SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 8, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9905 Lynne Harvey, Index 158576/14
Plaintiff-Appellant,

-against-

Henry 85 LLC,
Defendant-Respondent,

4G Data Systems, Inc., et al.,
Defendants.

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Sullivan Papain Block McGrath & Cannavo P.C., New York (Christopher J. DelliCarpini of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Jennifer B. Ettenger of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered October 17, 2018, which granted the motion of defendant Henry 85 LLC for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Defendant failed to establish its entitlement to judgment as a matter of law in this action where plaintiff was injured when

she tripped and fell on a defective condition in a sidewalk pedestrian handicap ramp in the sidewalk adjacent to defendant's premises. Although a landowner is responsible for maintaining abutting sidewalks (*see* Administrative Code of City of NY § 7-210), it is not responsible for maintaining pedestrian ramps unless it created the defect or the ramp was constructed for its special use (*see Gary v 101 Owners Corp.*, 89 AD3d 627 [1st Dept 2011]).

Here, defendant failed to meet its initial burden of demonstrating that it did not create the defective condition. In relying on the deposition testimony of the building's superintendent, defendant only pointed to the gaps in plaintiff's proof instead of carrying its own burden on the motion (*see e.g. Torres v Merrill Lynch Purch.*, 95 AD3d 741, 742 [1st Dept 2012]; *Bryan v 250 Church Assoc., LLC*, 60 AD3d 578 [1st Dept 2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10006 The People of the State of New York, Ind. 4447/12
Respondent,

-against-

Sergey Aleynikov,
Defendant-Appellant.

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Marino, Tortorella & Boyle, P.C., New York (Kevin H. Marino of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Elizabeth Roper of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at double jeopardy motion; Daniel P. Conviser, J. at jury trial and sentencing), rendered October 23, 2018, convicting defendant of unlawful use of secret scientific material, and sentencing him to time served, unanimously affirmed.

The underlying facts of this case, as well as legal determinations relevant to this appeal, are set forth in prior decisions by the trial court, this Court and the Court of Appeals (49 Misc 3d 286 [Sup Ct, NY County 2015], *revd* 148 AD3d 77 [1st Dept 2017], *affd* 31 NY3d 383 [2018]). Briefly stated, defendant, a then-employee of Goldman Sachs, uploaded, without authorization, components of Goldman's valuable source code to a server in Germany. Based on this conduct, defendant was

initially tried and convicted in federal court of violating the National Stolen Property Act (NSPA), 18 USC § 2314, which makes it a crime to transport, transmit, or transfer "in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more, knowing the same to have been stolen, converted or taken by fraud." However, the Second Circuit reversed that conviction, holding, in relevant part, that the government had failed to present legally sufficient evidence to prove the NSPA's "goods" element because the code defendant uploaded to the German server was intangible property (*United States v Aleynikov*, 676 F3d 71, 76-79 [2d Cir 2012]).

Defendant argues on appeal that his later New York State prosecution and conviction of unlawful use of secret scientific material (Penal Law § 165.07), based on the same basic conduct – uploading the proprietary source codes to the German server – was barred by CPL 40.20(2), which generally prohibits prosecution of a person "for two offenses based upon the same act or criminal transaction." Defendant argues that the motion court (whose determination was accepted by the trial court as law of the case) erred in ruling that the state prosecution was permissible pursuant to the exception set forth in CPL 40.20(2)(f), which provides that a second prosecution based on the same act or

criminal transaction is permissible where

> "[o]ne of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state."

Defendant's argument rests on the claim that the "goods" element of the NSPA, which undisputedly requires that the property transported be "tangible," is equivalent to the "tangible reproduction" element of New York's unlawful use statute. That statute provides that

> "[a] person is guilty of unlawful use of secret scientific material when, with intent to appropriate . . . the use of secret scientific material, and having no right to do so and no reasonable ground to believe that he [or she] has such right, [the person] makes a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such secret scientific material" (Penal Law § 165.07).

Central to defendant's claim is the proposition that, in finding the evidence legally insufficient to support an NSPA conviction, the Second Circuit found not only that the source code was intangible as it was transported from the Goldman server, but that it was also intangible as it resided, taking up hard drive space on the physical medium of the German server. Defendant argues that if this understanding of the Second

Circuit's analysis – and thus the nature of the "goods" element – is correct, it would be inconsistent to conclude both that the source codes were not "goods" within the meaning of the NSPA and that they were a "tangible reproduction" within the meaning of the state unlawful use statute as they existed on the German server.

