHETERSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered July 28, 2010. The order, among other things, limited defendant Stephen C. Arnold's liability to the amount specified in the guaranty agreement.

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

Memorandum: In an action seeking, inter alia, to enforce a limited guaranty, plaintiff contends that Supreme Court erred in determining that defendant Stephen C. Arnold is not liable to plaintiff for attorneys' fees in excess of the limitation contained in his personal guaranty. We reject that contention. It is undisputed that an officer of defendant Lightwave Enterprises, Inc. (Lightwave) entered into a lease with plaintiff, and that Arnold and other officers of Lightwave contemporaneously signed a limited guaranty providing that they would be liable for all payments due under the lease. The guaranty also provided in consecutive sentences that the unsuccessful party in an action brought by plaintiff against Arnold and the other guarantors would be liable for reasonable attorneys' fees to be fixed by the court and that the guaranty "is limited to $50,000 individually and $150,000 in the aggregate." After Lightwave defaulted on its obligations, plaintiff commenced proceedings seeking, inter alia, to enforce the lease against Lightwave and the guaranty against Arnold and the other guarantors. In a bench decision, the court concluded that plaintiff was entitled to a judgment against Lightwave and the guarantors in the amount of $510,510.24. In the order on appeal, the court further concluded that Arnold's liability under the guaranty was limited to $50,000, inclusive of attorneys' fees.

Contrary to plaintiff's contention, the guaranty unequivocally limits Arnold's liability to $50,000, and we thus conclude that plaintiff may not seek attorneys' fees that would increase Arnold's exposure under the guaranty. We reject plaintiff's contention that the guaranty is ambiguous on the issue of whether the limit includes attorneys' fees. "Whether an agreement is ambiguous is a question of law for the courts . . . Ambiguity is determined by looking within the four corners of the document, not to outside sources . . . And in deciding whether an agreement is ambiguous courts 'should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought' " (*Kass v Kass*, 91 NY2d 554, 566, quoting *William C. Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524). In addition, a guaranty is to be strictly construed (*see generally White Rose Food v Saleh*, 99 NY2d 589, 591).

Here, the guaranty does not state that plaintiff is entitled to attorneys' fees in excess of the amount guaranteed. If the parties had wished to provide otherwise, it is elementary that they could have done so (*see e.g. Anglo Irish Bank Corp. Ltd. v Ashkenazy*, 28 Misc 3d 1222[A], 2010 NY Slip Op 51428[U], *4-5; *County Glen, LLC v Himmelfarb*, 4 Misc 3d 1015[A], 2004 NY Slip Op 50886[U], *4). Inasmuch as the guaranty at issue here unequivocally and without reservation limits Arnold's liability to $50,000, plaintiff is not entitled to recover attorneys' fees that would expand his liability in excess of that amount.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

804.2

CA 11-00028

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

INTEGRATED FACILITY SYSTEMS, INC.,
PLAINTIFF-APPELLANT,

V ORDER

COLLEEN C. GARDNER, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF LABOR, BUREAU OF PUBLIC WORKS,
DEFENDANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, BUFFALO (ROBERT A. DOREN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered October 29, 2010 in a declaratory judgment action. The order granted the motion of defendants to dismiss the complaint and denied as moot the cross motion of plaintiff for summary judgment.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

804

CA 10-02131

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

BEACON FEDERAL, PLAINTIFF-RESPONDENT,

V ORDER

PHILIP J. SIMAO, PRIME L.L.C., ALSO KNOWN AS PRIME, LLC, ONONDAGA DEVELOPMENT, LLC, WARNERS ROAD DEVELOPMENT, LLC, ALSO KNOWN AS WARNERS ROAD DEVELOPMENT, DEFENDANTS-APPELLANTS, DEALMAKER AUTO GROUP L.L.C., ET AL., DEFENDANTS.

MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE (JAN S. KUBLICK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 27, 2010 in a mortgage foreclosure action. The order, inter alia, granted plaintiff judgment against defendants.

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

805

KA 09-02439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ORLANDO C. LOPEZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., 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 (Stephen R. Sirkin, J.), rendered January 29, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: On appeal from a judgment of County Court (Sirkin, J.) convicting him, upon his plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]), defendant contends that Supreme Court (Affronti, J.) erred in determining following a pretrial hearing that the victim had an independent basis for his in-court identification of defendant. We reject that contention. Factors to consider in determining whether there is an independent basis for an in-court identification despite the use of otherwise improper identification procedures include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation" (*Neil v Biggers*, 409 US 188, 199-200; *see People v Smart*, 305 AD2d 1110, *lv denied* 100 NY2d 566). The People must establish the existence of an independent basis for the identification by clear and convincing evidence (*see People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833), and the suppression court's decision will not be disturbed if it is supported by "sufficient evidence" in the record (*People v Yukl*, 25 NY2d 585, 588, *cert denied* 400 US 851; *see also People v Youngblood*, 294 AD2d 954, 955, *lv denied* 98 NY2d 704). Here, there is ample evidence that the victim had an independent basis for identifying defendant. The victim testified that he viewed the perpetrator face-to-face for 30 to 45 seconds in a

well-lit area, and the victim's description of the perpetrator was sufficiently specific to establish that he had a clear view of him at the time of the crime (*see People v Tindale*, 295 AD2d 987, *lv denied* 98 NY2d 714; *People v Bostic* [appeal No. 2], 222 AD2d 1073, *lv denied* 88 NY2d 876; *People v Neese*, 138 AD2d 531).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

