



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED
FEBRUARY 11, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE
HON. SALVATORE R. MARTOCHE
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. ELIZABETH W. PINE
HON. JEROME C. GORSKI, ASSOCIATE JUSTICES
PATRICIA L. MORGAN, CLERK

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

1141

KA 08-01980

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHEN C. ST. LAURENT, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (James W. McCarthy, J.), rendered August 27, 2007. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Oswego County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]). We agree with defendant that County Court erred in setting the expiration date of the order of protection without taking into account the jail-time credit to which he is entitled (*see People v Dixon*, 38 AD3d 1242; *People v Mingo*, 38 AD3d 1270). Although defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317), we exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify in the order of protection an expiration date in accordance with CPL 530.13 (former [4] [ii]), the version of the statute in effect when the judgment was rendered on August 27, 2007. As defendant correctly concedes, however, he failed to preserve for our review his contention that the court failed to state on the record sufficient reasons for issuing the order of protection (*see CPL 470.05 [2]*), and we decline to exercise our power to address his contention as a matter of discretion in the interest of justice (*see CPL 470.15*

[6] [a]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1225

CA 09-00612

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

CRYSTAL RUN NEWCO, LLC,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

UNITED PET SUPPLY, INC., DOING
BUSINESS AS THE PET COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), AND
JACQUELINE POOLE ZERILLI, NEW WINDSOR, FOR
DEFENDANT-APPELLANT-RESPONDENT.

YOUNG, SOMMER, LLC, ALBANY (J. MICHAEL NAUGHTON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered September 25, 2008. The order, among other things, denied that part of plaintiff's motion for summary judgment and denied that part of defendant's cross motion 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 on the first cause of action and as modified the order is affirmed without costs, and

It is further ORDERED that judgment be entered in favor of plaintiff and against defendant in the amount of \$20,472.35.

Memorandum: Plaintiff (hereafter, landlord) commenced this action to recover unpaid rent and accelerated rent pursuant to the terms of its commercial property lease with defendant (hereafter, tenant). The landlord thereafter moved, inter alia, for summary judgment on the complaint, and the tenant cross-moved for summary judgment, seeking a determination that the landlord wrongfully terminated the lease, and the tenant also sought leave to amend the answer to assert counterclaims. Supreme Court denied the landlord's motion and granted that part of the tenant's cross motion for leave to amend the answer.

We conclude that the court erred in denying that part of the landlord's motion for summary judgment on the first cause of action, seeking past due rent based on the tenant's breach of the lease. The

landlord met its initial burden by submitting evidence that the tenant failed to pay past due rent in the amount of \$20,472.35 during the time in which the tenant remained in possession of the premises. The tenant was "obligated to pay rent for as long as [it was] in possession of the premises inasmuch as it is well settled that the obligation of a commercial tenant to pay rent is not suspended if the tenant remains in possession of the leased premises" (*Matter of First Citizens Natl. Bank v Koronowski*, 46 AD3d 1474, 1475 [internal quotation marks omitted]). In opposition to that part of the landlord's motion, the tenant failed to present evidence establishing that it had paid the past due rent in question for the period in which the tenant remained in possession of the premises. The tenant's "general allegations" were insufficient to raise an issue of fact to defeat that part of the landlord's motion (*Towers Org. v Glockhurst Corp.*, 160 AD2d 597, 599). Thus, the landlord is entitled to summary judgment on the first cause of action. We therefore modify the order accordingly, and we direct that judgment be entered in favor of the landlord and against the tenant in the amount of \$20,472.35.

We reject the tenant's contention that the notice of default provided by the landlord was legally insufficient and thus that the tenant does not owe the past due rent in question. "Lease interpretation is subject to the same rules of construction as are applicable to other agreements" (*Matter of Cale Dev. Co. v Conciliation & Appeals Bd.*, 94 AD2d 229, 234, *affd* 61 NY2d 976). "A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). We thus conclude, based on the rules of construction applicable to leases, that the tenant failed to establish that the notice provided by the landlord was insufficient under the terms of the lease.

We further conclude, however, that there are issues of fact on the record before us whether the landlord also breached the lease prior to its termination and whether the acceleration clause in the lease is enforceable (*see Benderson v Poss*, 142 AD2d 937). Thus, the court properly determined that summary judgment in favor of either party was inappropriate with respect to those issues.

We reject the landlord's contention that the court abused its discretion in granting the tenant leave to amend its answer to assert counterclaims. "The decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959), and "the resulting determination will not lightly be set aside" (*Rose v Velletri*, 202 AD2d 566, 567 [internal quotation marks omitted]). "Although it would have been better practice for [the tenant] to have included the proposed amended [answer] with [its] cross motion" (*Walker v Pepsico, Inc.*, 248 AD2d 1015, 1015), we cannot say on the record before us that the court abused its discretion, particularly in view of the fact that there is

no indication that the proposed amendment was without merit or would prejudice the landlord.

Finally, there is no merit to the landlord's contention that the failure of the tenant to seek an injunction in accordance with *First Natl. Stores v Yellowstone Shopping Ctr.* (21 NY2d 630, rearg denied 22 NY2d 827) precludes the tenant from challenging the validity of the lease termination. Although the failure to seek an injunction prior to the termination of the lease removed the ability of the tenant to cure its default, that failure does not preclude the tenant from asserting a counterclaim against the landlord for breach of contract (see *La Lanterna, Inc. v Fareri Enters., Inc.*, 37 AD3d 420, 423-424).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1257

KA 06-03426

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MALCOLM T. RIDDICK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS 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 (Richard A. Keenan, J.), rendered August 17, 2006. 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 (two counts).

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, those parts of the motion seeking to suppress tangible property and statements are granted, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

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 [former (2)]) and two counts of criminal possession of a weapon in the third degree (§ 265.02 [3], [former (4)]), defendant contends that County Court erred in refusing to suppress the handgun that he discarded while being pursued by the police and his subsequent statements to the police because the police lacked reasonable suspicion to justify the pursuit. We agree.

At the suppression hearing, the People presented evidence that, on December 22, 2005, City of Rochester (City) police officers and federal law enforcement agents were patrolling various areas of the City known for gang activity as part of a law and order detail in an attempt to reduce gun violence and crime. The officers were traveling in an unmarked cargo van, which was followed by an unmarked SUV, but they were each wearing a vest with police markings on the front and back. Shortly after midnight, the officers observed defendant and two other men standing on a street corner in an area that, according to the police, was known for recent armed robberies and violent gang activity. The driver of the van pulled up just past the three

individuals, rolled down his window, and told them to leave the area. According to one of the passengers in the van, defendant reached for his waistband and walked away from his companions. At some point thereafter, defendant began to run. The police pursued defendant on foot and discovered a discarded handgun during their subsequent search of the path taken by defendant.

As an initial matter, we conclude that the police had an objective credible reason to approach the three men on the street corner and to request information in light of the late hour, the cold weather, the absence of other pedestrian or automobile traffic, and the presence of the men in a high crime area (see generally *People v McCoy*, 46 AD3d 1348, lv denied 10 NY3d 813). Thus, we conclude that the police encounter was lawful at its inception (see *People v De Bour*, 40 NY2d 210, 220).

With respect to the subsequent pursuit, it is well settled that "the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime" (*People v Martinez*, 80 NY2d 444, 446). Flight alone "is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry" (*People v Holmes*, 81 NY2d 1056, 1058; see *People v Ross*, 251 AD2d 1020, 1021, lv denied 92 NY2d 882). However, " 'a defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit' " (*People v Martinez*, 59 AD3d 1071, 1072, lv denied 12 NY3d 856 [emphasis added], quoting *People v Sierra*, 83 NY2d 928, 929; see *People v Davis*, 48 AD3d 1120, 1121-1122, lv denied 10 NY3d 957).

It is further well settled that actions that are "at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality" (*People v Powell*, 246 AD2d 366, 369, appeal dismissed 92 NY2d 886; see *De Bour*, 40 NY2d at 216). Here, the fact that defendant reached for his waistband, absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion that defendant had committed or was about to commit a crime (see *Sierra*, 83 NY2d at 930; *Powell*, 246 AD2d at 369; *People v Howard*, 147 AD2d 177, 178-181, appeal dismissed 74 NY2d 943; cf. *People v Forbes*, 283 AD2d 92, 93-94, lv denied 97 NY2d 681). The mere fact that defendant was located in an alleged high crime area does not supply that requisite reasonable suspicion, in the absence of "other objective indicia of criminality" (*Powell*, 246 AD2d at 370; see *People v Cornelius*, 113 AD2d 666, 670), and no such evidence was presented at the suppression hearing. Thus, although the police had a valid basis for the initial encounter, we conclude that "there was nothing that made permissible any greater level of intrusion" (*People v Howard*, 50 NY2d 583, 590, cert denied 449 US 1023).

We further agree with defendant that the evidence presented at

the suppression hearing was insufficient to establish that defendant knew that the individuals who approached him in the unmarked vehicles were police officers. We note at the outset that, contrary to the dissent, we conclude that defendant preserved his contention for our review. Defendant moved, *inter alia*, to suppress tangible property and his statements to the police on the ground that he was subjected to an unlawful stop and arrest, and thus his contention with respect to the legality of the police conduct is preserved for our review (see *People v De Bour*, 40 NY2d 210, 214). "The mere emphasis of one prong of attack over another or a shift in theory on appeal[] will not constitute a failure to preserve" (*id.* at 215). Furthermore, although the dissent concludes that the record is not sufficiently developed to enable us to review the merits of defendant's contention on appeal, we note that at a suppression hearing the People have the initial burden of establishing the legality of the police conduct (see *People v Wise*, 46 NY2d 321, 329; *People v Baldwin*, 25 NY2d 66, 70-71).

Turning to the merits of defendant's contention, we conclude that, although the officers were wearing vests with police markings, no evidence was presented to establish that the markings were visible when the driver of the van pulled up just past the three individuals and rolled down his window. Indeed, according to the evidence presented, it was dark outside and the driver of the van was seated therein when he addressed the individuals. Notably, the driver of the van, who was in the best position to testify concerning the visibility of the police markings on his clothing and whether defendant appeared to recognize him as a police officer, did not testify at the suppression hearing. The testimony of a passenger in the van that the individuals "learned we were the police" when the driver rolled down his window is mere speculation and thus is insufficient to establish that the driver was identifiable as a police officer at that time. In the absence of any evidence indicating that the police officers were clearly identifiable as such (*cf. Martinez*, 80 NY2d at 446; *People v Brewer*, 28 AD3d 265, *lv denied* 7 NY3d 753; *People v Hernandez*, 3 AD3d 325, *lv denied* 2 NY3d 741), or that defendant recognized the officers as such (*cf. People v Pines*, 281 AD2d 311, 311-312, *affd* 99 NY2d 525; *People v Byrd*, 304 AD2d 490, *lv denied* 100 NY2d 579; *People v Brown*, 277 AD2d 107, 108, *lv denied* 96 NY2d 756), it cannot be said that the officers were justified in pursuing defendant based on his alleged "flight" from the police (*cf. Martinez*, 59 AD3d at 1072).

Inasmuch as the police officers' pursuit of defendant was unlawful, the handgun seized by the police should have been suppressed (see *People v Brogdon*, 8 AD3d 290, 292), and the statements made by defendant to the police following the unlawful seizure also should have been suppressed as fruit of the poisonous tree (see *People v Christianson*, 57 AD3d 1385, 1388). In light of our conclusion that the court should have granted those parts of defendant's omnibus motion seeking to suppress tangible property obtained as a result of the illegal pursuit and defendant's subsequent statements to the police, defendant's guilty plea must be vacated (see *People v Stock*, 57 AD3d 1424). Further, because our conclusion results in the

suppression of all evidence in support of the crimes charged, the indictment must be dismissed (*see id.*). We therefore remit the matter to County Court for proceedings pursuant to CPL 470.45.