However, as reflected in our previous decision in this case, holding that the evidence was legally sufficient to establish the "tangible reproduction" element (148 AD3d at 88], and in the Court of Appeals' affirmance (31 NY3d at 399), the Second Circuit did not hold that the source codes were intangible as they existed on the German server. Rather, it held that "at the time of the theft" (*Aleynikov*, 676 F3d at 78) – which was the same as the time that the codes were transmitted – the codes were purely intangible. Because the elements are not equivalent, there is no inconsistency between the Second Circuit's determination that the codes were intangible when transported and this Court's determination that defendant made a tangible reproduction when he

uploaded them to the German server, where they resided within a physical medium. Accordingly, there was no double jeopardy bar to the state prosecution.

We do not reach the People's other ground for affirmance.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10007 In re Ronnie A.,
Petitioner-Appellant,

-against-

Barbara J.,
Respondent-Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

John R. Eyerman, New York, for respondent.

Carol L. Kahn, New York, attorney for the child.

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Order, Family Court, New York County (Carol Goldstein, J.), entered on or about June 29, 2018, which, following a hearing, granted the motion of respondent mother to dismiss petitioner father's modification of custody petition, unanimously affirmed, without costs.

The father did not meet his prima facie burden of establishing a "sufficient change of circumstances" such that the custody arrangement should be modified (*Matter of Sergei P. v Sofia M.*, 44 AD3d 490, 490 [1st Dept 2007]). The sole basis alleged in the petition is that the child is not performing well academically and lacks structure in the mother's home. However, the child's most recent report card indicates that he is passing

every class and that his grades have significantly improved. The child's academic success is tied largely to the mother securing tutoring for him as well as arranging for an individualized education plan, which the father, who has not met with the child's teachers, initially opposed. Furthermore, the child, now a teenager, is happy with the current custody and visitation arrangement and does not wish for it to change (*see e.g. Matter of Manfredo v Manfredo*, 53 AD3d 498, 500 [2d Dept 2008]).

While the father raises several additional issues on appeal, they are outside the scope of the petition.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10008- Index 23369/13E
10009- 23370/13E
10010-
10011
[M-7151] Craig South,
Plaintiff-Appellant,

-against-

Metropolitan Transportation Authority,
et al.,
Defendants-Respondents.

- - - - -

Metropolitan Transportation Authority,
et al.,
Third-Party Plaintiffs-Respondents,

-against-

Iron Bridge Constructors Inc.,
Third-Party Defendants-Appellants,

Bilingual Safety Training, LLC,
Third-Party Defendants.

- - - - -

Wayne Gavonich,
Plaintiff-Appellant,

-against-

Metropolitan Transportation Authority,
et al.,
Defendants-Respondents.

- - - - -

Metropolitan Transportation Authority,
et al.,
Third-Party Plaintiffs-Respondents,

-against-

Iron Bridge Constructors, Inc.,
Third-Party Defendants-Appellants,

Bilingual Safety Training, LLC,
Third-Party Defendant.

- - - - -

Robert Peoples,
Plaintiff,

-against-

City of New York,
Defendant,

Metropolitan Transportation Authority,
et al.,
Defendants-Respondents,

Manhattan and Bronx Surface Transit
Operation Authority, et al.,
Defendants.

- - - - -

Metropolitan Transportation Authority,
et al.,
Third-Party Plaintiffs-Respondents,

-against-

Iron Bridge Constructors, Inc.,
Third-Party Defendant-Appellant,

Bilingual Safety Training, LLC,
Third-Party Defendant.

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Sacks and Sacks LLP, New York (Scott N. Singer of counsel), for Craig South and Wayne Gavinovich, appellants.

Hannum Feretic Prendergast & Merlino, LLC, New York (Jessica M. Erickson of counsel), for Iron Bridge Constructors, Inc., appellant.

Shein & Associates, P.C., Syosset (Robert O. Pritchard of counsel), for respondents.

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Orders, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 7, 2018, which denied plaintiffs Wayne Gavonich's and Craig South's motions for summary judgment on their Labor Law § 240(1) claims, unanimously reversed, on the law, without costs, and the motions granted. Orders, same court (Lucindo Suarez, J.), entered on or about April 17 and 18, 2019, which denied third-party defendant Iron Bridge Constructors, Inc.'s motions pursuant to CPLR 1010 and 603 to dismiss or, in the alternative, sever the third-party actions as against it, unanimously reversed, on the facts, without costs, and the motions to sever granted.