806

KA 09-00043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE D. WRIGHT, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., 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 July 17, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (three counts), robbery 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 modified on the law by reversing that part convicting defendant of robbery in the second degree under count four of the indictment and dismissing that count and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of robbery in the first degree (Penal Law § 160.15 [2] - [4]) and one count each of robbery in the second degree (§ 160.10 [2] [b]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant failed to preserve for our review his contention that the third and fourth counts of the indictment are duplicitous (*see People v Sponburgh*, 61 AD3d 1415, *lv denied* 12 NY3d 929). In any event, that contention is without merit inasmuch as "[e]ach count of [the] indictment . . . charge[s] one offense only" (CPL 200.30 [1]; *see generally People v Keindl*, 68 NY2d 410, 417, *rearg denied* 69 NY2d 823). We agree with defendant, however, that the fourth count of the indictment, charging defendant with robbery in the second degree (Penal Law § 160.10 [2] [b]), is an inclusory concurrent count of robbery in the first degree as charged in the third count of the indictment (§ 160.15 [4]), and thus should be dismissed. Although defendant correctly concedes that he failed to preserve that contention for our review, we note that preservation is not required and thus that count four "must be dismissed as a matter of law because a verdict of guilty upon the greater [count] is deemed a dismissal of every lesser [inclusory concurrent count]" (*People v Rodrigues*, 74 AD3d 1818, 1819, *lv denied* 15 NY3d 809, *cert denied* ___

US ___, 131 S Ct 1505 [internal quotation marks omitted]; *see* CPL 300.40 [3] [b]; *People v Skinner*, 211 AD2d 979, 980, *lv denied* 86 NY2d 741). We therefore modify the judgment accordingly.

Defendant failed to preserve for our review his contention that he was denied a fair trial based upon two instances of alleged prosecutorial misconduct on summation (*see* CPL 470.05 [2]; *People v Hill*, 82 AD3d 1715) and, in any event, that contention is without merit. The statement of the prosecutor in which he addressed the reason for the absence of a particular item of physical evidence from the evidence inventory was a "fair response to defense counsel's summation" (*People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733), and it " 'did not exceed the broad bounds of rhetorical comment permissible in closing argument' " (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854, quoting *People v Galloway*, 54 NY2d 396, 399). Although we agree with defendant that the reference by the prosecutor to defendant's parole status was improper in light of County Court's ruling concerning such status, we conclude that defendant was not deprived of a fair trial by that single instance of misconduct (*see generally Galloway*, 54 NY2d at 401; *People v Seeler*, 63 AD3d 1595, 1596-1597, *lv denied* 13 NY3d 838).

We reject the further contention of defendant that the court's *Sandoval* ruling constitutes an abuse of discretion. The record establishes that the court, upon properly weighing the probative value of defendant's prior convictions against their potential for prejudice (*see People v Freeney*, 291 AD2d 913, 914, *lv denied* 98 NY2d 637), ruled that the People were limited to cross-examining defendant only with respect to the fact that he had two prior felony convictions (*see generally People v Hayes*, 97 NY2d 203, 207-208). We likewise reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Baker*, 14 NY3d 266, 270-271; *People v Baldi*, 54 NY2d 137, 147). We further conclude that the evidence is legally sufficient to support defendant's conviction of the three counts of robbery in the first degree and the count of criminal possession of a weapon in the third degree (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of those 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).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe, and we note that he failed to preserve for our review his further contention that the sentence imposed constitutes cruel and unusual punishment (*see People v Reese*, 31 AD3d 582, *lv denied* 7 NY3d 851). In any event, that further contention lacks merit. Defendant's sentence is not " 'grossly disproportionate to the crime' " and thus does not constitute cruel and unusual punishment (*People v Holmquist*, 5 AD3d 1041, 1042, *lv denied* 2 NY3d

800; *see generally People v Thompson*, 83 NY2d 477, 479-480).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

808

CA 11-00214

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

COUNTY OF ERIE, PLAINTIFF-RESPONDENT,

V ORDER

GATEWAY-LONGVIEW, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

CARTER, CONBOY, CASE, BLACKMORE, MALONEY & LAIRD, P.C., ALBANY (WILLIAM J. DECAIRE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARTIN A. POLOWY, ACTING COUNTY ATTORNEY, BUFFALO (DAVID J. SLEIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered May 3, 2010 in a declaratory judgment action. The order denied the motion of defendant Gateway-Longview, Inc. to dismiss 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.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