All concur except CENTRA, J.P., and FAHEY, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the judgment. Initially, we conclude that defendant failed to preserve for our review his contention that the police did not have a legal basis to pursue him because he did not flee from individuals whom he knew to be police officers (*see* CPL 470.05 [2]). Defendant moved, *inter alia*, to suppress the handgun and his statements to the police "on the ground that such . . . evidence and statements are the unattenuated result of an unlawful arrest or seizure of the defendant's person." In his affirmation in support of the motion, defense counsel did not allege that defendant was unaware that he was fleeing from the police. Further, there is no indication based on defendant's cross-examination of the police officers at the suppression hearing that defendant was contending that he was unaware that the individuals in the van that approached him were police officers. In addition, at the close of the suppression hearing, defendant submitted a memorandum of law in support of his motion but did not contend therein that there was insufficient evidence to demonstrate that he knew that he was fleeing from police officers. Based on the above, it cannot be said that defendant preserved his present contention for our review (*see People v Turriago*, 90 NY2d 77, 83-84, *rearg denied* 90 NY2d 936; *People v Carter*, 86 NY2d 721, 722, *rearg denied* 86 NY2d 839; *People v Martin*, 50 NY2d 1029, 1030-1031; *see also People v Johnson*, 83 NY2d 831, 834). The Court of Appeals' decision in *People v De Bour* (40 NY2d 210) does not compel a different result. Although in that case the Court held that "[t]he mere emphasis of one prong of attack over another or a shift in theory on appeal, will not constitute a failure to preserve" (*id.* at 215), there was sufficient evidence in *De Bour* to permit the Court to address the merits of the defendant's contention on appeal (*see id.* at 214-215). Here, however, the record is not sufficiently developed to enable us to review the merits of defendant's contention on appeal (*see People v Jones*, 81 AD2d 22, 38-39).

Nevertheless, inasmuch as the majority has reviewed the merits of defendant's contention, we do so as well, to the extent that the record allows. We cannot agree with the majority that County Court erred in denying those parts of defendant's omnibus motion seeking to suppress tangible property and defendant's statements to the police. The record establishes that, shortly after midnight in late December 2005 police officers traveling in an unmarked van approached defendant and two other men who were standing on a street corner in an area known for recent armed robberies and violent gang activity. The temperature outside at the time was 15 degrees, and the officers were each dressed in a "battle dress uniform," which consisted of an ammunition belt, handcuffs, flashlights and, most importantly, a dark vest with markings in large yellow letters on the front and back stating, "Police, ATF Agent." There was no other pedestrian or automobile traffic, and the officer who was driving the van stopped

that vehicle near the street corner in question and rolled down his window to speak to the group. According to the officer who was seated behind the driver, the officer driving the van was visible to defendant at that time. The officer driving the van spoke with the group for approximately five seconds before defendant reached for his waistband and began to walk away. At that point, an officer seated on the passenger's side of the van yelled to alert the other officers, including those following the van in an unmarked SUV, that defendant was reaching for his waistband. The officers pursued defendant on foot and eventually apprehended him. One of the officers subsequently retraced the path of defendant by following his footprints in the snow and recovered a handgun in an alley.

"It is well settled that 'a defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit' " (*People v Martinez*, 59 AD3d 1071, 1072, *lv denied* 12 NY3d 856, quoting *People v Sierra*, 83 NY2d 928, 929). First, contrary to the majority's conclusion, the record establishes that defendant knew that the men in the van were police officers and that he fled in response to their approach. The police officers testified at the suppression hearing that they were wearing vests identifying themselves as such when they approached defendant in the unmarked van. We conclude that the reasonable inferences to be drawn from their testimony support the conclusion that defendant was aware that they were police officers (*see People v Randolph*, 278 AD2d 52, *lv denied* 96 NY2d 762).

Second, we disagree with the majority that the police were not justified in pursuing defendant. In determining whether reasonable suspicion exists, " 'the emphasis should not be narrowly focused on . . . any . . . single factor, but on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer' " (*People v Stephens*, 47 AD3d 586, 590, *lv denied* 10 NY3d 940). Here, defendant was standing outside late at night in the cold, in an area known for significant criminal activity, and he reached for his waistband before fleeing. Based on those circumstances, and particularly in light of the fact that "[i]t is quite apparent to an experienced police officer . . . that a handgun is often carried in the waistband" (*People v Benjamin*, 51 NY2d 267, 271; *see People v Zeigler*, 61 AD3d 1398), we cannot agree with the majority that the court erred in refusing to suppress the handgun and defendant's statements to the police (*see People v Pines*, 99 NY2d 525, 526-527).

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

1284

CAF 08-01934

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

IN THE MATTER OF MARY LOUISE COAN,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS N. THOMPSON, RESPONDENT-APPELLANT.

BARNEY & AFFRONTI, LLP, ROCHESTER (BRIAN J. BARNEY OF COUNSEL), FOR
RESPONDENT-APPELLANT.

SIEGEL, KELLEHER & KAHN, LLP, BUFFALO (STEVEN G. WISEMAN OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Marilyn L. O'Connor, J.), entered December 26, 2007 in a proceeding pursuant to Family Court Act article 4. The order, among other things, determined respondent's monthly child support obligation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing in the seventh ordering paragraph that respondent's child support obligation is \$10,000 per month until June 18, 2006 and by vacating the amount of retroactive child support awarded in the eighth ordering paragraph and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following Memorandum: Respondent father appeals from an order directing him to pay monthly child support in the amount of \$13,526.06. The Support Magistrate had ordered that the father's child support obligation was \$8,126 per month, taking into consideration the fact that the father had paid approximately \$17,000 in college tuition for the oldest child and had made other voluntary payments. Family Court determined, however, that the Support Magistrate abused her discretion in offsetting the father's child support obligation based on the college tuition and other voluntary payments that he made. The court noted that the parties had established accounts for the children's college expenses and thus ordered that the children's college expenses were to be paid from those accounts until they were depleted, at which time the parties were to contribute the college expenses on a pro rata basis.

We conclude that the court abused its discretion in calculating the father's child support obligation based on the presumptive amount. The court did not provide any "record articulation" to support its determination that the presumptive amount was necessary to provide for

the expenses and the standard of living previously enjoyed by the family (*Matter of Cassano v Cassano*, 85 NY2d 649, 655). Petitioner mother testified at the fact-finding hearing that the household expenses were \$15,000 per month, and the Support Magistrate attributed only \$10,000 per month as expenses for the children. The Support Magistrate's findings are entitled to great deference, and we conclude that the Support Magistrate's calculation of the children's expenses is supported by the record (see generally *Matter of Luther v Luther*, 35 AD3d 473). We further note that two of the children are now over the age of 21 (see Family Ct Act § 413 [1] [a]). We therefore modify the order by providing in the seventh ordering paragraph that the father's child support obligation is \$10,000 per month until June 18, 2006, the date on which the oldest child reached the age of 21, and by vacating the amount of retroactive child support awarded in the eighth ordering paragraph. We remit the matter to Family Court to determine following a further hearing, if necessary, the father's child support obligation beginning June 18, 2006 and the amount of retroactive child support for the period of November 17, 2003 through February 28, 2005.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1285

CA 08-00464

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

EVELYN D. OLIVER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BENJAMIN F. OLIVER, DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (KATHRYN B. FRIEDMAN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

THE WILLIAMS LAW FIRM, LLP, BATAVIA (THOMAS DRAKE WILLIAMS OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Genesee County
(Robert C. Noonan, A.J.), entered June 22, 2007 in a divorce action.
The judgment, among other things, distributed the marital assets.

It is hereby ORDERED that the judgment so appealed from is
unanimously modified on the law by providing in the third decretal
paragraph that the proceeds from the liquidation of the parties' real
property shall be applied equally to the credit card/vendor debt and
the educational debt and that the parties shall be jointly responsible
for the educational debt, by providing in the fifth decretal paragraph
that the balance of the mortgage payments due to the parties on the
former marital property shall be divided equally between the parties,
and by providing in the sixth decretal paragraph that maintenance
shall terminate on plaintiff's 62nd birthday and as modified the
judgment is affirmed without costs.

Memorandum: In this action seeking a divorce and ancillary
relief, defendant husband appeals from a judgment that, inter alia,
distributed the marital assets and awarded maintenance to plaintiff
wife. It is well settled that " '[e]quitable distribution presents
issues of fact to be resolved by the trial court, and its judgment
should be upheld absent an abuse of discretion' " (*Prasinos v*
Prasinos, 283 AD2d 913, 913; see *Booth v Booth*, 24 AD3d 1238). We
agree with defendant that Supreme Court abused its discretion in
awarding plaintiff all of the mortgage payments owed to the parties by
the purchasers of property that the parties sold during their
marriage. The evidence in the record, including the testimony of both
parties, establishes that they jointly owned the property, that they
both contributed to its maintenance and operation, and that they both
agreed to take the mortgage as part of the purchase price of the
property. Consequently, the balance of the mortgage payments due
shall be divided equally between the parties. We therefore modify the

judgment accordingly. It is also well settled that trial courts "are granted substantial discretion in determining what distribution of marital property [- including debt -] will be equitable under all the circumstances" (*McKeever v McKeever*, 8 AD3d 702, 702 [internal quotation marks omitted]). Here, however, it is undisputed that the parties agreed that they each would contribute to their children's education, and they arranged to do so by having plaintiff use her credit cards to support the children in college, while defendant cosigned for the children's student loans and made the payments on those loans. We thus conclude that the court abused its discretion in directing that the proceeds from the liquidation of the parties' real property be applied first to the credit card/vendor debt and then to the educational debt, with any remaining educational debt to be paid solely by defendant. We therefore further modify the judgment accordingly.

We reject the remainder of defendant's contentions concerning the equitable distribution of the marital assets and debts. Defendant is correct that a court's distribution of marital assets may be an abuse of discretion in the event that a court directs that marital assets are to be used to pay debt that was incurred for personal purposes unrelated to the marriage (see *Godfryd v Godfryd*, 201 AD2d 927, 928; see also *McKeever*, 8 AD3d at 703; *Jonas v Jonas*, 241 AD2d 839, 840), and that, here, the court agreed with defendant that plaintiff engaged in "economic misconduct or malfeasance." The court further determined, however, that defendant also engaged in such conduct and balanced defendant's conduct against that of plaintiff. Inasmuch as defendant does not address that part of the court's determination with respect to his own conduct, we see no basis upon which to disturb the court's conclusion that the credit card debt should be paid using marital assets.

Contrary to defendant's further contention, the court properly set forth the factors it considered in determining the amount and duration of the maintenance award (see *McBride-Head v Head*, 23 AD3d 1010, 1011; *Kelly v Kelly*, 19 AD3d 1104, 1106, appeal dismissed 5 NY3d 847, 6 NY3d 803). "Moreover, the court did not abuse its discretion in awarding maintenance to plaintiff in the amount and duration specified" (*Saylor v Saylor*, 32 AD3d 1358, 1359). We note, however, that the court specified in its decision that maintenance shall terminate upon the 62nd birthday of plaintiff, whereas the judgment specifies that maintenance shall terminate upon her 67th birthday. Where, as here, there is a conflict between the court's decision and judgment, the decision controls (see *Pauk v Pauk*, 232 AD2d 386, 390-391, lv dismissed 89 NY2d 982; *Green v Morris*, 156 AD2d 331, 331-332, lv denied 75 NY2d 705, rearg denied 75 NY2d 1005; see generally *Matter of Christina M.*, 247 AD2d 867, lv denied 91 NY2d 812; *Di Prospero v Ford Motor Co.*, 105 AD2d 479, 480). We therefore further modify the judgment accordingly.

Finally, plaintiff did not take a cross appeal from the judgment and thus is precluded from obtaining the affirmative relief that she seeks (see *Millard v Alliance Laundry Sys., LLC*, 28 AD3d 1145, 1148;

see generally Hecht v City of New York, 60 NY2d 57, 61).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1390

CA 09-01066

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

LEHIGH CONSTRUCTION GROUP, INC.,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

LEXINGTON INSURANCE COMPANY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, BUFFALO (TONI L. FRAIN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (RENATA KOWALCZUK OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered November 20, 2008 in a declaratory judgment action. The order, insofar as appealed from, denied the motion of defendant Lexington Insurance Company for a declaration that it is not obligated to defend or indemnify plaintiff in the underlying action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted and judgment is granted in favor of defendant Lexington Insurance Company as follows:

It is ADJUDGED and DECLARED that defendant Lexington Insurance Company is not obligated to defend or indemnify plaintiff in the underlying action.