Plaintiffs Gavonich and South established prima facie that defendants are liable for their injuries under Labor Law § 240(1) by submitting evidence that they fell to the ground and were injured when the lift truck upon which they were working moved when it was struck by a passing bus (*Alomia v New York City Tr. Auth.*, 292 AD2d 403, 405 [2d Dept 2002]; *see Zengotita v JFK Intl. Air Term., LLC*, 67 AD3d 426 [1st Dept 2009]; *Dos Santos v State of New York*, 300 AD2d 434 [2d Dept 2002]). Moreover, the lift truck, which was being used as an elevated work platform, lacked a guardrail to prevent falls (*see Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]). In opposition, defendants failed to raise an issue of fact. They rely instead on hearsay evidence as

to how the accident may have occurred. Such hearsay evidence alone is insufficient to defeat a motion for summary judgment (*Ying Choy Chong v 457 W. 22nd St. Tenants Corp.*, 144 AD3d 591, 592 [1st Dept 2016]).

Given defendants' unexplained, extensive delays in commencing the third-party actions after discovery had been completed and the trial-ready posture of all three main actions, Iron Bridge's motion to sever the third-party actions as against it should have been granted (*see Garcia v Gesher Realty Corp.*, 280 AD2d 440 [1st Dept 2001]; *Cusano v Sankyo Seiki Mfg. Co.*, 184 AD2d 489 [2d Dept 1992]).

M-7151 - *Robert Peoples v City of New York*

Motion to stay trial pending determination of the appeal denied as academic.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10012 The People of the State of New York Ind. 2907/09
Respondent,

-against-

Ruben Sandoval,
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Gray of counsel), for respondent.

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Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about May 13, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 15 points for a history of drug or alcohol abuse. Defendant's statements to correction officials that he was under the influence of the alcohol and marijuana at the time of the offense, and that he abused those substances, which led him to be referred to a substance abuse program, constituted clear and convincing evidence supported a finding of drug and alcohol abuse (*see People v Palmer*, 20 NY3d 373, 378-379 [2013]; *People v Van Phu Bui*, 156 AD3d 448 [1st Dept 2017]).

The court properly assessed 10 points for unsatisfactory conduct while confined. Defendant incurred a tier II and two tier III disciplinary violations during his five years of incarceration, and one of the tier III violations was incurred less than four months before the Board's assessment. In this case, the seriousness, rather than the number, of the infractions warranted the point assessment (*see People v Mabee*, 69 AD3d 820, 821 [2d Dept 2010][single tier III], *lv denied* 15 NY3d 703 [2010]; *People v Chabrier*, 38 AD3d 355 [1st Dept 2007][same], *lv denied* 9 NY3d 801 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10013- Index 654759/17
10014- 650740/18
10014A-
10014B-
10014C Yitzhak Aron Pastreich, et al.,
Plaintiffs-Appellants,

-against-

Mark Pastreich, et al.,
Defendants-Respondents,

- - - - -

Paul Levine, Esq., etc.,
Intervenor-Respondent.

- - - - -

Mark Pastreich,
Plaintiff-Respondent,

-against-

Yitzhak Aron Pastreich, et al.,
Defendants-Appellants,

Lisa Aronson, etc.,
Defendant.

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Todd & Levi, LLP, New York (Jill Levi of counsel), Offit Kurman, P.A., New York (Paul M. Kaplan of counsel), and Sills Cummis & Gross P.C., New York (James M. Hirschhorn of counsel), for Yitzhak Aron Pastreich, Menachem Mendl Pastreich and One Civic Center LLC, appellants.

Meister Seelig & Fein LLP, New York (Jeffrey Schreiber and Kevin A. Fritz of counsel) for Mark Pastreich and One Civic Center Management LLC, respondents.

Rosenfeld & Kaplan, New York (Tab K. Rosenfeld of counsel), for Lisa Aronson, respondent.

Lemery Greisler, LLC, Saratoga Springs (Robert A. Lippman of counsel), for Paul Levine, respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about January 8, 2019, in index no. 654759/17, which granted the motion of defendants Mark Pastreich (Mark) and One Civic Center Management LLC (Management) for summary judgment on their affirmative defense of equitable estoppel, unanimously reversed, on the law, and the motion denied, without costs. Judgment, same court and Justice, entered March 20, 2019, removing plaintiffs Yitzhak Aron Pastreich (Yitzhak) and Menachem Mendl Pastreich (Menachem) as trustees of the Irrevocable Trust of 2012 FBO Samuel Pastreich, the Irrevocable Trust of 2012 FBO Eta Tzipporah Pastreich, and the Mark Pastreich Irrevocable Trust of 2012 (the Trusts), appointing Paul Levine as successor trustee and co-trustee, and awarding the Trusts $1.4 million against Yitzhak, unanimously reversed, on the law and the facts, Yitzhak and Menachem reinstated as trustees of the Trusts, Levine removed as successor trustee and co-trustee, and the award against Yitzhak reduced to $330,873. Appeal from order, same court and Justice, entered January 23, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered June 7, 2019, which denied plaintiffs' motion for renewal, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered May

11, 2018, in index no. 650740/18, which directed the Trusts to convey title to the building to plaintiff and permitted plaintiff to substitute three properties and pay $330,873, unanimously affirmed, without costs.