809

CA 11-00307

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

MONA FOLMAR, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

LEWISTON-PORTER CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (GREGORY A. CASCINO OF COUNSEL), FOR RESPONDENT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 19, 2010. The order granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Claimant injured her wrist on May 28, 2009 while driving a school bus in the parking lot of respondent's property. The injury occurred when claimant slammed on the brakes of the school bus in order to avoid a collision with a vehicle pulling out of a parking space, whereupon a student on the bus who was standing near the front fell and landed on claimant's arm and wrist. We agree with respondent that Supreme Court abused its discretion in granting claimant's application, dated February 8, 2010, for leave to serve a late notice of claim (*see* General Municipal Law § 50-e [5]; *Palumbo v City of Buffalo*, 1 AD3d 1032). "It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether [respondent] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice [respondent]" (*Le Mieux v Alden High School*, 1 AD3d 995, 996). Here, claimant failed to establish a reasonable excuse for her failure to serve a timely notice of claim (*see Matter of Heffelfinger v Albany Intl. Airport*, 43 AD3d 537, 539; *Le Mieux*, 1 AD3d at 996). In addition, "[claimant] failed to establish that [respondent] had actual knowledge of the essential

facts constituting the claim" within the requisite time period (*Palumbo*, 1 AD3d at 1033). Respondent's "knowledge of the accident and the injury, without more, does not constitute 'actual knowledge of the essential facts constituting the claim' " (*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147). The proposed notice of claim alleges that claimant was injured because a bus aide employed by respondent was negligent in supervising the children on the bus. Moreover, the proposed notice of claim alleges that respondent is vicariously liable for the actions of the teacher who drove his vehicle into the path of the bus. The record supports respondent's contention that it was not aware of those allegations until claimant made the instant application, and thus was unaware of any facts to suggest that it was responsible for claimant's injuries despite its knowledge that the accident occurred (*see Kirtley v Albany County Airport Auth.*, 67 AD3d 1317, 1318-1319; *Le Mieux*, 1 AD3d at 996). Finally, respondent established that it would be prejudiced by the delay in serving the late notice of claim (*see Le Mieux*, 1 AD3d at 996-997).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

810

CA 11-00265

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

NEW YORK MUTUAL UNDERWRITERS, AS SUBROGEE OF GARY FITZGERALD AND KIMBERLY FITZGERALD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS KING, RYAN HARE, BENJAMIN BERGAN AND KAYLEE PETROSINO, DEFENDANTS-APPELLANTS.

LAW OFFICE OF TAYLOR & SANTACROSE, BUFFALO (CHRISTOPHER R. TURNER OF COUNSEL), FOR DEFENDANT-APPELLANT THOMAS KING.

HISCOCK & BARCLAY, LLP, SYRACUSE (KEVIN M. HAYDEN OF COUNSEL), FOR DEFENDANT-APPELLANT RYAN HARE.

LAW OFFICE OF THERESA J. PULEO, SYRACUSE (JOSEPH RALPH PACHECO, II, OF COUNSEL), FOR DEFENDANT-APPELLANT BENJAMIN BERGAN.

LAW OFFICES OF MARY AUDI BJORK, DEWITT (BARNEY F. BILELLO OF COUNSEL), FOR DEFENDANT-APPELLANT KAYLEE PETROSINO.

KNYCH & WHRITENOUR, LLC, SYRACUSE (BRENDAN J. REAGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 20, 2010. The order denied the motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions are granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action as subrogee of Gary and Kimberly Fitzgerald seeking to recover damages from a fire at the Fitzgeralds' vacation home. Defendants, one of whom was the nephew of the Fitzgeralds, had spent the night at the house and awoke the following morning when the fire broke out. The fire investigators determined that the fire originated on the rear porch of the house, but the cause of the fire was undetermined. The investigators were unable to determine conclusively whether the fire was caused by either a carelessly discarded cigarette or an unattended citronella candle.

Supreme Court erred in denying defendants' motions for summary judgment dismissing the complaint against them. Defendants met their initial burden of establishing that they were not responsible for the

fire, and plaintiff failed to raise a triable issue of fact (*see Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130). Defendants submitted evidence establishing that none of them smoked a cigarette on the porch, and they further submitted evidence establishing that none of them lit the candle or even observed that it was lit. The affidavit of plaintiff's expert in opposition to the motions is insufficient to raise a triable issue of fact because it is based on mere speculation (*see Public Serv. Mut. Ins. Co. v 99¢ Plus of Fifth Ave.*, 5 AD3d 276; *Easy Shopping Corp. v Sneakers Ctr. & Sports*, 303 AD2d 361; *Tower Ins. Co. of N.Y. v M.B.G. Inc.*, 288 AD2d 69).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