Memorandum: Defendant John R. Sherk was injured in January 2004 when he fell from a height during the course of performing construction work on a church owned by the remaining defendants, with the exception of defendant Lexington Insurance Company (Lexington). Sherk's employer had been hired by plaintiff to perform construction and renovation services on the church. In January 2007, Sherk commenced a Labor Law and common-law negligence action (hereafter, underlying action) seeking damages for the injuries he sustained when he fell in January 2004. Plaintiff was served with Sherk's summons and complaint by the Secretary of State on January 12, 2007 and received notice of such service by mail on February 23, 2007. Plaintiff was named as a defendant in the underlying action as an additional insured under a commercial general liability policy issued to plaintiff's employer by Lexington. Pursuant to the terms of that

policy, plaintiff was required to notify Lexington of an occurrence or any claim made or suit brought against any insured "as soon as practicable." It is undisputed that plaintiff did not notify Lexington of the underlying action until April 17, 2007, which was the first notice to Lexington of both the occurrence and the claim. Plaintiff did not transmit a copy of the complaint to Lexington until May 8, 2007.

By letter dated May 15, 2007, Lexington notified plaintiff that it would not defend or indemnify plaintiff in the underlying action based upon the failure of plaintiff to provide notice of its receipt of the complaint as soon as practicable. Lexington stated in a letter to plaintiff dated June 8, 2007 that Lexington had discovered that plaintiff provided notice of the occurrence to its excess carrier on January 16, 2007, "which further supports that notice to Lexington . . . three months later was indeed late." Plaintiff thereafter commenced this action seeking a declaration that Lexington is obligated to defend and indemnify it in the underlying action. Lexington served an answer to the complaint and moved, in essence, for a declaration that it is not obligated to defend or indemnify plaintiff in the underlying action on the ground that the "three-month delay is unreasonable as a matter of law." Supreme Court denied the motion based on its determination that there are issues of fact whether plaintiff's notice was timely. We reverse the order insofar as appealed from.

In opposing the motion, plaintiff contended that its delay was based upon a reasonable belief in nonliability because it was only a "pass through" defendant with respect to the underlying action. Although a good faith belief in nonliability may excuse a failure to provide timely notice of an occurrence (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743), here there was a failure to provide timely notice of the actual commencement of the underlying action. We thus conclude under these circumstances that, as a matter of law, plaintiff's assumption that other parties would bear the ultimate responsibility for Sherk's injuries is an insufficient excuse for failing to provide Lexington with timely notice of the fact that the underlying action had been commenced (*see Philadelphia Indem. Ins. Co. v Genesee Val. Improvement Corp.*, 41 AD3d 44, 47).

Finally, there is no merit to plaintiff's further contention that Lexington's disclaimer was untimely. Lexington conducted its investigation of the matter and issued its disclaimer within four weeks of its first notice of Sherk's accident and the underlying action. We thus conclude under these circumstances that Lexington's disclaimer was timely as a matter of law (*see Severson Env'tl. Servs., Inc. v Sirius Am. Ins. Co.*, 64 AD3d 1234, 1235).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1391

CA 08-01424

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

STEFANY V. LEWIS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN F. LEWIS, DEFENDANT-APPELLANT.

ABBIE GOLDBAS, UTICA, FOR DEFENDANT-APPELLANT.

STEFANY V. LEWIS, PLAINTIFF-RESPONDENT PRO SE.

PETER J. DIGIORGIO, JR., LAW GUARDIAN, UTICA, FOR MATTHEW L. AND RACHEL L.

Appeal from a judgment of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered April 30, 2008 in a divorce action. The judgment, inter alia, awarded maintenance to plaintiff.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating the 8th through 21st and 34th decretal paragraphs and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment of divorce that, inter alia, directed him to pay to plaintiff the sum of \$750 per month as maintenance for a period of 10 years and granted plaintiff's request for attorney's fees in the sum of \$6,500. At the outset, we agree with defendant that Supreme Court erred in failing to set forth the reasons for its determination to award maintenance to plaintiff (*see Hartnett v Hartnett*, 281 AD2d 900, 901). Consequently, "intelligent review of the amount and duration of the maintenance award . . . is not possible" (*id.*; *see Otto v Otto*, 150 AD2d 57, 61). We therefore modify the judgment accordingly, and we remit the matter to Supreme Court for a new determination with respect to maintenance and to set forth the reasons for its determination.

We reject defendant's contention that the court erred in incorporating the oral stipulation of the parties with respect to child custody into the judgment. In support of his contention, defendant relies upon Domestic Relations Law § 236 (B) (3), pursuant to which an agreement by the parties in a divorce action is enforceable if the agreement is, inter alia, in writing and subscribed by the parties (*see generally* CPLR 2104). "That reliance is misplaced, however, because '[t]he requirements of Domestic Relations Law § 236 (B) (3) pertain to stipulations [that affect] the equitable

distribution of marital property' " (*Kelly v Kelly*, 19 AD3d 1104, 1106, *appeal dismissed* 5 NY3d 847, 6 NY3d 803; *see Charland v Charland*, 267 AD2d 698, 699). We agree with defendant, however, that the oral stipulation concerning the distribution of certain items of personal property was improperly incorporated into the judgment. That stipulation was transcribed into the record but was not reduced to writing, subscribed by the parties or acknowledged, as required by Domestic Relations Law § 236 (B) (3). We therefore further modify the judgment accordingly, and we direct Supreme Court upon remittal to make a new determination with respect to the distribution of the items of personal property distributed in the 8th through 21st decretal paragraphs following a further hearing, if necessary (*see generally James v James*, 202 AD2d 1006).

We reject defendant's further contention that the court abused its discretion in granting plaintiff's request for attorney's fees. Plaintiff presented the invoices for her attorney's fees, and the evidence presented by the parties concerning their respective financial conditions supports the award of attorney's fees to plaintiff (*see McBride-Head v Head*, 23 AD3d 1010).

Finally, defendant contends that he was denied effective assistance of counsel. In the context of civil litigation, however, such a contention will not be considered absent extraordinary circumstances, and such circumstances are not present here (*see Matter of Hares v Walker*, 8 AD3d 1019, 1020).

All concur except CARNI, J., who dissents in part in accordance with the following Memorandum: I respectfully dissent in part. I cannot agree with the majority that the requirements of Domestic Relations Law § 236 (B) (3) pertain only to stipulations that affect the equitable distribution of marital property. In my view, the oral stipulation with respect to custody of the parties' children was invalid because it failed to comply with the requirements of section 236 (B) (3). That section expressly includes agreements that provide "for the custody, care, education and maintenance of any child[ren] of the parties" Further, the Court of Appeals stated in *Matisoff v Dobi* (90 NY2d 127, 132) that section 236 (B) (3) "authorizes spouses or prospective spouses to contract out of the elaborate statutory system and provide for matters such as inheritance, distribution or division of property, spousal support, and *child custody and care* in the event that the marriage ends" (emphasis added).

I therefore would further modify the judgment by vacating the 2nd through 7th decretal paragraphs, and I would further direct Supreme Court upon remittal to make a new determination with respect to custody following a further hearing, if necessary.

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

1393

CA 09-00040

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

KELLY VANDEWATER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CANANDAIGUA NATIONAL BANK, DEFENDANT-RESPONDENT.

CHRISTINA A. AGOLA, ATTORNEYS & COUNSELORS AT LAW, PLLC, ROCHESTER
(CHRISTINA A. AGOLA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER, LLP, ROCHESTER (ELIZABETH A. CORDELLO OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County
(Frederick G. Reed, J.), entered March 6, 2008 in an action pursuant
to Executive Law § 290. The order granted in part defendant's motion
for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by denying that part of the motion for
summary judgment dismissing the complaint insofar as the complaint
alleges retaliatory discharge under the opposition clause of Executive
Law § 296 (1) (e) and reinstating the complaint to that extent and as
modified the order is affirmed without costs.

Memorandum: Plaintiff contends, inter alia, that Supreme Court
erred in granting that part of defendant's motion for summary judgment
dismissing the complaint insofar as it alleges retaliatory discharge
under the opposition clause of section 296 (1) (e) of the Executive
Law (hereafter, Human Rights Law). According to plaintiff, she
complained to supervisory personnel that her direct supervisor created
a hostile work environment by making various sexual comments in her
presence and that she was terminated from her position because she
opposed that conduct by informing defendant of the comments made by
her supervisor. Defendant moved for summary judgment dismissing the
retaliatory discharge claim, contending that plaintiff had never
complained of sexual harassment and was terminated because of her
inadequate performance.

Pursuant to Executive Law § 296 (1) (e), an employer may not
discharge an employee because he or she "has opposed any practices
forbidden [under Executive Law article 15] or because he or she has
filed a complaint, testified or assisted in any proceeding [under
Executive Law article 15]" (see also 42 USC § 2000 e-3 [a]). It is
well settled that the federal standards under title VII of the Civil

Rights Act of 1964 are applied to determine whether recovery is warranted under the Human Rights Law (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3). Thus, the three-step analysis employed to determine the existence of retaliation is whether there has been (1) participation by the plaintiff "in a protected activity known to [the] defendant; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action" (*id.* at 328).

Here, the record establishes a prima facie case of retaliation under the opposition clause of the statute, i.e., defendant discharged plaintiff because she complained to supervisory personnel that her direct supervisor created a hostile work environment by making sexual comments in her presence (see *Deravin v Kerik*, 335 F3d 195, 203 n 6). We note that, although the participation clause of the statute for retaliatory discharge does not apply to an internal sexual harassment investigation (see *id.* at 204-205; see also *Abbott v Crown Motor Co.*, 348 F3d 537, 543), here plaintiff has a potential claim for retaliatory discharge under the opposition clause of the statute, based on her allegation that she complained to supervisory personnel concerning the alleged sexual harassment by her direct supervisor. We further conclude that plaintiff's allegations were not merely "conclusory" such that they would be insufficient to defeat that part of defendant's motion with respect to retaliatory discharge (*Schwapp v Town of Avon*, 118 F3d 106, 110).

We conclude on the record before us that, although defendant established a non-discriminatory reason for plaintiff's termination (see generally *Vitale v Rosina Food Prods.*, 283 AD2d 141, 144), there nevertheless remains an issue of fact whether defendant's proffered reasons for plaintiff's termination were pretextual. We thus conclude with respect to plaintiff's claim under the opposition clause of the statute that there is an issue of fact whether there was a causal connection between "plaintiff's protected activity and the adverse employment action" of termination (*Forrest*, 3 NY3d at 328). We therefore modify the order accordingly.

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

1420

CA 09-00303

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

IN THE MATTER OF JOHN M. IRWIN,
PETITIONER-APPELLANT,

V

ORDER

ONONDAGA COUNTY RESOURCE RECOVERY AGENCY,
A.T. (TOM) RHOADS, EXECUTIVE DIRECTOR, ONONDAGA
COUNTY RESOURCE RECOVERY AGENCY, ANDY BRIGHAM,
RECORDS ACCESS OFFICER, ONONDAGA COUNTY RESOURCE
RECOVERY AGENCY, AND WILLIAM J. BULSIEWICZ,
AGENCY COUNSEL, ONONDAGA COUNTY RESOURCE
RECOVERY AGENCY, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

STEVEN S. LANDIS, P.C., NEW YORK CITY (STEVEN S. LANDIS OF COUNSEL),
FOR PETITIONER-APPELLANT.

WILLIAM J. BULSIEWICZ, NORTH SYRACUSE, RESPONDENT-RESPONDENT PRO SE,
AND FOR ONONDAGA COUNTY RESOURCE RECOVERY AGENCY, A.T. (TOM) RHOADS,
EXECUTIVE DIRECTOR, ONONDAGA COUNTY RESOURCE RECOVERY AGENCY, AND ANDY
BRIGHAM, RECORDS ACCESS OFFICER, ONONDAGA COUNTY RESOURCE RECOVERY
AGENCY, RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court,
Onondaga County (Donald A. Greenwood, J.), entered August 19, 2008 in
a proceeding pursuant to CPLR article 78. The judgment, insofar as
appealed from, denied in part the petition.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1421

CA 09-00305

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

IN THE MATTER OF JOHN M. IRWIN,
PETITIONER-APPELLANT,

V

OPINION AND ORDER

ONONDAGA COUNTY RESOURCE RECOVERY AGENCY,
A.T. (TOM) RHOADS, EXECUTIVE DIRECTOR, ONONDAGA
COUNTY RESOURCE RECOVERY AGENCY, ANDY BRIGHAM,
RECORDS ACCESS OFFICER, ONONDAGA COUNTY RESOURCE
RECOVERY AGENCY, AND WILLIAM J. BULSIEWICZ,
AGENCY COUNSEL, ONONDAGA COUNTY RESOURCE
RECOVERY AGENCY, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

STEVEN S. LANDIS, P.C., NEW YORK CITY (STEVEN S. LANDIS OF COUNSEL),
FOR PETITIONER-APPELLANT.