The argument advanced by Mark, Management, and defendant Lisa Aronson (Lisa) (collectively, respondents) that Yitzhak and Menachem lack standing to appeal is unavailing (*see Pastreich v Pastreich,* 2019 NY Slip Op 68780[U], 68781[U], and 68782[U] [1st Dept, Apr. 25, 2019]).

We reverse the grant of summary judgment to respondents Mark and Management on their affirmative defense of equitable estoppel alleged to have arisen from appellants' statements made at an October 2013 meeting. Particularly in view of the signed agreement between Management and appellant One Civic Center LLC (*see Fisher Bros. Sales v United Trading Co. Desarrollo y Comercio*, 191 AD2d 310, 311 [1st Dept 1993] ["estoppel will only rarely be permitted to overcome a signed writing"]), respondents failed to establish that, as a matter of law, they justifiably relied on the statements at the meeting as signifying that appellants had no objection to, and would not assert claims based on, Mark's treating the trust's property as if it were his own. Contrary to respondents' contention, the sufficiency of

appellants' opposition to Mark and Management's motion is irrelevant, because the materials submitted on the motion, such as the transcript of the October 2013 meeting, failed to establish that equitable estoppel barred any of appellants' claims (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In light of the deferential standards for conforming pleadings to the proof (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Gonfiantini v Zino*, 184 AD2d 368, 369 [1st Dept 1992]) and managing discovery (*see Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 176 [1st Dept 2002]), we will not disturb the court's exercise of its discretion in, in effect, allowing Lisa to add a counterclaim seeking to require Yitzhak to repay the Trusts for any money he had taken from them for legal fees and allowing respondents to add a counterclaim requesting indemnification for their legal fees.

However, the court should not have sua sponte removed Yitzhak and Menachem as trustees (*see* Estates, Powers & Trusts Law § 7-2.6[a][2]). Furthermore, the court itself found that there was no evidence that Menachem participated in Yitzhak's wrongdoing.

Further, as to the imposition of liability on Yitzhak, we

decline to disturb that finding in light of the deference due to the court's ability to see and hear the witnesses (*see Smith v City of New York*, 217 AD2d 423, 424 [1st Dept 1995]) and assess credibility (*see Claridge Gardens v Menotti*, 160 AD2d 544, 544-545 [1st Dept 1990]). However, the fact that liability can be imposed on Yitzhak does not mean that he must pay all the amounts listed in the judgment. First, he does not have to pay Lisa $100,000, because there was no evidence that she had incurred that amount in legal fees and because of the American Rule (*see Baker v Health Mgt. Sys.*, 98 NY2d 80, 88 [2002]). Second, since Mark did not request punitive damages, the court should not have awarded them (*see April v April*, 272 NY 331, 337 [1936] [court erred in imposing charge on trustee sua sponte]). Third, since both sides agreed that Yitzhak had taken only $330,873 – not $1.4 million – from the Trusts, he must repay only that amount.

In index no. 650740/18, Yitzhak and Menachem contend that they deserve a new trial on the value of the building because the court did not permit full discovery. This argument is unavailing in light of the court's "broad discretion . . . in the area of discovery" (*Cho*, 300 AD2d at 176). Similarly, the court providently exercised its discretion in disregarding the Hubbell Report (*see generally Muhl v Fraser Assoc.*, 247 AD2d 224 [1st

Dept 1998]) and Cherry Tree Ventures LLC's offer to buy the building. It is true that "the purchase price set in the course of an arm's length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the highest rank to determine the true value of the property at that time" (*W.T. Grant Co. v Srogi*, 52 NY2d 496, 511 [1981] [internal quotation marks omitted]). However, Cherry Tree's offer was not at arm's length because Yitzhak was its sole member (*see id.* [seller "had no interest in or connection with the purchaser"]).