814

CA 10-01352

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

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON STEIN, RESPONDENT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered June 23, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 in which Supreme Court determined, following a nonjury trial, that he has a mental abnormality that predisposes him to committing sex offenses (*see* Mental Hygiene Law § 10.03 [i]), and directed that he be committed to a secure treatment facility. We reject respondent's contention that the court improperly assumed the role of an advocate when it sua sponte reopened the proof at the conclusion of the mental abnormality phase of the trial, inasmuch as the court stated on the record that additional evidence was required in order to clarify hearsay issues, particularly with respect to collateral interviews conducted by one of the psychologists (*see generally People v Arnold*, 98 NY2d 63, 68). We further note that the court stated that it would allow respondent's expert to provide a supplemental report and supplemental testimony taking into account the new testimony. Also contrary to respondent's contention, the evidence is legally sufficient to support the court's determination that he suffers from a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i) (*see Matter of State of New York v Gierszewski*, 81 AD3d 1473). According to the testimony of two psychologists presented by petitioner, respondent suffers from paraphilia not otherwise specified, which predisposes him to committing sexual offenses, and that he has had serious difficulty controlling that sexual conduct. Petitioner thus established by clear and convincing evidence that

respondent suffers from "a congenital or acquired condition, disease or disorder that affects [his] emotional, cognitive, or volitional capacity . . . in a manner that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [respondent] having serious difficulty in controlling such conduct" (§ 10.03 [i]; *see Gierszewski*, 81 AD3d at 1473).

We further conclude that the court's determination that respondent suffers from a mental abnormality within the meaning of the statute is not against the weight of the evidence. The evidence presented by respondent that conflicted with that presented by petitioner merely raised a credibility issue for the court to resolve, and its determination is entitled to great deference given its "opportunity to evaluate [first-hand] the weight and credibility of [the] conflicting expert testimony" (*Matter of State of New York v Chrisman*, 75 AD3d 1057, 1058). Upon our review of the record, we conclude that the evidence does not " 'preponderate[] so greatly in [respondent's] favor that the [court] could not have reached its conclusion on any fair interpretation of the evidence' " (*Matter of State of New York v Shawn X.*, 69 AD3d 165, 169, *lv denied* 14 NY3d 702).

Contrary to respondent's further contention, the evidence is legally sufficient to support the determination that he requires confinement. Petitioner's two psychologists testified at the dispositional phase of the trial that respondent had multiple compliance problems in the past both with probation and parole and that he was likely to recidivate if released from custody. Petitioner thus established by the requisite clear and convincing evidence that respondent "has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.07 [f]; *see Matter of State of New York v Craig T.*, 77 AD3d 1062, 1063). Respondent's contention regarding the order issued following the probable cause hearing is not properly before us because no appeal lies from such an order (*see* § 10.13 [b]). We have considered respondent's remaining contention and conclude that it is without merit.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

815

CA 11-00168

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

SHENICE BROWN, INFANT, BY THE PARENT AND NATURAL GUARDIAN, FRANCES BROWN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

OSAMARINA V. SMITH, IN HER REPRESENTATIVE CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. SMITH, DECEASED, DEFENDANT, AND GEORGE POWELL, IN HIS REPRESENTATIVE CAPACITY AS EXECUTOR OF THE ESTATE OF SARAH SHULTZ STUVER, DECEASED, DEFENDANT-APPELLANT.

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

THORNTON & NAUMES, LLP, ROCHESTER (DAVID J. MCMORRIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 20, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant George Powell, in his representative capacity as executor of the estate of Sarah Shultz Stuver, deceased, for summary judgment.

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

Memorandum: The infant plaintiff commenced this action seeking damages for injuries she allegedly sustained as a result of her exposure to lead paint while residing in a house rented to her mother by George Powell (defendant), as executor of the estate of Sarah Shultz Stuver. Supreme Court properly denied defendant's motion for summary judgment seeking dismissal of the complaint against him. Defendant failed to meet his initial burden of establishing that he did not have actual or constructive notice of the lead-paint condition (*see Harden v Tynatishon*, 49 AD3d 604, 605; *Vidal v Rodriguez*, 301 AD2d 517, 518; *Alexander v Westminster Presbyt. Church*, 291 AD2d 813, 813-814; *see generally Chapman v Silber*, 97 NY2d 9, 15). In support of his motion, he submitted only the pleadings, an affirmation of his attorney, and a memorandum of law. "It is well established, however, that an affirmation submitted by an attorney who has no personal knowledge of the facts is without evidentiary value" (*Conti v City of*