WILLIAM J. BULSIEWICZ, NORTH SYRACUSE, RESPONDENT-RESPONDENT PRO SE,
AND FOR ONONDAGA COUNTY RESOURCE RECOVERY AGENCY, A.T. (TOM) RHOADS,
EXECUTIVE DIRECTOR, ONONDAGA COUNTY RESOURCE RECOVERY AGENCY, AND ANDY
BRIGHAM, RECORDS ACCESS OFFICER, ONONDAGA COUNTY RESOURCE RECOVERY
AGENCY, RESPONDENTS-RESPONDENTS.

Appeal from an amended judgment (denominated amended order) of
the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered
September 8, 2008 in a proceeding pursuant to CPLR article 78. The
amended judgment, insofar as appealed from, denied in part the
petition.

It is hereby ORDERED that the amended judgment so appealed from
is modified on the law by granting those parts of the petition seeking
to compel disclosure of unpublished photographs in the possession of
respondent Onondaga County Resource Recovery Agency with the exception
of unpublished photographs depicting individuals other than petitioner
or relating to active or ongoing law enforcement investigations and
seeking to compel disclosure of the system metadata associated with
those photographs that have been disclosed or are subject to
disclosure and as modified the amended judgment is affirmed without
costs, and respondent Executive Director of Onondaga County Resource
Recovery Agency is directed to provide to petitioner forthwith those
photographs that are subject to disclosure and the system metadata
associated with those photographs that have been disclosed or are
subject to disclosure.

Opinion by FAHEY, J.: The primary issue before us on this appeal is whether Supreme Court erred in denying petitioner's request pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) seeking, inter alia, to compel disclosure of all of the electronically stored photographs in the possession of respondent Onondaga County Resource Recovery Agency (OCRRA) that were available for use in any OCRRA publication, with the exception of those photographs depicting only OCRRA staff, and any "associated metadata" with respect to those photographs. We will provide an extensive definition of the term metadata later in this opinion.

We conclude that the court erred in denying the FOIL request with respect to the unpublished photographs in the possession of OCRRA with the exception of unpublished photographs depicting individuals other than petitioner or relating to active or ongoing law enforcement investigations. We also conclude that the court should have ordered OCRRA to disclose the "system" metadata associated with the photographs that OCRRA has already disclosed to petitioner, as well as the photographs that we have deemed subject to disclosure under FOIL. We thus conclude that the amended judgment should be modified accordingly.

I

On November 28, 2007, OCRRA, a public agency that handles solid waste and recycling for Onondaga County, sent an e-mail to individuals who subscribed to a "news-blasts" list that OCRRA used to publicize its activities. The e-mail contained a newsletter advising subscribers that the compost "season" at two of OCRRA's compost sites would be extended through December 1, 2007, and it was opened by 1,800 of the 2,607 subscribers on the "news-blasts" list. Featured on the newsletter was an image of petitioner engaged in what was, by all accounts, the process of emptying leaves from a bag at an OCRRA compost site. OCRRA's former Public Information Officer (PIO) stated that petitioner actually posed for that photograph, which was taken in the fall of 2005, and gave OCRRA his name at that time. Petitioner was not identified by name in the e-mail.

According to the PIO, on December 12, 2007, petitioner "demanded two free annual compost site access passes in exchange for the use of his picture" and "indicated that the 'problem [would] go away' if OCRRA provided him with free compost site passes for 2008 and 2009." In a subsequent letter to the PIO, petitioner acknowledged having suggested "that a [complimentary] compost pass would be an appropriate [quid pro quo] for the use of [his photograph], without prior notification or authorization, to advertise [OCRRA's] compost site," but he disagreed with the PIO's characterization of the discussions between the PIO and petitioner concerning the subject compost passes. An OCRRA "Compost Season Pass Order & Authorization Form" signed by petitioner indicated that OCRRA sold season passes for \$10.

II

Given its reluctance to begin a practice of paying for the use of images in its newsletter and other educational publications, OCRRA refused to provide petitioner with any complimentary compost passes. On December 17, 2007, petitioner, who taught computer systems engineering courses for 15 years as an adjunct associate professor at Syracuse University, made a FOIL request to OCRRA seeking, inter alia, "[a]ny and all records involving [his] photograph that was used in the . . . e-mail . . . , including the image file itself and any associated metadata," and "[r]ecords of [photographs] in OCRRA's storage system that are available for use in any OCRRA publications, including [Web site] and e-mail activities." With respect to the second aforementioned request, petitioner stated that "[r]ecords are to specifically include [photographs] on the 'Shared Drive,' " and that "[photographs] depicting only OCRRA employees or staff can be excluded." Moreover, petitioner subsequently amended his request for records of photographs to encompass " '[a]ll computer records that are associated with published [photographs] in all OCRRA publications, including [Web site] and e-mail activities, for the years 2005, 2006, and 2007,' " while again excluding " '[photographs] depicting only OCRRA employees or staff' " At the time of the FOIL request, there were at least 28,900 photographs on OCRRA's computer system.

In response to the FOIL request, OCRRA provided petitioner with digital copies of 1,423 photographs that had already been published, as well as two photographs of petitioner. OCRRA denied petitioner's request with respect to the remaining photographs in OCRRA's files on the grounds that the request was overbroad and constituted an unwarranted invasion of the personal privacy of the individuals depicted in the unpublished photographs. According to petitioner, the photographs that were produced had been reduced in quality and resolution and were bereft of metadata.

Petitioner thereafter commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of OCRRA denying certain parts of his FOIL request. The court denied the petition with the exception of "the disclosure of photographs taken by Onondaga County Special Deputy Sheriffs assigned to work with OCRRA, which relate to former, closed or inactive law enforcement investigations, if they have not been previously provided"

III

Addressing first petitioner's FOIL request concerning photographs, we conclude that the court erred in denying that part of the request seeking unpublished photographs that do not depict individuals.

The records of a public agency, including photographs, are presumptively open to public disclosure, without regard to the purpose of the request for disclosure (*see Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440; *Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 492). A request for disclosure should not be denied merely because the request is voluminous (*see Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249), or because the requested

records were not actually used in the agency's decision-making process (see *Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 80; see generally *Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 156). A FOIL request, however, must "reasonably describe" the record requested (Public Officers Law § 89 [3] [a]), to enable the agency to identify and produce the record (see *Konigsberg*, 68 NY2d at 249; *M. Farbman & Sons*, 62 NY2d at 82-83). We agree with petitioner that he reasonably described the photographs he sought in his FOIL request.

We further conclude, however, that respondents met their burden of establishing that the unpublished photographs of individuals other than petitioner and those relating to active or ongoing law enforcement investigations were exempt from disclosure pursuant to Public Officers Law § 87 (2) (b), which authorizes the agency to deny disclosure of records if such disclosure "would constitute an unwarranted invasion of personal privacy"

Weighing the public's interest in the photographs requested against the privacy interests of the individuals depicted (see *Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485; *Matter of Edwards v New York State Police*, 44 AD3d 1216; *Matter of Hawley v Village of Penn Yan*, 35 AD3d 1270, 1271, amended on rearg 38 AD3d 1371), we conclude that the court properly denied disclosure of the unpublished photographs of individuals other than petitioner and the unpublished photographs relating to active or ongoing law enforcement investigations. The record establishes that the individuals photographed by OCRRA consented to its use of their photographs only for public education purposes. Disclosure to outside parties for undisclosed reasons does not fall within that purpose and thus infringes upon the privacy of the individuals depicted. Further, photographs relating to active or ongoing law enforcement investigations are by their nature private. The record does not support the theory that there is a public interest in disclosure of either the unpublished photographs of individuals other than petitioner or the unpublished photographs relating to active or ongoing law enforcement investigations.

In view of our determination concerning the above-mentioned unpublished photographs, we need not address the contention of petitioner that the court erred in denying his request for an in camera review of the photographs or, alternatively, for a log identifying each such photograph. We note that petitioner's request appears to be intended to enable the court to determine which of the withheld photographs fall within the scope of the exemption for personal privacy asserted by OCRRA. Inasmuch as we have determined which of the disputed photographs are subject to disclosure under FOIL, there is no need for an in camera review or a log of the photographs at this juncture (see generally *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275)

metadata associated with the subject photographs, we conclude that the court should have ordered respondents to disclose the metadata associated with those photographs that OCRRA has already disclosed to petitioner, as well as those photographs that we have deemed subject to disclosure under FOIL. We note that, although the FOIL request could have been phrased more precisely, it is our view that petitioner's request for "[a]ll computer records that are associated with published [photographs] in all OCRRA publications . . . for the years 2005, 2006, and 2007" included a demand for the metadata associated with those images. We are also careful to note, however, that our decision is limited to the facts of this case in this evolving area of the law. The issue of whether metadata is subject to disclosure has been broached in a number of other jurisdictions, and we consider informative but not dispositive the decision of the Supreme Court of Arizona in *Lake v City of Phoenix* (222 Ariz 547, 218 P3d 1004).

Nearly "every electronic document contains metadata" (Simon, *E-Discovery, Coming to Terms with Metadata*, NYLJ, Oct. 27, 2008, at S2, col 2). As earlier referenced, we now set forth a detailed definition of the term metadata for those lacking familiarity with the term. Metadata is "secondary information" not apparent on the face of the document "that describes an electronic document's characteristics, origins, and usage" (Spiro and Mogul, *Expert Analysis*, Southern District Civil Practice Roundup, "*The New Black*": *Meditations on Metadata*, NYLJ, Feb. 5, 2009, at 3, col 1).

"Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Most metadata is generally not visible when a document is printed or when the document is converted to an image file. Metadata can be altered intentionally or inadvertently and can be extracted when native files are converted to image files. Sometimes the metadata can be inaccurate, as when a form document reflects the author as the person who created the template but who did not draft the document. In addition, metadata can come from a variety of sources; it can be created automatically by a computer, supplied by a user, or inferred through a relationship to another document" (Berman and Beerman, *New York State E-Discovery Law, On "Metadata," Instant Messaging and Bates Stamping*,

NYLJ, Aug. 31, 2007, at 3, col 1).

There are three types of metadata, each of which is of a different nature and is described as follows:

"Substantive Metadata

Substantive metadata, or application metadata, is information created by the software used to create the document, reflecting editing changes or comments, and instructions concerning fonts and spacing. 'Substantive metadata is embedded in the document it describes and remains with the document when it is moved or copied.' Such information is useful in showing the genesis of a particular document and the history of proposed revisions or changes . . .

System Metadata

System metadata reflects automatically generated information about the creation or revision of a document, such as the document's author, or the date and time of its creation or modification. System metadata is not necessarily embedded in the document, but can be obtained from the operating system or information management system on which the document was created . . . [S]ystem metadata is most relevant if a document's authenticity is at issue, or there are questions as to who received a document or when it was received.

Embedded Metadata

Embedded metadata is data that is inputted into a file by its creators or users, but that cannot be seen in the document's display. Common types of embedded metadata include the formulas used to create spreadsheets, hidden columns, references, fields, or internally or externally linked files. Embedded metadata is often critical to understanding complex spreadsheets which lack an explanation of the formulas underlying the output in each cell. The two most common ways of producing metadata for ESI [electronically stored information] are to produce documents (i) in a TIFF or pdf format with an accompanying 'load file' or (ii) in 'native format' " (Spiro and Mogul, NYLJ, at 3, col 1; see *Aguilar v Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 FRD 350, 354-355 [SD NY]).