Yitzhak and Menachem argue that the court abused its discretion in failing to consolidate the 2018 action with the 2017 action. However, they did not move to consolidate the two actions; rather, they moved to dismiss the 2018 action on the ground of a prior action pending.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10015 The People of the State of New York, Ind. 3948/15
Respondent,

-against-

Jamar Halsey,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered March 17, 2016, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order. Denial of the application for

permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10016 The People of the State of New York, Ind. 1469/16
Respondent,

-against-

Jason Feaster,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered November 1, 2016,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10018- Index 151460/13
10018A Joseph DeGidio, 59544/14
Plaintiff-Respondent-Appellant,

-against-

The City of New York, et al.,
Defendants-Appellants-Respondents,

Hoffman Equipment Company, et al.,
Defendants.

- - - - -

Metropolitan Transportation Authority,
et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

Hoffman Equipment Company,
Third-Party Defendant-Respondent-Appellant,

J&E Industries, LLC,
Third-Party Defendant-Respondent.

_____

Cullen & Dykman LLP, New York (Elio M. DiBerardino of counsel), for The City of New York and Hudson Yards Development Corporation, appellants-respondents.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Mario Castellitto of counsel), for Metropolitan Transportation Authority, MTA Capital Construction, The New York City Transit Authority and the New York City Department of Transportation, appellants-respondents.

Fortunato & Fortunato, PLLC, Brooklyn (Louis A. Badolato of counsel), for Joseph DeGidio, respondent-appellant.

Lewis Johs Avallone Aviles, LLP, Islandia (John B. Saville of counsel), for Hoffman Equipment Company, respondent-appellant.

Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Christopher Simone of counsel), for respondent.

Order, Supreme Court, New York County, (Arlene P. Bluth, J.), entered November 21, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, granted defendants Metropolitan Transportation Authority, MTA Capital Construction, The New York City Transit Authority, and the New York City Department of Transportation's (collectively the MTA defendants) motion to dismiss plaintiff's Labor Law § 241(6) claim, granted defendant Hoffman Equipment Company's (Hoffman) motion to dismiss plaintiff's Labor Law § 200 and common law claims as against it, granted third-party defendant J&E Industries, LLC's (J&E) summary judgment motion to dismiss the indemnification claims against it, denied the MTA defendants' motion for summary judgment on their contractual indemnification claims against J&E, denied defendants the City of New York (City) and Hudson Yards Development Corporation's (Hudson Yards) cross motion for summary judgment dismissing plaintiff's complaint as untimely, and denied Hoffman's summary judgment motion seeking dismissal of the MTA defendants' third-party complaint against it, unanimously modified, on the law, to grant plaintiff partial

summary judgment on his Labor Law § 240(1) claims against the MTA defendants and the City, dismiss the Labor Law claims against Hudson Yards, and reinstate plaintiff's common law negligence claims against Hoffman, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about February 20, 2019, which, to the extent appealable, denied the motion of the City and Hudson Yards to renew, unanimously affirmed, without costs, and otherwise dismissed as taken from an nonappealable order.

The collapse of a crane constitutes a prima facie violation of Labor Law § 240(1) (*see Matter of E. 51st St. Crane Collapse Litig.*, 89 AD3d 426, 427 [1st Dept 2011]; *Cosban v New York City Tr. Auth.*, 227 AD2d 160, 161 [1st Dept 1996]). A plaintiff need not be directly injured by a portion of the crane for the Labor Law to apply -- injuries that occur while trying to avoid being struck during a hoisting accident may qualify (*see Flores v Metropolitan Transp. Auth.*, 164 AD3d 418 [1st Dept 2018]; *Matter of 91st St. Crane Collapse Litig.*, 133 AD3d 478 [1st Dept 2015]). While plaintiff's testimony at his deposition varied somewhat from his 50-h testimony, he repeatedly cautioned that the accident happened so fast it was difficult for him to describe exactly how it occurred. In any event, no matter which version

is accepted, Labor Law § 240(1) applies to the MTA defendants and the City (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010]). In light of this finding, we need not address plaintiff's Labor Law § 241(6), § 200 or negligence claims against those defendants (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 11-12 [1st Dept 2011]). Hoffman and Hudson Yards were not owners, general contractors, or statutory agents, and therefore the Labor Law claims should be dismissed as to them.

Hoffman refurbished the subject crane one year before the accident and performed maintenance on it several times thereafter. Although a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third person (*see Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]), an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so as to have "launched a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002], quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]; *see also Church v Callanan Indus.*, 99 NY2d 104, 111-112 [2002]; *Castlepoint Ins. Co. v Moore*, 109 AD3d 718 [1st Dept 2013])). Hoffman failed to adequately address the findings of the independent crane company

that conducted the post-accident investigation, which concluded that several maintenance and repair issues contributed to over wear on the crane's wire ropes (*see Parker v Crown Equip. Corp.*, 39 AD3d 347 [1st Dept 2007]). Thus, Hoffman's argument that the third party complaint of the MTA defendants should be dismissed, is unpersuasive. While the motion court correctly dismissed plaintiff's Labor Law claims against Hoffman, as it is not a proper Labor Law defendant, it should not have dismissed plaintiff's common law claims against it.