Niagara Falls Water Bd., 82 AD3d 1633, 1634), and that a memorandum of law also has no evidentiary value and, indeed, is properly included in a record on appeal for the sole purpose of establishing that an issue has been preserved for our review (*see generally Matter of Lloyd v Town of Greece Zoning Bd. of Appeals* [appeal No. 2], 292 AD2d 818). It is also well settled that, in seeking summary judgment dismissing a complaint, "[a] moving party must affirmatively establish the merits of [his or her] . . . defense and does not meet [his or her] burden by noting gaps in [the] opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980; *see Frank v Price Chopper Operating Co.*, 275 AD2d 940). Although in his brief on appeal defendant relies on evidence submitted by plaintiff in opposition to the motion, i.e., plaintiff's deposition testimony, we do not consider that deposition testimony in determining the merits of defendant's motion inasmuch as he failed to meet his initial burden of proof (*see Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355). Defendant's failure to do so requires denial of the motion, regardless of the sufficiency of the opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

818

CA 10-02385

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

JOHN W. KARCZ, JR. AND JENNIFER KARCZ,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KLEWIN BUILDING COMPANY, INC., E&F/WALSH
BUILDING COMPANY, LLC, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

KLEWIN BUILDING COMPANY, INC., THIRD-PARTY
PLAINTIFF-APPELLANT,

V

MADER CONSTRUCTION COMPANY, INC., THIRD-PARTY
DEFENDANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MICHAEL T. FEELEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (DAVID M. HEHR OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 5, 2010 in a personal injury action. The order granted the motion of plaintiffs for partial summary judgment pursuant to Labor Law § 240 (1), denied in part and granted in part the cross motion of defendants Klewin Building Company, Inc. and E&F/Walsh Building Company, LLC for summary judgment against plaintiffs and denied that part of the cross motion seeking summary judgment against third-party defendant Mader Construction Company, Inc.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the cross motion of defendant-third party plaintiff Klewin Building Company, Inc. and defendant E&F/Walsh Building Company, LLC seeking summary judgment dismissing the Labor Law § 241 (6) claim against them in its entirety and the Labor Law § 200 and common-law negligence claims against them, and dismissing those claims against them, 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 John W. Karcz, Jr. (plaintiff) when a truss he had lifted overhead onto the aerial platform of a scissor lift fell on him at a construction project at the Seneca Niagara Casino. Plaintiffs moved for partial summary judgment on the Labor Law § 240 (1) claim against defendant-third-party plaintiff Klewin Building Company, Inc. (Klewin) and defendant E&F/Walsh Building Company, LLC (collectively, defendants), and defendants cross-moved for, inter alia, summary judgment dismissing the complaint against them and for common-law and contractual indemnification against third-party defendant, Mader Construction Company, Inc. (Mader), plaintiff's employer. Supreme Court granted plaintiffs' motion and granted only that part of defendants' cross motion with respect to specified sections of Labor Law § 241 (6), leaving intact the Labor Law § 241 (6) claim insofar as it alleges the violation of 12 NYCRR 23-6.1 (d).

Initially, we reject defendants' contention that Labor Law vicarious liability provisions do not apply in this case because plaintiff sustained the injury on an Indian reservation, i.e., that of the Seneca Nation. As correctly acknowledged by defendants, state laws may apply on reservations "unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law" (*Mescalero Apache Tribe v Jones*, 411 US 145, 148; *see White Mtn. Apache Tribe v Bracker*, 448 US 136, 142-143). This action is between non-Indians, however, and does not implicate the internal affairs of the Seneca Nation (*see Seneca v Seneca*, 293 AD2d 56, 58-59). Indeed, the locus of the alleged tort is the Seneca Nation's sole connection to this action, and thus that connection is merely tangential. The court therefore did not violate the Seneca Nation's right to self-government by exercising jurisdiction over this dispute (*see Alexander v Hart*, 64 AD3d 940, 941-942).

Furthermore, the laws of the Seneca Nation, i.e., the Seneca Nation of Indians Peacemakers' Court and Surrogate's Court Civil Procedure Rules (Court Rules), cede jurisdiction to New York under the circumstances of this action, thus belying defendants' contention that the application of New York law would infringe on the Indian reservation's self-government. Specifically, the Court Rules direct that the Seneca Nation "shall not" assume jurisdiction in an action such as this, in which the rights of the Seneca Nation or its members are not directly affected and another forum for resolution of the dispute exists.

With respect to the merits, we conclude that the court properly granted plaintiffs' motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. The truss fell and struck plaintiff because of the absence or inadequacy of a safety device of the kind enumerated in Labor Law § 240 (1) (*see Jock v Landmark Healthcare Facilities, LLC*, 62 AD3d 1070, 1071-1072; *Ullman v Musall*, 306 AD2d 813). Thus, "the harm [to plaintiff] flow[ed] directly from the application of the force of gravity" (*Runner v New*

York Stock Exch., Inc., 13 NY3d 599, 604). We reject defendants' contention that plaintiff's actions were the sole proximate cause of the accident. Rather, those actions, insofar as plaintiff may have moved toward the falling truss in an attempt to prevent it from falling, raise "at most, an issue of comparative negligence," which is not an available defense under section 240 (1) (*Dean v City of Utica*, 75 AD3d 1130, 1131).