The production of a hard copy of a document (i.e., one in paper

form) or the production of a document electronically but in what is basically a "picture" or "static" form, such as a portable document file (.pdf) or tagged image file format (.tiff), limits the information provided "to the actual text or superficial content of the document" (Spiro and Mogul, NYLJ, at 3, col 1; see also *Aguilar*, 255 FRD at 353 n 3). Only when an electronic document is produced in its "native" form can metadata be disclosed.

The metadata at issue in this case includes file names and extensions, sizes, creation dates and latest modification dates of digitally-stored photographs, and thus it appears to be of the "system" variety. Records stored in an electronic format are subject to FOIL (see generally *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464). We are therefore constrained to conclude that the subject "system" metadata, which is at its core the electronic equivalent of notes on a file folder indicating when the documents stored therein were created or filed, constitutes a "record" subject to disclosure under FOIL (see Public Officers Law § 86 [4]). We do not, however, reach the issue whether metadata of any other nature, including "substantive" and "embedded" metadata, is subject to disclosure under FOIL. Moreover, we do not address the issue concerning whether and when metadata of any nature is subject to disclosure under the CPLR.

V

Accordingly, we conclude that the amended judgment should be modified by granting those parts of the petition seeking to compel disclosure of unpublished photographs in the possession of OCRRA with the exception of unpublished photographs depicting individuals other than petitioner or relating to active or ongoing law enforcement investigations and seeking to compel disclosure of the system metadata associated with those photographs that have been disclosed or are subject to disclosure. We direct respondent Executive Director of OCRRA to provide to petitioner forthwith those photographs that are subject to disclosure and the system metadata associated with those photographs that have been disclosed or are subject to disclosure.

SCUDDER, P.J., and CENTRA, J., concur with FAHEY, J.; GORSKI, J., dissents in part in accordance with the following Opinion in which GREEN, J., concurs: We respectfully dissent in part. In our view, respondent Onondaga County Resource Recovery Agency (OCRRA) failed to meet its burden of establishing that disclosure of the unpublished photographs of individuals other than petitioner would constitute an unwarranted invasion of personal privacy (see Public Officers Law § 87 [2] [b]; § 89 [2] [b]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462). Disclosure "exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government" (*Data Tree, LLC*, 9 NY3d at 462). Petitioner requested those photographs "available for use in any OCRRA publications" The majority concludes that the subjects of those photographs gave only a limited consent to the use of their likeness for the purpose of public education. However, the public education purpose for which the subjects allowed their photographs to be taken was for use in OCRRA's publications. We therefore conclude that OCRRA failed to establish

that "the material requested falls squarely within the ambit of . . . [the personal privacy] statutory exemption[]" (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571; see § 87 [2] [b]; § 89 [2] [b]), inasmuch as those subjects "understood or reasonably should have understood[] that [their likenesses] were destined for public disclosure" (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 488). We therefore would further modify the amended judgment by granting those parts of the petition seeking to compel disclosure of unpublished photographs of individuals other than petitioner and the "system" metadata associated with those photographs, as described by the majority. We would further direct respondent Executive Director of OCRRA to provide to petitioner those photographs and the system metadata associated with them.

Finally, we note that the majority impliedly questions the motives of petitioner in requesting the photographs and metadata at issue, as do we, but we agree with the majority that motive is not a relevant factor in evaluating such a request (see *Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 492).

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

1437

CA 09-00850

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

DIANNA THOMPSON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JOSEPH EDWARD MATHER, DANIEL G. COTY,
JUDITH A. DIMARCO AND OSWEGO COUNTY OB-GYN, P.C.,
DEFENDANTS-RESPONDENTS.

DR. NELLIE KAZZAZ AND DR. RAMA GODISHALA,
NONPARTY RESPONDENTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered October 27, 2008 in a medical malpractice action. The order, among other things, directed that plaintiff will not be entitled to take the videotaped depositions of two nonparty witnesses unless certain conditions were met.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law with costs, the motion is granted and counsel for nonparty respondents is precluded from objecting during or otherwise participating in the videotaped depositions.

Memorandum: Plaintiff commenced this medical malpractice action alleging that defendants deviated from the standard of care in providing obstetrical and gynecological treatment by prescribing oral contraceptives when they knew or should have known based on plaintiff's medical and family history that the use of oral contraceptives as prescribed was contraindicated. In May 2004, plaintiff suffered an acute myocardial infarction, and she alleges that defendants' departure from the standard of care was a substantial factor in causing her injury and subsequent disability.

In preparation for trial, plaintiff's counsel arranged for nonparty respondents, plaintiff's treating cardiologists (hereafter, physicians), to provide testimony in advance of trial that would be videotaped and presented at trial in accordance with 22 NYCRR 202.15. The physicians were accompanied at the scheduled videotaping by counsel retained by their medical malpractice insurance carrier.

During the videotaped trial testimony of nonparty respondent Dr. Rama Godishala, counsel for that physician interposed objections to, inter alia, form and relevance. Plaintiff's counsel objected to the participation by counsel during the videotaped trial testimony and the parties were unable to resolve the dispute. The videotaping therefore was suspended and plaintiff moved for an order "precluding . . . Dr. Godishala's counsel from objecting at the videotaped trial testimony except as to privileged matters or in the event that she were to deem questioning to be abusive or harassing."

In its order deciding the motion, Supreme Court directed that plaintiff and defendants are to "consider providing general releases to the [physicians] . . . with respect to their initial treatment of [plaintiff]" and that, if such releases are provided, plaintiff will "be entitled to have a videotaped deposition of [the physicians] during which deposition the attorneys for the [physicians] shall not be permitted to speak" The order further provided that, if the general releases are not provided, then the attorneys for the parties and the physicians "shall seek to work out ground rules for a non-party deposition" of the physicians. The order then provided that, if the attorneys are unable to "work out ground rules," plaintiff will not be entitled to take the videotaped depositions of the physicians and they "are to be subpoenaed to testify" at trial.

We agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition. CPLR 3113 (c) provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court." Although counsel for the physicians correctly conceded at oral argument of plaintiff's motion in Supreme Court that she had no right to object during or to participate in the trial of this action, she nevertheless asserted that she was entitled to object during nonparty depositions and videotaped deposition questioning. We cannot agree that there is such a distinction, based on the express language of CPLR 3113 (c). Indeed, we discern no distinction between trial testimony and pre-trial videotaped deposition testimony presented at trial. We note in addition that 22 NYCRR 202.15, which concerns videotaped recordings of civil depositions, refers only to objections by the parties during the course of the deposition in the subdivision entitled "Filing and objections" (see 22 NYCRR 202.15 [g] [1], [2]). We thus conclude that plaintiff is entitled to take the videotaped depositions of the physicians and that counsel for those physicians is precluded from objecting during or otherwise participating in the videotaped depositions.

Lastly, we note that the practice of conditioning the videotaping of depositions of nonparty witnesses to be presented at trial upon the provision of general releases is repugnant to the fundamental obligation of every citizen to participate in our civil trial courts and to provide truthful trial testimony when called to the witness stand. Contrary to nonparty respondents' contention, the fact that the statute of limitations has not expired with respect to a nonparty treating physician witness for the care that he or she provided to a

plaintiff provides no basis for such a condition.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1475

KAH 08-02538

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
BILLY WITHERSPOON, PETITIONER-APPELLANT,

V

ORDER

JAMES MORRISSEY, SUPERINTENDENT, BUTLER
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF
COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered March 25, 2008. The judgment denied the petition for a writ of habeas corpus.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1478

CA 09-01238

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

RACHEL ANDERSON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NEIL WEINBERG, SIMCA PARTNERS, L.P.,
AND SIMCA, INC., DEFENDANTS-APPELLANTS.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (ALAN J. BEDENKO OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

LORENZO & COHEN, BUFFALO (AMANDA A. GRESENS OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 28, 2009 in a personal injury action. The order denied defendants' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell after stepping in a snow-covered pothole in a parking lot owned and maintained by defendants. We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. A landowner is liable for a dangerous or defective condition on his or her property when the landowner "created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it" (*Backer v Central Parking Sys.*, 292 AD2d 408, 409; *see Khamis v CG Foods, Inc.*, 49 AD3d 606, 607; *Batista v KFC Natl. Mgt. Co.*, 21 AD3d 917). In support of their motion, defendants submitted the deposition testimony of defendant Neil Weinberg, establishing that defendants did not create the allegedly dangerous condition nor did they have actual or constructive notice of the pothole, and plaintiff failed to raise a triable issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In opposing the motion, plaintiff contended that defendants had constructive notice of the pothole, and in support thereof she submitted photographs of the parking lot taken after the accident. "A photograph may be used to prove constructive notice of an alleged defect shown in the photograph if it was taken reasonably close to the time of the accident and there is testimony that the condition at the

time of the accident was substantially as shown in the photographs" (*Lustenring v 98-100 Realty*, 1 AD3d 574, 577, lv dismissed in part and denied in part 2 NY3d 791; see *DeGiacomo v Westchester County Healthcare Corp.*, 295 AD2d 395; *Truesdell v Rite Aid of N.Y.*, 228 AD2d 922). Here, plaintiff established that the photographs were taken at some point during the 5½-week period after the accident, but she failed to establish that they depicted the pothole in question or, indeed, that they reasonably depicted the condition of the parking lot at the time of the accident. Without that authentication, the photographs submitted by plaintiff thus do not constitute the requisite evidentiary proof in admissible form necessary to raise an issue of fact with respect to constructive notice (see *Young v Ai Guo Chen*, 294 AD2d 430, 431; *Truesdell*, 228 AD2d at 923).

Finally, we reject plaintiff's contention that defendants contend for the first time on appeal that they lacked actual or constructive notice of the pothole and thus that their contention is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Defendants sufficiently raised that contention in support of their motion, and plaintiff's opposition to the motion addressed that contention, identifying it as the crucial issue in the case. In any event, given that defendants could only establish their entitlement to summary judgment dismissing the complaint by establishing that they neither created the allegedly dangerous condition nor had actual or constructive notice thereof, we conclude that the notice issue is properly before us on appeal (see *Welch v De Cicco*, 9 AD3d 725, 727).

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

1483

CA 09-01352

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

COVANTA NIAGARA, L.P.,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

TOWN OF AMHERST,
DEFENDANT-APPELLANT-RESPONDENT.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (PATRICK M. KELLY OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (RALPH L. HALPERN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered February 3, 2009 in an action for breach of contract. The order denied plaintiff's motion for partial summary judgment on the issue of liability and denied defendant's cross motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion in part and dismissing those claims in the first cause of action that accrued prior to September 30, 2006 and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a solid waste disposal company, commenced this action seeking damages resulting from the alleged breach by defendant of its contract with plaintiff. The contract had been amended in 1996 to add a price protection clause, pursuant to which the payment rate per ton of waste would be reduced commensurate with any other contract between plaintiff and another municipality in Erie County "on the same terms and conditions and for the same type of service." In the spring of 2005, defendant unilaterally reduced its monthly payments to plaintiff to equal the payment rate per ton of waste contained in plaintiff's contract with a neighboring town, retroactive to July 2004. Plaintiff thereafter commenced an action against the Town of Amherst Garbage and Refuse District #1 (District) seeking to recover the amount due under the contract from July 2004 through December 2006, when the contract was terminated. The complaint in that action was dismissed on the ground that plaintiff had never filed a notice of claim as required by Town Law § 65 (3) and, in affirming that order on appeal (*Covanta Niagara, L.P. v Town of Amherst Garbage & Refuse Dist. #1*, 49 AD3d 1295, lv denied 10 NY3d

712), we rejected plaintiff's contention that a notice of claim was unnecessary, inasmuch as we agreed with Supreme Court that the District and defendant were not separate entities.

Plaintiff subsequently filed a notice of claim on March 21, 2007 and commenced the instant action asserting three causes of action: first, for breach of contract seeking to recover the difference between what defendant actually paid and the contract rate during the time period from July 2004 through December 2006; second, for an account stated seeking to recover the above sum on that theory; and third, a cause of action seeking to recover the difference between what defendant actually paid and the contract rate for services rendered during the time period from August 2006 through December 2006, which, according to plaintiff, is the sixth-month notice of claim period. Plaintiff thereafter moved for partial summary judgment on the issue of liability with respect to the third cause of action, and defendant cross-moved to dismiss the complaint on the grounds that the action was barred by the doctrine of res judicata based on the dismissal of the complaint in the prior action against the District, the action was barred based on plaintiff's failure to file a notice of claim as required by Town Law § 65 (3), and the action was time-barred based on plaintiff's failure to commence the action within the 18-month statute of limitations set forth in that statute. Defendant now appeals from the order insofar as it denied defendant's cross motion, and plaintiff cross-appeals from the order insofar as it denied plaintiff's motion. We conclude that Supreme Court should have granted the cross motion in part and dismissed those claims in the first cause of action that accrued prior to September 30, 2006, and we therefore modify the order accordingly.