The court correctly dismissed the claims seeking contractual indemnity against J&E, finding that the accident did not arise out of the work performed by J&E, which played no role in the crane's maintenance or operation (*compare Balbuena v New York Stock Exchange, Inc.*, 49 AD3d 374 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010]; *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268 [1st Dept 2007]). The facts that the load that would have been hoisted absent the collapse was J&E materials, and that plaintiff, a J&E employee, was one of the injured parties, are an insufficient basis to find that the accident was a consequence of, or connected to, J&E's work, particularly where hoisting was an activity specifically exempted from the contract between J&E and its prime contractor.

The City failed to raise a question of fact as to whether it was a proper Labor Law defendant. Hudson Yards, however, sufficiently rebutted plaintiff's prima facie showing that it was a proper Labor Law defendant (*see DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480 [1st Dept 2015]; *Hutchinson v City of New York*, 18 AD3d 370 [1st Dept 2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10019 BDC Finance LLC, Index 650375/08
Plaintiff-Appellant,

-against-

Barclays Bank PLC,
Defendant-Respondent.

_____

Joseph Hage Aaronson LLC, New York (Gregory P. Joseph of counsel), for appellant.

Sullivan & Cromwell LLP, New York (Jeffrey T. Scott of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 7, 2018, which after a nonjury trial, found that defendant (Barclays) is not liable to plaintiff (BDC) on the claim for breach of contract, unanimously affirmed, with costs.

BDC claims that Barclays was contractually required to transfer the "undisputed amount" of $5,080,000 to it by the close of business on October 7, 2008, and that Barclays' failure to make the full transfer of that amount on that day resulted in its being obligated to pay a $40 million collateral call in its entirety, which it did not do.

In a prior appeal in this case, this Court granted BDC's motion for summary judgment on its cause of action for breach of contract, finding as a matter of law, among other things, that

Barclays did not properly dispute the October 6, 2008 collateral call of $40 million because it neither notified BDC of the dispute nor transferred the "undisputed amount" of $5,080,000 by October 7, 2008, that Barclays' payment of $5 million on October 8 was a day late, and that, because Barclays did not pay the undisputed amount by the October 7 deadline, it lost any right it may have had to suspend the payment of the full $40 million (*see BDC Fin. L.L.C. v Barclays Bank PLC*, 110 AD3d 582 [1st Dept 2013], *mod* 25 NY3d 37 [2015]).

The Court of Appeals reversed the grant of summary judgment to BDC, on the grounds, as relevant here, that BDC did not deny that Barclays had given notice that it disputed the collateral call, and that material issues of fact existed as to whether Barclays complied with the undisputed amount provision. "A question of fact exists as to whether BDC received the full benefit of the amount it was owed when Barclays paid the $5 million and reduced the amount of its collateral call to BDC by the additional $80,000" (25 NY3d 37, 44 [2015]).

At the ensuing trial, Supreme Court found that BDC failed to prove by a preponderance of the evidence that it did not receive the full benefit of the contractual provision concerning the payment of the undisputed amount, and held that Barclays is not

liable to BDC for breach of contract.

A fair interpretation of the evidence supports the trial court's conclusion that, although it was due on October 7, 2008, Barclays' October 8, 2008 transfer to BDC of $5 million and its reduction of the amount of its collateral call by $80,000 substantially complied with its contractual obligation and provided BDC with the full benefit of the amount that was owed. BDC's arguments that the trial court should have strictly enforced the contractual provisions regarding the timing of the payment of the undisputed amount and should have found that Barclays engaged in equivocal and willful conduct that misled BDC as to whether it had given notice of a dispute and its intention to pay the undisputed amount, are foreclosed by the rulings of the Court of Appeals, which are law of the case (*see NAMA Holdings, LLC v Greenberg Traurig, LLP*, 92 AD3d 614 [1st Dept 2012]).

BDC's remaining challenges to the trial court's finding of no liability are unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10020 The People of the State of New York, Ind. 3035/17
Respondent,

-against-

Bulfrano Navarro,
Defendant-Appellant.