We agree with defendants, however, that the court erred in denying that part of their cross motion seeking summary judgment dismissing the Labor Law § 241 (6) claim against them in its entirety, and we therefore modify the order accordingly. Defendants established as a matter of law that 12 NYCRR 23-6.1 (d) is inapplicable to the facts of this case, and plaintiffs failed to raise a triable issue of fact (*see McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582). Section 23-6.1 (a) provides in relevant part that "[t]he general requirements of this Subpart shall apply to all material hoisting equipment *except* . . . *aerial baskets*" (emphasis added), and the lift that was used in this case constituted an aerial basket (*see* 12 NYCRR 23-1.4 [b] [2]).

We also agree with defendants that the court erred in denying those parts of their cross motion seeking summary judgment dismissing the Labor Law § 200 and common-law negligence claims against them, and we therefore further modify the order accordingly. Defendants established as a matter of law that they did not have the authority to exercise supervisory control over plaintiff's work and that they neither created nor had actual or constructive notice of the allegedly dangerous condition that caused the accident, and plaintiffs failed to raise a triable issue of fact in opposition (*see Talbot v Jetview Props., LLC*, 51 AD3d 1396, 1397).

Lastly, the court properly denied that part of the cross motion seeking indemnification for Klewin against Mader, inasmuch as that part of the cross motion is premature at this juncture of the litigation. The antisubrogation rule bars Klewin's third-party action inasmuch as Mader and Klewin were insured under the same primary and excess policies (*see generally ELRAC, Inc. v Ward*, 96 NY2d 58, 76, *rearg denied* 96 NY2d 855), except to the extent that Klewin seeks indemnification for amounts in excess of the coverage afforded by the policies at issue (*see Bruno v Price Enters.*, 299 AD2d 846, 848). Although Klewin contends on appeal that the excess carrier has not agreed to indemnify Klewin for amounts in excess of the primary policy, there is no support in the record for that contention and in any event, as we have noted, any issue with respect thereto is premature at this juncture of the litigation.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

820.1

CA 10-02178

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

SOUTH BUFFALO ELECTRIC, INC.,
PLAINTIFF-APPELLANT,

V ORDER

ACCADIA SITE CONTRACTING, INC.,
AND DEVELOPERS SURETY AND INDEMNITY
COMPANY, DEFENDANTS-RESPONDENTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (HOWARD E. BERGER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH J. MANNA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 24, 2010 in a breach of contract action. The order denied plaintiff's motion for partial summary judgment and granted defendants' cross motion for partial summary judgment.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on March 18, 2011,

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

820.2

KA 10-00823

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMBER MARACLE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 25, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the second degree and forgery in the second degree (four counts).

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of four counts of forgery in the second degree is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]) and four counts of forgery in the second degree (§ 170.10 [1]). In appeal No. 2, she appeals from a resentence with respect to the conviction of the four counts of forgery in the second degree in appeal No. 1. Contrary to defendant's contention in appeal No. 1, her waiver of the right to appeal as part of the plea agreement was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). The record "establish[es] that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*id.*). Thus, defendant's valid waiver of the right to appeal encompasses her challenge to the severity of the sentence in appeal No. 1 and the resentence in appeal No. 2 (*see id.* at 255-256; *People v Hidalgo*, 91 NY2d 733, 737). The further contention of defendant in appeal No. 1 that she was denied effective assistance of counsel does not survive her plea or her valid waiver of the right to appeal because defendant "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [her] attorney['s] allegedly poor performance' " (*People v Wright*, 66 AD3d

1334, *lv denied* 13 NY3d 912; *see People v Zuliani*, 68 AD3d 1731, 1732, *lv denied* 14 NY3d 894).

Although the contention of defendant in appeal No. 1 that her guilty plea was not knowing, voluntary and intelligent survives her valid waiver of the right to appeal (*see Zuliani*, 68 AD3d at 1732), defendant failed to preserve that contention for our review by failing to move to withdraw her plea or to vacate the judgment of conviction (*see People v Watts*, 78 AD3d 1593, *lv denied* 16 NY3d 838). 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 colloquy casts any doubt on defendant's guilt or the voluntariness of the plea" (*Watts*, 78 AD3d 1593). In any event, we conclude that defendant's contention lacks merit. Although the amount of restitution that was included in the plea bargain was less than $50,000, that amount of restitution does not negate the element of grand larceny in the second degree that the value of the property stolen by defendant exceeded $50,000 (*see* Penal Law § 155.40 [1]). In pleading guilty, defendant agreed to the recitation of the facts set forth by the prosecutor that she stole property from her former employer that had a value in excess of $50,000.

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

820.3

KA 10-01937

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMBER MARACLE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), 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 (M. William Boller, A.J.), rendered January 28, 2010. Defendant was resentenced upon her conviction of forgery in the second degree (four counts).