Addressing first defendant's cross motion, we note that, "[u]nder the doctrine of res judicata, a disposition on the merits bars litigation between the same parties or those in privity with them of a cause of action arising out of the same transaction or series of transactions" (*Barbieri v Bridge Funding, Inc.*, 5 AD3d 414, 415; see *Matter of Hunter*, 4 NY3d 260, 269; *O'Brien v City of Syracuse*, 54 NY2d 353, 357). The court erred in determining that res judicata does not apply because the defendant in the first action was the District, and not defendant. In affirming the order in the prior appeal in this case, we agreed with Supreme Court that defendant is in privity with the District (see generally *Buechel v Bain*, 97 NY2d 295, 303-305, cert denied 535 US 1096; *Goldstein v Massachusetts Mut. Life Ins. Co.*, 32 AD3d 821). Nevertheless, we conclude that, although the court's prior dismissal of the complaint in the action against the District was a final determination of the action for purposes of the doctrine of res judicata (see *Smith v Russell Sage Coll.*, 54 NY2d 185, 194, rearg denied 55 NY2d 878), plaintiff in fact filed a notice of claim on March 21, 2007, and thus that dismissal was final only with respect to those claims that accrued prior to the six-month notice of claim period, i.e., prior to September 21, 2006. Thus, the court should have granted the cross motion on res judicata grounds with respect to those claims in the first cause of action that accrued prior to the six-month period.

In addition, defendant was entitled to dismissal of those claims in the first cause of action relating to services rendered by plaintiff prior to August 2006 based on plaintiff's failure to file a notice of claim. The notice of claim requirement is a prerequisite for maintaining a contract action against defendant and requires dismissal of any claim accruing outside the notice of claim period (see *Mohl v Town of Riverhead*, 62 AD3d 969; *Whalen v Reisman*, 298 AD2d 455). A cause of action for breach of contract accrues when the plaintiff has the right to make a demand for payment (see CPLR 206 [a]; *Kuo v Wall St. Mtge. Bankers, Ltd.*, 65 AD3d 1089, 1090; *Swift v New York Med. Coll.*, 25 AD3d 686, 687; *Town Bd. of Town of New Castle v Meehan*, 226 AD2d 702, *lv denied* 88 NY2d 811), which in this case was 30 days after defendant received plaintiff's respective invoices, pursuant to the terms of the contract. We further note, however, that none of the claims in the second and third causes of action accrued outside the six-month notice of claim period, and thus the court properly denied those parts of defendant's cross motion based on plaintiff's failure to file a notice of claim with respect to those two causes of action.

We further conclude that the court erred in denying defendant's cross motion with respect to those claims in the first cause of action that accrued prior to September 30, 2006 based on plaintiff's failure to commence the action within the 18-month statute of limitations set forth in Town Law § 65 (3). The action was commenced with the filing of the summons on March 31, 2008. Thus, plaintiff was time-barred from pursuing claims in the first cause of action that accrued prior to September 30, 2006 on that ground.

Finally, we conclude that the court properly denied plaintiff's motion for partial summary judgment on liability with respect to the third cause of action. Plaintiff failed to establish its entitlement to summary judgment by failing to "show that there is no defense to the cause of action or that the . . . defense has no merit" (CPLR 3212 [b]; see *Executive Sec. Corp. v Gray*, 67 AD2d 860, 861). Plaintiff addressed the defense for the first time in its reply affidavit submitted in response to defendant's opposing papers, and the court therefore properly refused to consider plaintiff's reply affidavit when determining the sufficiency of the motion for partial summary judgment (see *Korthas v U.S. Foodservice, Inc.*, 61 AD3d 1407, 1408; *Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188). Thus, plaintiff's motion was properly denied, regardless of the sufficiency of defendant's opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

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

1485

CA 07-02646

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

AUGUST J. GILLON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CARL D. TRAINA, DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (CHARLES C. RITTER, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. SAROFEEEN, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered November 9, 2007 in a breach of contract action. The judgment awarded plaintiff money damages after a nonjury trial.

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

Memorandum: Plaintiff commenced this action asserting two causes of action, for breach of contract and for money had and received, seeking to recover the sum of \$71,200 loaned to defendant from 1999 until 2001 by plaintiff's grandfather, who is now deceased. In 2001, defendant executed a confession of judgment at the request of plaintiff's grandfather, and defendant agreed to pay the money to plaintiff. We conclude that Supreme Court, following a nonjury trial, properly determined that plaintiff is entitled to judgment in the amount of \$71,200, with interest from the date of the commencement of the action. Plaintiff is entitled to that sum based on his cause of action for money had and received, inasmuch as it is undisputed that plaintiff's grandfather loaned defendant the sum of \$71,200. "A cause of action for money had and received sounds in quasi contract and 'arises when, in the absence of an agreement, one party possesses money [that belongs to another and that] in equity and good conscience it ought not retain' " (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220). Although the affidavit in confession of judgment was not filed in accordance with CPLR 3218 (b) and therefore is not a valid judgment by confession, the court nonetheless properly considered the affidavit executed by defendant in accordance with CPLR 3218 (a) as evidence of the underlying debt (see *Ray v Ray*, 61 AD3d 442, 443). The record further establishes that plaintiff's grandfather assigned his interest in the underlying debt to plaintiff, that defendant agreed to pay the sum of \$71,200 to plaintiff, and that defendant

failed to make any payments to plaintiff. Finally, there is no merit to defendant's contention that plaintiff had the burden of proving nonpayment of the debt, inasmuch as the "alleged payment of an indebtedness" is an affirmative defense (*CIT Group/Factoring Mfrs. Hanover v Supermarkets Gen. Corp.*, 183 AD2d 454, 455; see generally CPLR 3018 [b]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1523

CAF 08-02589

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

IN THE MATTER OF JOSEPH SCHILLACI AND
CATHY SCHILLACI, PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

CHARMAINE FORBES, RESPONDENT-APPELLANT.

JOHN T. NASCI, ROME, FOR RESPONDENT-APPELLANT.

PAUL SKAVINA, LAW GUARDIAN, ROME, FOR KAYTRYN F.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered October 22, 2008 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioners visitation with their granddaughter.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and in the exercise of discretion without costs, the petition is dismissed, and the order entered January 28, 2008 is vacated.

Memorandum: Respondent mother appeals from an order (Brian M. Miga, J.H.O.) that, inter alia, granted specified visitation to petitioners, the paternal grandparents of their 10-year-old granddaughter. The grandparents had filed the petition that is the subject of this appeal, alleging that the mother willfully violated an order entered in January 2008 granting them visitation with their granddaughter. Although that order is not contained in the record on appeal, the order that is the subject of this appeal reflects that the prior order directed that the grandparents shall have "reasonable visitation as the parties can agree." We note at the outset that Family Court erred in determining that "any future violation" of the order on appeal would be deemed to be willful, inasmuch as a determination of a willful violation is made only after a full evidentiary hearing (*see Matter of Elliott v Marble*, 49 AD3d 923, 924; *see generally Matter of Hوجلund v Hوجلund*, 234 AD2d 794, 795).

At the hearing on the instant petition, the grandparents presented only the testimony of their daughter, who had visited with the child for approximately two months prior to the hearing pursuant to a temporary order of Family Court (Joan E. Shkane, J.). Although we agree with the mother that the court lacked authority to order temporary visitation with a nonparty without her consent, we note that the mother did not object to the order and in fact testified at the

hearing that she did not oppose the visitation between her child and her child's aunt. The evidence presented by the grandparents in support of the instant petition failed to address whether the mother willfully violated the order entered in January 2008, and the court made no finding whether the mother violated that order (*see generally Matter of Lonneil L.G. v Tammy G.-G.*, 39 AD3d 1200). The court instead modified the January 2008 order by establishing a visitation schedule, but the court made no findings with respect to whether such visitation was in the best interests of the child (*see generally Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 181). Furthermore, the evidence presented by the mother at the hearing and obtained by the court at the *Lincoln* hearing established that the child, who was being treated for leukemia, was opposed to visitation with her grandparents. We note that the record established that, although the mother had historically facilitated visitation between the child and the grandparents, the child objected to the visitation after she became ill, and the mother yielded to the child's wishes and did not require the child to visit her grandparents. Thus, despite the fact that we are unable to review the propriety of the court's determination with respect to visitation with the grandparents based on the court's failure to set forth findings in support of that determination (*see Matter of Elliot v Marble*, 49 AD3d 923, 925), we nevertheless make our own determination on the record before us that it is not in the child's best interests to continue visitation with the grandparents (*see Matter of Wilson v McGlinchey*, 2 NY3d 375, 382). We therefore in the exercise of our discretion vacate the order entered January 28, 2008.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1524

CAF 08-02431

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

IN THE MATTER OF LORIE SPORTELLO,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL A. SPORTELLO, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

JOHN J. RASPANTE, NEW HARTFORD, FOR PETITIONER-APPELLANT.

JESSICA MANIERI, LAW GUARDIAN, HERKIMER, FOR TYLER R.S. AND MICHAEL
V.S.

Appeal from an order of the Family Court, Herkimer County
(Anthony J. Garramone, J.H.O.), entered July 30, 2008 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.

Memorandum: With respect to the order in appeal No. 1, we
conclude that Family Court properly dismissed the petition seeking
permission for the parties' children to relocate with petitioner
mother. At the time of the hearing on the petition, the mother did
not know where she would be relocating and thus could not provide any
information concerning where the children would live or the schools
that they would attend. Thus, the mother failed to meet her burden of
establishing that the proposed relocation is in the best interests of
the children (*see Matter of Seyler v Hasfurter*, 61 AD3d 1437). With
respect to the order in appeal No. 2, we conclude that the court
properly dismissed the mother's petition seeking to modify respondent
father's visitation rights by requiring that the presently
unsupervised visitation be supervised. The mother failed to meet her
burden of establishing that the father was an abusive or unfit parent
(*see Matter of Ritz v Otero*, 265 AD2d 560), and the court's
determination is entitled to deference where, as here, it has a sound
basis in the record (*see Matter of Custer v Slater*, 2 AD3d 1227).
With respect to the order in appeal No. 3, which dismissed the
mother's violation petition, the mother has not raised any contentions
concerning that order in her brief on appeal, and thus we deem any
such contentions abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d

984) .

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1525

CAF 08-02432

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

IN THE MATTER OF LORIE SPORTELLLO,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL A. SPORTELLLO, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

JOHN J. RASPANTE, NEW HARTFORD, FOR PETITIONER-APPELLANT.

JESSICA MANIERI, LAW GUARDIAN, HERKIMER, FOR TYLER R.S. AND MICHAEL
V.S.

Appeal from an order of the Family Court, Herkimer County
(Anthony J. Garramone, J.H.O.), entered July 30, 2008 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 Sportello v Sportello* ([appeal
No. 1] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1526

CAF 08-02433

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

IN THE MATTER OF LORIE SPORTELLO,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL A. SPORTELLO, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

JOHN J. RASPANTE, NEW HARTFORD, FOR PETITIONER-APPELLANT.

JESSICA MANIERI, LAW GUARDIAN, HERKIMER, FOR TYLER R.S. AND MICHAEL
V.S.