_____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered March 22, 2018,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10021 The People of the State of New York, Ind. 1537/14
Respondent,

-against-

Dwayne Ocasio,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

_____

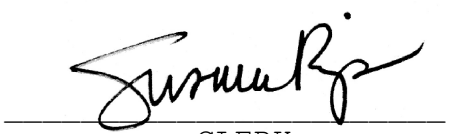
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered April 6, 2017,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019



CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10022 The People of the State of New York, Ind. 2123/13
Respondent,

-against-

Jason Tomczyk,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Arielle Reid of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered March 21, 2016, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 15 years, to be followed by 5 years of postrelease supervision, unanimously affirmed.

Defendant's request for a charge on the defense of temporary lawful possession of a firearm was correctly denied. For a defendant to be entitled to a temporary lawful possession charge, "there must be proof in the record showing a legal excuse for having the weapon in [the defendant's possession] as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner"

(*People v Williams*, 50 NY2d 1043, 1045 [1980]).

Here, although the jury apparently credited defendant's testimony that he took possession of the subject handgun in a struggle with an assailant, whom he shot in self-defense, there is no reasonable view of the trial evidence upon which the jury could have found that defendant's subsequent continued possession of the gun was innocent and lawful. In this regard, defendant testified that, after the shooting, he took the gun with him into a cab, into a store, and finally to his apartment, where he concealed it in a closet. During the six to eight hours the gun remained in his possession after the shooting, defendant made no effort to report it to the police, even when he saw police officers outside his apartment building and even when police officers and his parole officer arrived at his apartment in the course of their investigation of the shooting (*see People v Snyder*, 73 NY2d 900, 901-02 [1989] [where the defendants "made no effort to report the incident to the State Police, notwithstanding . . . that the police were at the scene when (they) returned there one-half hour later," the evidence was "utterly at odds with (their) claim of innocent possession temporarily and incidentally resulting from disarming a wrongful possessor]" [internal quotation marks and citations omitted]).

The court properly denied defendant's suppression motion. The record supports the hearing court's findings that the police lawfully arrested defendant on the threshold of his apartment (*see People v Garvin*, 30 NY3d 174, 181-82 [2017], *cert denied* __ US __, 139 S Ct 57 [2018]), and that, in any event, there were exigent circumstances that would justify a warrantless entry (*see e.g. People v Mealer*, 57 NY2d 214, 219 [1982], *cert denied* 460 US 1024 [1983]).

We perceive no grounds for reduction of the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10023-
10023A The People of the State of New York, Respondent,

Ind. 4813/13
1924/16

-against-

Anibel Quinones,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Steven R. Strother of counsel), for appellant.

_____

Judgments, Supreme Court, New York County (Laura A. Ward, J.), rendered January 3, 2017, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10024 The People of the State of New York, Ind. 791/16
Respondent,

-against-

Demetrius Gonzalez,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Victorien Wu of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J. at plea and sentence), rendered December 8, 2016, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10025 The People of the State of New York, Ind. 3777/13
Respondent,

-against-

Mulbah Keita,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Dana B. Wolfe of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered October 5, 2016, convicting defendant, after a jury trial, of attempted rape in the first degree, sexual abuse in the first degree (two counts) and attempted sexual abuse in the first degree, and sentencing him to an aggregate term of seven years, unanimously affirmed.

Defendant did not preserve any of his claims regarding allegedly duplicitous counts, and we decline to review them in the interest of justice.

The court properly denied defendant's suppression motion. We have reviewed a photograph of the lineup, and we agree with the hearing court that the age disparity between defendant and the fillers was not so noticeable as to single defendant out (*see*

People v Jackson, 98 NY2d 555, 559 [2002]). Defendant's other challenges to the lineup are unavailing.

Defendant did not preserve his claim that the court should have provided him with an interpreter, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Neither defendant nor any of the attorneys who represented him ever requested any interpreter, and defendant's trial testimony cast no doubt on his ability to communicate in English, albeit with a heavy accent (*see People v Ramos*, 26 NY2d 272 [1970]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10026N Errant Gene Therapeutics, LLC, Index 150856/17
Plaintiff-Respondent,

-against-

Sloan-Kettering Institute for
Cancer Research, et al.,
Defendants-Appellants.

_____

Holland & Knight LLP, New York (Charles A. Weiss of counsel), and Wilmer Cutler Pickering Hale and Dorr LLP, New York (Robert J. Gunther, Jr. of counsel), for Sloan-Kettering Institute for Cancer Research, appellant.

Schlam Stone & Dolan LLP, New York (John M. Lundlin of counsel), for Bluebird Bio Inc., appellant.