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

Same Memorandum as in *People v Maracle* ([appeal No. 1] ___ AD3d ___ [June 10, 2011]).

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

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

1415/09

CA 09-00554

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

TIMOTHY LORENZ AND EILEEN LORENZ,
PLAINTIFFS-RESPONDENTS,

V ORDER

VILLAGE OF DEPEW, ET AL., DEFENDANTS,
ADELPHIA CABLE COMMUNICATIONS,
DEFENDANT-APPELLANT.

ADELPHIA CABLE COMMUNICATIONS, THIRD-PARTY
PLAINTIFF,

V

PHASECOM AMERICA, INC. AND MASTEC
TECHNOLOGIES, INC., THIRD-PARTY DEFENDANTS.

WEBSTER SZANYI LLP, BUFFALO (MARK C. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered June 10, 2008. The order, inter alia, granted that part of plaintiffs' motion seeking summary judgment on liability pursuant to Labor Law § 240 (1) against defendant Adelphia Cable Communications.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties and filed on May 26, 2011,

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

Patricia L. Morgan

Entered: June 10, 2011

Clerk of the Court

MOTION NO. (1157/03) KA 01-00558. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY LINNEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND GORSKI, JJ. (Filed June 10, 2011.)

MOTION NO. (1618/03) KA 03-00349. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMION SMITH, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GREEN, JJ. (Filed June 10, 2011.)

MOTION NO. (1619/03) KA 03-00350. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMION SMITH, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GREEN, JJ. (Filed June 10, 2011.)

MOTION NO. (781.1/05) KA 02-01330. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V YANCY WEAREN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, PERADOTTO, AND GORSKI, JJ. (Filed June 10, 2011.)

MOTION NO. (1123/06) KA 04-02221. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM M. NICHOLS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, GORSKI, AND MARTOCHE, JJ. (Filed June 10, 2011.)

MOTION NO. (1125/07) KA 06-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN E. AKIN, DEFENDANT-APPELLANT. -- Motion for reargument

or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, LINDLEY, AND GREEN, JJ. (Filed June 10, 2011.)

MOTION NO. (72/08) KA 06-03305. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEVEN T. CARLISLE, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GREEN, JJ. (Filed June 10, 2011.)

MOTION NO. (915/08) KA 03-01573. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMIAN JOHNSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., GREEN, GORSKI, AND MARTOCHE, JJ. (Filed June 10, 2011.)

MOTION NO. (1006/08) KA 07-00713. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JARVIS LASSALLE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND GORSKI, JJ. (Filed June 10, 2011.)

MOTION NO. (644/09) KA 08-00218. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEREMY MILLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, GORSKI, AND MARTOCHE, JJ. (Filed June 10, 2011.)

MOTION NO. (1136.2/09) CA 09-01520. -- DESTINY USA HOLDINGS, LLC, PLAINTIFF-RESPONDENT, V CITIGROUP GLOBAL MARKETS REALTY CORP., DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals dismissed

on stipulation as withdrawn. PRESENT: SCUDDER, P.J, FAHEY, PERADOTTO, GREEN, JJ. (Filed June 10, 2011.)

MOTION NO. (375/10) KA 09-00476. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V OHNJA OLOMONSA, ALSO KNOWN AS JOHN SOLOMON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, AND GREEN, JJ. (Filed June 10, 2011.)

MOTION NO. (1511/10) KA 09-02220. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANA P. BROWN, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 10, 2011.)

MOTION NO. (80/11) KA 10-00244. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEFFREY F. FASO, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed June 10, 2011.)

MOTION NO. (87/11) CA 10-01474. -- KAI LIN, PLAINTIFF-APPELLANT, V STRONG HEALTH, DEPARTMENT OF DENTISTRY, UNIVERSITY OF ROCHESTER MEDICAL SCHOOL, UNIVERSITY DENTAL FACULTY GROUP AND DR. CARLO ERCOLI, DEFENDANTS-RESPONDENTS. (AND ANOTHER ACTION.) (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed June 10,

2011.)

MOTION NO. (87.1/11) CA 09-02432. -- KAI LIN, PLAINTIFF-APPELLANT, V STRONG HEALTH, DEPARTMENT OF DENTISTRY, UNIVERSITY OF ROCHESTER MEDICAL SCHOOL, UNIVERSITY DENTAL FACULTY GROUP AND DR. CARLO ERCOLI, DEFENDANTS-RESPONDENTS. (AND ANOTHER ACTION.) (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed June 10, 2011.)

MOTION NO. (183/11) CA 10-01721. -- ALEXANDROS TSOULIS, PLAINTIFF-RESPONDENT-APPELLANT, V ABBOTT BROS. II STEAK OUT, INC., DEFENDANT-APPELLANT-RESPONDENT. -- Motion and cross motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ. (Filed June 10, 2011.)