Appeal from an order of the Family Court, Herkimer County
(Anthony J. Garramone, J.H.O.), entered July 30, 2008 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 Sportello v Sportello* ([appeal
No. 1] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1528

CA 09-00518

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

JAY N JEN, INC., PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

POLGE SEAFOOD DISTRIBUTING, INC.
AND TIMOTHY J. POLGE,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

ALI, PAPPAS & COX, P.C., SYRACUSE (P. DOUGLAS DODD OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

GERMAIN & GERMAIN, LLP, SYRACUSE (JOHN J. MARZOCCHI OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 13, 2009 in a breach of contract action. The order and judgment following a nonjury trial, among other things, awarded plaintiff money damages against defendant Polge Seafood Distributing, Inc. and dismissed the counterclaims.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for the alleged breach of a written Asset Purchase Agreement (agreement). Pursuant to the agreement, plaintiff was to purchase the assets of defendant Polge Seafood Distributing, Inc. (Polge), which included equipment, inventory, stock in trade, goodwill and customer lists. Polge retained the manufacturing business that produced cocktail sauce, mustard and horseradish products (mustard products). Polge was also required pursuant to the agreement to sell the mustard products to plaintiff at a volume discount level below the existing wholesale pricing for plaintiff's sale and distribution to customers identified on the above-mentioned customer lists. In addition, the agreement included a covenant prohibiting Polge from operating a competing business within a 100-mile radius of the existing distribution business location.

According to plaintiff, defendants breached the agreement by refusing to sell mustard products to plaintiff at a volume discount and by marketing and selling those products to existing customers identified on the customer lists. Defendants asserted counterclaims

seeking, inter alia, damages for plaintiff's alleged breach of the agreement by selling mustard products to customers obtained from a Web site and to express shipping customers that defendants claimed to have retained or excluded from the terms of the agreement.

Following a nonjury trial, Supreme Court determined that defendants had breached the agreement by refusing to sell the mustard products to plaintiff without justification. The court further determined, however, that plaintiff had mitigated its damages within two months of the breach by acquiring substitute products from a different manufacturer for sale and distribution. Thus, by the order and judgment in appeal No. 1, the court awarded plaintiff two months of lost profits. The court also dismissed defendants' counterclaims, determining that the express terms of the agreement barred defendants' contention that Polge retained the right to market and to sell mustard products to all Web site and express shipping customers. By the order in appeal No. 2, the court denied plaintiff's motion for attorney's fees and expert fees.

With respect to the order and judgment in appeal No. 1, we reject the contention of plaintiff on its appeal therefrom that the court erred in failing to award damages for lost profits for a period of 14 years, which plaintiff alleged was an appropriate period of time based upon the promissory note that it executed. The record establishes that plaintiff was able to secure adequate cover within two months of defendants' breach of the agreement (*see Fertico Belgium v Phosphate Chems. Export Assn.*, 70 NY2d 76, 81-82, *rearg denied* 70 NY2d 694), and plaintiff failed to demonstrate a basis upon which to estimate its lost profits beyond those two months with the requisite degree of reasonable certainty (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261). In addition, there is no indication in the record that the parties contemplated that defendants would assume liability for plaintiff's lost profits for a period of 14 years in the event that defendants breached the agreement (*see Kenford Co. v County of Erie*, 73 NY2d 312, 320).

We reject plaintiff's further contention that the court erred in refusing to award damages for the alleged breach by defendants of their duty not to impair the goodwill transferred as part of the sale of the assets of the distributing business. Plaintiff failed to demonstrate "either reduced sales to a solicited customer to whom defendant[s] sold [mustard products] or that the opportunity for profit on additional sales to such customer was lost by consequence of defendant[s'] solicitation" (*Hyde Park Prods. Corp. v Lerner Corp.*, 65 NY2d 316, 322; *see Sager Spuck Statewide Supply Co. v Meyer*, 298 AD2d 794, 796).

Contrary to the contention of defendants on their cross appeal in appeal No. 1, the court properly dismissed their counterclaims seeking, inter alia, damages for plaintiff's alleged breach of the agreement by selling mustard products to Web site and express shipping customers allegedly retained by Polge. There is no provision in the agreement, which is "complete, clear and unambiguous on its face," establishing that defendants retained or excluded those customers from

the customer lists transferred to plaintiff pursuant to the agreement (see *Greenfield v Philles Records*, 98 NY2d 562, 569).

With respect to plaintiff's appeal from the order in appeal No. 2, we conclude that the court erred in denying that part of plaintiff's motion seeking attorney's fees pursuant to paragraph 8 (B) of the agreement. We agree with plaintiff that paragraph 8 (B) of the agreement is not ambiguous when read in its entirety and that it expressly provides for plaintiff's recovery of attorney's fees incurred as a result of defendants' breach of the agreement (see generally *Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325). We therefore reverse the order insofar as appealed from in appeal No. 2, grant plaintiff's motion in part, award attorney's fees to plaintiff, and remit the matter to Supreme Court to determine the amount of reasonable attorney's fees following a hearing, if necessary.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1529

CA 09-00519

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

JAY N JEN, INC., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

POLGE SEAFOOD DISTRIBUTING, INC.
AND TIMOTHY J. POLGE, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

ALI, PAPPAS & COX, P.C., SYRACUSE (P. DOUGLAS DODD OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

GERMAIN & GERMAIN, LLP, SYRACUSE (JOHN J. MARZOCCHI OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 12, 2009 in a breach of contract action. The order, insofar as appealed from, denied that part of plaintiff's motion for attorney's fees.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in part, attorney's fees are awarded to plaintiff, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the same Memorandum as in *Jay N Jen, Inc. v Polge Seafood Distrib., Inc.* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1532

CA 09-01523

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

EUGENE PALLADINO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CNY CENTRO, INC., DEFENDANT-RESPONDENT.

ROBERT LOUIS RILEY, SYRACUSE, FOR PLAINTIFF-APPELLANT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE
(CRAIG M. ATLAS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 26, 2008. The order and judgment granted defendant's motion to dismiss the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiff commenced this action against his employer seeking, inter alia, a determination that his entitlement to pension and retirement benefits began on November 1, 1983, based upon a "return to work" agreement between the parties dated January 6, 1987 that resolved a pending grievance by plaintiff in connection with the termination of plaintiff's employment on May 6, 1985. Supreme Court granted defendant's motion to dismiss the complaint, determining that plaintiff is limited to seeking recourse through the grievance procedure set forth in the collective bargaining agreement (CBA) between the parties. That was error.

It is axiomatic that plaintiff's complaint is to be afforded a liberal construction, that the facts alleged therein are accepted as true, and that plaintiff is to be afforded every possible favorable inference in order to determine whether the facts alleged in the complaint "fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88). We conclude that the complaint alleges causes of action for anticipatory breach of contract and equitable estoppel with respect to the 1987 agreement. We further conclude that neither the 1987 agreement nor the CBA conclusively establishes a defense to those causes of action as a matter of law (*see id.*). Although the CBA provides for a grievance process pursuant to which it is arguable that plaintiff may contest defendant's determination with respect to his date of hire for the purpose of determining his pension rights, we

conclude that the grievance process set forth in the CBA is not plaintiff's exclusive means to seek recourse for defendant's actions. Rather, because defendant utilized the 1987 agreement to determine plaintiff's effective date of hire and the dispute between the parties involves the interpretation of that agreement, we conclude that plaintiff has properly alleged causes of action upon which relief may be granted.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1535

CA 09-00410

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

PETER M. O'CONNELL, LOUIS A. LARSON, BRUCE J. SPAULDING, NANCY F. SPAULDING, THOMAS M. BOND AND ANITA M. BOND, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JAMES B. GRAVES, TERRI J. GRAVES, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

DAVIDSON & O'MARA, PC, ELMIRA (PAMELA GEE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOLMBERG, GALBRAITH, VAN HOUTEN & MILLER, ITHACA (DIRK A. GALBRAITH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered January 28, 2009 in an action pursuant to RPAPL article 15. The judgment, insofar as appealed from, granted that part of the motion of plaintiffs for summary judgment dismissing the second counterclaim.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the second counterclaim is reinstated.

Memorandum: Plaintiffs, the owners of property that borders property owned by James B. Graves and Terri J. Graves (defendants), installed a septic system in August 1994 and enclosed the area with a wall constructed of railroad ties measuring approximately 22 feet in length and 3.7 feet in width at its widest point. It is undisputed that defendants became aware of the wall for the first time in August 1995. In December 2005, a new survey of defendants' property was conducted, which revealed that the wall constructed by plaintiffs encroached on defendants' property at a maximum distance of 3.7 feet. Plaintiffs commenced this action pursuant to RPAPL article 15 seeking, inter alia, a determination that they are the lawful owners of the property enclosed by the wall based on adverse possession. Defendants in turn asserted two counterclaims, alleging that plaintiffs engaged in continuous trespass, both with respect to the area enclosed by the wall and that part of the septic system that extends approximately eight inches beyond the wall. Plaintiffs moved for, inter alia, summary judgment dismissing the counterclaims, and defendants cross-moved for, inter alia, summary judgment dismissing the amended

complaint. In their cross motion papers, defendants conceded that they were aware that the septic system had been installed, but they contended that they were not aware of the subterranean encroachment beyond the wall until they dug in an area adjacent to the wall in 2007. Plaintiffs, on the other hand, contended that they had the right to the use of the land because they had obtained title to the property based on their adverse possession of it for at least 10 years. As limited by their brief, defendants appeal from the judgment insofar as it granted that part of plaintiffs' motion for summary judgment dismissing the second counterclaim, seeking treble damages for plaintiffs' continuing subterranean trespass. Even assuming, arguendo, that plaintiffs established their entitlement to judgment as a matter of law on that counterclaim, we conclude that defendants raised a triable issue of fact sufficient to defeat the motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

In granting plaintiffs' motion with respect to the second counterclaim, Supreme Court determined that the second counterclaim, for subterranean trespass, was time-barred on the ground that the trespass had occurred in excess of 10 years. That was error. "The essence of trespass to real property is injury to the right of possession, and such trespass may occur under the surface of the ground . . . [A] trespass that constitutes an unlawful encroachment on a [party's] property will be considered a continuous trespass giving rise to successive causes of action . . . Thus, for purposes of the statute of limitations, suits will only be time-barred by the expiration of such time as would create an easement by prescription or change of title by operation of law," here, by adverse possession (*Bloomington, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 66; see *509 Sixth Ave. Corp. v New York City Tr. Auth.*, 15 NY2d 48, 52). The subterranean encroachment beyond the wall was not open and notorious, a necessary element of adverse possession (see *Walling v Przybylo*, 7 NY3d 228, 232), and thus the second counterclaim is not barred by the statute of limitations (see generally *509 Sixth Ave. Corp.*, 15 NY2d at 52-53).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1561

KA 08-02139

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CLEVELAND CHILES, DEFENDANT-APPELLANT.

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 23, 2008. The judgment convicted defendant, upon his plea of guilty, of failure to register as a sex offender and/or to verify his status as a sex offender.

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 failure to register as a sex offender and/or to verify his status as such (Correction Law § 168-f [4]), defendant contends that the superior court information (SCI) was jurisdictionally defective because it did not set forth the date by which he was required to register his change of address. Although the contention of defendant survives both his plea and his valid waiver of the right to appeal (*see People v Chianese*, 41 AD3d 1168, 1169, *lv denied* 9 NY3d 1032; *see also People v Cieslewicz*, 45 AD3d 1344, 1345), we nevertheless reject that contention. The SCI included the specific date on which defendant violated the statute by failing to register his change of address and incorporated the elements of the crime by reference to the statute (*see Chianese*, 41 AD3d at 1169). Thus, the SCI "effectively charge[d] . . . defendant with the commission of a particular crime and afforded him fair notice of the charges made against him, so that he [could] prepare a defense and . . . avoid subsequent attempts to retry him for the same crime" (*People v Welch*, 46 AD3d 1228, 1229, *lv denied* 10 NY3d 845 [internal quotation marks omitted]).