McCue Sussmane Zapfel & Cohen, P.C., New York (Kenneth Sussmane of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about June 6, 2019, which denied defendants' motion to strike plaintiff's jury demand, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff has waived its right to a jury trial. When, as here, the complaint either joins legal and equitable causes of action arising out of the same alleged wrong or seeks both legal and equitable relief, there is a waiver of a plaintiff's right to a jury trial (*see Marko v Korf*, 166 AD3d 545 [1st Dept 2018]; *Security Pac. Natl. Bank v Evans*, 148 AD3d 465 [1st Dept 2017];

Willis Re Inc. v Hudson, 29 AD3d 489 [1st Dept 2006]). Plaintiff's sixth cause of action for a permanent injunction sounds in equity, is not incidental to the remaining claims and as a result of its inclusion, it can no longer be said that money damages would afford a complete remedy (*see e.g. Willis Re Inc.*, 29 AD3d at 489-490). Furthermore, "[o]nce the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury" (*Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846-847 [1st Dept 1990]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10027N In re Elco Administrative Services, Index 20046/17E
Petitioner-Respondent,

-against-

Marlene Bones-Rojos, et al.,
Respondents,

MGA Insurance Company, Inc.,
Respondent-Appellant.

_____

Picciano & Scahill, P.C., Bethpage (Albert J. Galatan of counsel), for appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (Anne P. O'Brien of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered December 5, 2018, which granted petitioner' motion for a permanent stay of arbitration to the extent of temporarily staying arbitration so that a framed issue hearing could be held to determine whether the offending vehicle was uninsured or underinsured and whether respondent complied with her discovery obligations, and amended the caption to add Melissa Blackellar, Shawn Sewell, and MGA Insurance Company, Inc. (MGA) as respondents, unanimously modified, on the law, to temporarily stay arbitration pending a hearing on the issue of personal jurisdiction as to MGA before a hearing on the coverage issue,

and otherwise affirmed, without costs.

A hearing must be directed to determine whether there was personal jurisdiction over respondent insurer MGA (*see Matter of Preferred Mut. Ins. Co. [Fu Guan Chan]*, 267 AD2d 181, 182 [1st Dept 1999]). Issues were also raised by MGA as to whether service was proper.

A request to arbitrate an uninsured motorist claim may be stayed to establish the threshold issue of the insurance status of the alleged offending vehicle on the date of the accident (*see e.g. Matter of Hereford Ins. Co. v Vasquez*, 158 AD3d 470, 471 [1st Dept 2018]; *Matter of Public Serv. Mut. Ins. Co. [Binder]*, 121 AD2d 903 [1st Dept 1986]). Here, the term "STATUTORY," which appeared on the declaration page of the policy issued by MGA to the offending vehicle in connection with personal injury

coverage, raised issues as to compliance with New York's financial responsibility law, including uninsured motorist coverage.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

10061- Ind. 2144/13
10061A The People of the State of New York, 4154N/13
Respondent,

-against-

Koran Wilkins,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Karen Schlossberg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered March 20, 2014, as amended May 7 and May 12, 2014, convicting defendant, after a jury trial, of strangulation in the second degree, assault in the second degree (two counts), and assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 14 years, and judgment, same court (Charles H. Solomon, J.), rendered May 6, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a concurrent term of two years, unanimously affirmed.

Defendant's conviction of strangulation in the second degree

was supported by legally sufficient evidence, and the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that when defendant put the strangulation victim in a chokehold, which made her feel weak, drowsy, and woozy, he caused her to fall into a "stupor" (Penal Law § 121.12).

Defendant's legal insufficiency claims regarding his convictions of assault in the second degree are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We likewise find that the verdict was not against the weight of the evidence. We similarly accept the jury's credibility findings. Defendant's conviction of strangulation in the second degree provided the requisite underlying felony to support both counts of felony assault, and the evidence also established the elements, as applicable, of physical injury and immediate flight from a felony.

The court provided a meaningful response to a jury note when it defined "impairment" in connection with second-degree strangulation by reading a definition stated in a medical dictionary. The Penal Law does not define the word impairment,

and by reading from a dictionary, the court did not negate an element of the crime or conflate the offense with the misdemeanor crime of criminal obstruction of breathing or blood circulation.

The court's imposition of consecutive sentences on the two counts of assault in the second degree, which involved different victims, was proper. The felony assaults share the same underlying felony of second-degree strangulation and thus have overlapping elements, but defendant committed "separate and distinct acts" of injuring two victims, one during commission or attempted commission of the strangulation in the second degree, and the second when he punched another victim in flight from the earlier strangulation (*see People v Laureano*, 87 NY2d 640, 643 [1996]; *People v Truesdell*, 70 NY2d 809, 811 [1987]).

In light of our affirmance of the trial convictions, there is no basis upon which to vacate the plea conviction.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2019

CLERK