MOTION NO. (233/11) CA 10-00034. -- JEFFREY J. PITTS AND BRENDA L. PITTS, PLAINTIFFS-APPELLANTS, V BELL CONSTRUCTORS, INC., ALSO KNOWN AS BELL CONSTRUCTORS OF ROCHESTER, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GREEN, AND MARTOCHE, JJ. (Filed June 10, 2011.)

MOTION NO. (252/11) CA 10-01675. -- GENERAL STAR NATIONAL INSURANCE COMPANY, PLAINTIFF-APPELLANT, V NIAGARA FRONTIER TRANSIT METRO SYSTEM,

INC., DEFENDANT-RESPONDENT. -- Motion for reargument, leave to appeal to the Court of Appeals, and other relief denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, GREEN, AND GORSKI, JJ. (Filed June 10, 2011.)

MOTION NO. (269/11) CA 10-02252. -- IN THE MATTER OF COUNTY OF ERIE, PETITIONER-RESPONDENT, V CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 815, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 10, 2011.)

MOTION NO. (293/11) CA 10-01650. -- CLEAR SKIES OVER ORANGEVILLE, PETITIONER-APPELLANT, V TOWN BOARD OF TOWN OF ORANGEVILLE, SUSAN MAY, HANS BOXLER, JR., JAMES HERMAN, ANDREW FLINT, AND TOM SCHABLOSKI, IN THEIR CAPACITIES AS TOWN BOARD MEMBERS, RESPONDENTS-RESPONDENTS, AND STONEY CREEK ENERGY LLC, INTERVENOR-RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed June 10, 2011.)

MOTION NO. (317/11) CA 10-01163. -- FRANK MCGUIRE, ET AL., PLAINTIFFS, AND MCGUIRE CHILDREN, LLC, PLAINTIFF-RESPONDENT, V WILLIAM L. HUNTRESS, ACQUEST HOLDINGS, INC., ACQUEST DEVELOPMENT, LLC, ACQUEST GOVERNMENT HOLDINGS OPP, LLC, ACQUEST GOVERNMENT HOLDINGS, U.S. GEOLOGICAL, LLC, AND LINCOLN PARK ASSOCIATES, LLC, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P.,

CARNI, LINDLEY, AND GORSKI, JJ. (Filed June 10, 2011.)

MOTION NO. (318/11) CA 10-01165. -- FRANK MCGUIRE, ET AL., PLAINTIFFS, AND MCGUIRE CHILDREN, LLC, PLAINTIFF-RESPONDENT, V WILLIAM L. HUNTRESS, ACQUEST HOLDINGS, INC., ACQUEST DEVELOPMENT, LLC, ACQUEST GOVERNMENT HOLDINGS OPP, LLC, ACQUEST GOVERNMENT HOLDINGS, U.S. GEOLOGICAL, LLC, AND LINCOLN PARK ASSOCIATES, LLC, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND GORSKI, JJ. (Filed June 10, 2011.)

MOTION NO. (330/11) KA 09-01819. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PAUL R. CURRIER, DEFENDANT-APPELLANT. -- Motion for reargument and/or reconsideration granted and, upon reargument, the memorandum and order entered April 1, 2011 (83 AD3d 1421) is amended by deleting the ordering paragraph and substituting the following ordering paragraph "that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by reversing those parts convicting defendant of criminal trespass in the second degree and dismissing those counts of the indictment, and by reducing the sentences imposed for burglary in the second degree, attempted gang assault in the second degree and assault in the second degree to determinate terms of incarceration of six years, and as modified the judgment is affirmed," and by deleting the last two sentences of the memorandum and substituting the following sentences: "Finally, we agree with defendant that the sentences imposed for burglary in the second

degree, attempted gang assault in the second degree and assault in the second degree are unduly harsh and severe. Thus, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), we modify the judgment by reducing the sentences for those counts to determinate terms of incarceration of six years." PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 10, 2011.)

MOTION NO. (344/11) CA 10-01730. -- JOAN HAYMON, INDIVIDUALLY AND AS MOTHER AND NATURAL GUARDIAN OF LEONARD HAYMON, AN INFANT, PLAINTIFF-APPELLANT, V DONALD J. PETTIT, DEFENDANT, AND CITY OF AUBURN, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 10, 2011.)

MOTION NO. (412/11) KA 06-01424. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY N. OTT, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND MARTOCHE, JJ. (Filed June 10, 2011.)

KA 10-01837. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SALVATORE J. ABRAMO, 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 Allegany County Court, Thomas P. Brown, J. - Violation of Probation). PRESENT: SCUDDER,

P.J., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ. (Filed June 10, 2011.)

KA 08-02287. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHEILA L. SMITH, 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 Monroe County Court, Richard A. Keenan, J. - Attempted Robbery, 1st Degree). PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ. (Filed June 10, 2011.)

KA 08-01553. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SEAN P. TRACY, 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 Supreme Court, Monroe County, Patricia D. Marks, A.J. - Petit Larceny). PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ. (Filed June 10, 2011.)