Defendant further contends that Supreme Court failed to advise him of his duties pursuant to the Sex Offender Registration Act (SORA) at the time it determined his risk level. In support of that contention, defendant relies on a transcript attached to his brief, which is not part of the stipulated record on appeal and therefore is

not properly before us (see *People v Huntsman*, 296 AD2d 858, *lv denied* 99 NY2d 536, 615). We therefore are unable to review that contention. We note in any event that Correction Law § 168-e (1) provides that "[a]ny sex offender, to be discharged, paroled, released to post-release supervision or released from any state or local correctional facility . . . shall at least [15] calendar days prior to discharge, parole or release, be informed of his or her duty to register under this article, by the facility in which he or she was confined" Here, defendant does not contend that the personnel at the correctional facility from which he was released failed to advise him of his duties to register pursuant to SORA, and there is no such showing in the record. Insofar as defendant contends that he did not knowingly violate SORA by failing to register a change of address, thus in effect challenging the sufficiency of the plea allocution, he failed to preserve that contention for our review by failing to move to withdraw his plea or to vacate the judgment of conviction (see *People v Stuart*, 19 AD3d 1167, *lv denied* 5 NY3d 810). In any event, that contention is without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1563

KA 07-02330

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

QUINTON T. HARVEY, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 20, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that, by denying his request to speak with his mother, the police in effect cut off the avenue by which he was most likely to obtain counsel and thus in effect denied defendant the right to counsel. Notably, defendant does not directly contend that he was denied the right to counsel, a contention that of course does not require preservation (*see People v Ramos*, 99 NY2d 27, 30). Were we to address the attenuated contention of defendant even in the absence of preservation (*see People v Humphrey*, 15 AD3d 683, 685, *lv denied* 5 NY3d 763; *see also People v Glover*, 144 AD2d 581), we would conclude that it is lacking in merit. "[I]t is impermissible for the police to use a confession, even if it be otherwise voluntary, obtained from a 17-year-old defendant when, in the course of extracting such confession, they have sealed off the most likely avenue by which the assistance of counsel may reach him by means of deception and trickery" (*People v Townsend*, 33 NY2d 37, 41; *see also People v Bevilacqua*, 45 NY2d 508, 513). Here, however, defendant failed to demonstrate that the police prevented him from speaking with his mother by means of "official deception or trickery" (*People v Salaam*, 83 NY2d 51, 55; *see People v Martin*, 39 AD3d 1213, *lv denied* 9 NY3d 878), and defendant thus is not entitled to the suppression of the statements that he made to the police after asking to speak with his mother.

We reject the further contention of defendant that the police unlawfully detained and arrested him. It is well settled that a general description of an individual, without more, is insufficient to provide reasonable suspicion that the individual has committed a crime to justify a forcible seizure of that individual (see *People v Stewart*, 41 NY2d 65, 69; *People v Thomas*, 300 AD2d 416, lv denied 99 NY2d 620). Here, however, the record of the suppression hearing establishes that a police officer saw defendant, who matched the general description of the suspects, emerge next to a vacant property less than one block from the scene of the shooting, in the path of the police K-9 unit that was tracking the suspects. The officer testified at the suppression hearing that defendant fled from the area when he observed the officer. It is well settled that "a defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929; see *People v Martinez*, 59 AD3d 1071, 1072, lv denied 12 NY3d 856). The officer thus was entitled to pursue and forcibly detain defendant in order to conduct an investigation into the shooting and robbery (see *People v McCoy*, 46 AD3d 1348, 1348-1349, lv denied 10 NY3d 813; *People v Galloway*, 40 AD3d 240, lv denied 9 NY3d 844; *People v Gatling*, 38 AD3d 239, lv denied 9 NY3d 865). Further, the police had the requisite probable cause to arrest defendant. The officer pursuing defendant observed him move his hand to his waist area and also observed defendant place his hands over the fence that he was attempting to scale. After detaining defendant, the officer also observed a gun on the other side of that fence. Based on the totality of the circumstances, the reasonable suspicion that justified the forcible seizure ripened into probable cause when the officer observed the gun, thus warranting the arrest (see *People v Cabrera*, 11 AD3d 238, lv denied 3 NY3d 755; *People v Strickland*, 291 AD2d 420, lv denied 98 NY2d 656; *People v Coon*, 212 AD2d 1009, lv denied 85 NY2d 937).

Defendant failed to preserve for our review his contention that he should have been adjudicated a youthful offender inasmuch as he failed to request youthful offender status either at the time of the plea proceedings or at sentencing (see *People v Ficchi*, 64 AD3d 1195; *People v Capps*, 63 AD2d 1632, lv denied 13 NY3d 795; *People v Fowler*, 28 AD3d 1183, 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]). Finally, the sentence is not unduly harsh or severe.

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

1566

KA 08-00215

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JORGE N.T., DEFENDANT-APPELLANT.

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

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from an adjudication of the Cattaraugus County Court (Larry M. Himelein, J.), rendered December 17, 2007. Defendant was adjudicated a youthful offender upon his plea of guilty of arson in the third degree and burglary in the third degree.

It is hereby ORDERED that the adjudication so appealed from is unanimously modified on the law by directing that the sentences of imprisonment shall run concurrently with respect to each other and as modified the adjudication is affirmed.

Memorandum: On appeal from a youthful offender adjudication based upon his plea of guilty of arson in the third degree (Penal Law § 150.10 [1]) and burglary in the third degree (§ 140.20), defendant contends that his waiver of the right to appeal was invalid. We reject that contention. 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" (*People v Lopez*, 6 NY3d 248, 256). The valid waiver by defendant of the right to appeal encompasses his challenge to the factual sufficiency of the plea allocution (*see People v Hinkson*, 59 AD3d 934, *lv denied* 12 NY3d 817), as well as his challenge to County Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *People v Gordon*, 42 AD3d 964, *lv denied* 9 NY3d 876).

Although the challenge by defendant to the amount of restitution ordered is not foreclosed by his waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement (*see People v Talley*, 300 AD2d 1038, *lv denied* 100 NY2d 566), defendant failed to preserve that challenge for our review inasmuch as he failed to object to the amount of restitution at sentencing or to request a hearing with respect thereto (*see People v Hannig*, 68 AD3d 1779; *People v Melino*, 52 AD3d 1054, 1056, *lv denied* 11 NY3d 791). Defendant further contends that he was denied effective

assistance of counsel based on defense counsel's failure to request a mental health examination to determine whether he was competent to proceed with his guilty plea. To the extent that defendant's contention survives the plea and waiver of the right to appeal (see *People v Santos*, 37 AD3d 1141, lv denied 8 NY3d 950), that contention is also unpreserved for our review because defendant failed to move to withdraw his plea or to vacate the judgment of conviction (see *People v Tantaio*, 41 AD3d 1274, lv denied 9 NY3d 882). In any event, that contention lacks merit. Although defendant had a history of mental health problems and treatment, "[t]here is no indication in the record that defendant was unable to understand the proceedings or that he was mentally incompetent at the time he entered his guilty plea" (*People v Williams*, 35 AD3d 1273, 1275, lv denied 8 NY3d 928), and "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287).

We agree with defendant, however, that the sentence imposed is illegal. The challenge by defendant to the legality of the sentence survives his waiver of the right to appeal (see *People v Christopher T.*, 48 AD3d 1131) and, as the People correctly concede, "having adjudicated defendant a youthful offender, the court 'was without authority to impose consecutive sentences in excess of four years' " (*People v Cory T.*, 59 AD3d 1063, 1064, quoting *People v Ralph W.C.*, 21 AD3d 904, 905; see Penal Law § 60.02 [2]; § 70.00 [2] [e]). We therefore modify the adjudication accordingly.

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

1567

CA 09-01436

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

VINCENT FALCO, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KRISTEN B. DEGNAN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

RICHARD G. VOGT P.C., ROCHESTER (LINDA J. VOGT OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered September 12, 2008 in a personal injury action. The judgment and order granted in part and denied in part defendant's motion to dismiss the complaint.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by granting the motion in its entirety and dismissing the complaint and as modified the judgment and order is affirmed without costs.

Memorandum: Even accepting all of the facts alleged by plaintiff in his complaint as true and according him the benefit of every favorable inference, as we must in the context of defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (*see Leon v Martinez*, 84 NY2d 83, 86-87; *Kumar v American Tr. Ins. Co.*, 49 AD3d 1353, 1354), we conclude that Supreme Court properly granted that part of defendant's motion seeking dismissal of the cause of action alleging the violation of General Business Law § 349. Plaintiff failed to allege that "the acts or practices [complained of] have a broader impact on consumers at large" and thus failed to state a cause of action for the violation of that statute (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25). We agree with defendant, however, that the court erred in denying that part of its motion seeking dismissal of the breach of contract cause of action, thereby granting the motion in its entirety. Plaintiff failed to allege facts sufficient to establish the existence of any agreement between the parties or between defendant and plaintiff's insurer. Thus, plaintiff failed to state a cause of action for breach of contract, inasmuch as "no contract of any kind exists between plaintiff and defendant and there is no recognized theory upon which

defendant . . . might be held liable to plaintiff, as a third-party beneficiary" (*Area Masonry v Dormitory Auth. of State of N.Y.*, 64 AD2d 810, 811). We therefore modify the judgment and order accordingly.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1572

CA 08-01848

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

VERONICA S., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PHILIP R.S., DEFENDANT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY L. TURNER OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

JAMES A. VAZZANA, LAW GUARDIAN, ROCHESTER, FOR BRITTANY M.S. AND
MORGAN E.S.

Appeal from a judgment of the Supreme Court, Monroe County (John M. Owens, J.), entered December 23, 2008 in a divorce action. The judgment, among other things, awarded plaintiff sole custody of the parties' children and granted defendant visitation.

It is hereby ORDERED that the judgment so appealed from is unanimously modified in the exercise of discretion by vacating the directive in the eighth decretal paragraph that defendant pay all of the Law Guardian's fees and providing that the Law Guardian's fees shall be divided equally between the parties and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: In this divorce action, defendant husband contends that Supreme Court erred in restricting his visitation with the parties' children upon awarding sole custody to plaintiff wife; that the court's decision-making process with respect to the children was flawed because the Law Guardian did not advise the court of the wishes of the children or advocate for them; and that the court erred in requiring defendant to pay certain fees to the expert psychologist and the Law Guardian.

We reject the contention of defendant that the court abused its discretion in limiting his visitation with the children. It is well settled that visitation issues are determined based on the best interests of the children (*see Matter of Wojcik v Newton* [appeal No. 2], 11 AD3d 1011; *Matter of Rought v Palidar*, 6 AD3d 1112), and that trial courts have "broad discretion in fashioning a visitation schedule" (*Rought*, 6 AD3d at 1112). Here, the record amply supports the court's determination that the best interests of the children would be served by restricted visitation with defendant (*see generally*

Matter of Hall v Porter, 52 AD3d 1289, 1289-1290; *Matter of Westfall v Westfall*, 28 AD3d 1229, *lv denied* 7 NY3d 706). Defendant admitted that he had sexual thoughts about children, including his own, and both the expert psychologist and defendant's social worker testified that defendant suffers from pedophilia. Although there is no evidence that defendant in fact engaged in sexual contact with minors, the expert psychologist testified that the children felt uncomfortable being alone with their father. "While the express wishes of children are not controlling, they are entitled to great weight, particularly where their age and maturity would make their input particularly meaningful" (*Koppenhoefer v Koppenhoefer*, 159 AD2d 113, 117). Here, the children were 12 and 15 years old, respectively, at the time of trial and, thus, their expressed preferences were entitled to great weight (see *Matter of Minner v Minner*, 56 AD3d 1198; *Koppenhoefer*, 159 AD2d at 117; *Bergson v Bergson*, 68 AD2d 931).

We reject defendant's further contention that the Law Guardian did not advise the court of the wishes of the children and did not advocate for them. We note at the outset that defendant contends for the first time on appeal that the Law Guardian did not advise the court of the children's wishes, and thus that contention is unpreserved for our review (see *Matter of Alyshia M.R.*, 53 AD3d 1060, 1061, *lv denied* 11 NY3d 707; see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, there is no merit to that contention. The record reflects that the Law Guardian met with the children several times in preparation for trial, interviewed both parties, attended all pretrial proceedings, vigorously questioned all of the witnesses at trial, made a successful motion for a *Lincoln* hearing, and represented the children during that hearing. The Law Guardian also prepared a post-trial submission in which he contended that sole custody be awarded to plaintiff, with restricted visitation to defendant. Even assuming, arguendo, that the Law Guardian did not adequately advise the court of the children's wishes, we conclude that the court had sufficient information to determine the best interests of the children (see *Alyshia M.R.*, 53 AD3d at 1061-1062; see also *Matter of Davona L.*, 45 AD3d 1392, *lv denied* 10 NY3d 707).

Also contrary to defendant's contention, we conclude that the court did not abuse its discretion in requiring defendant to pay the expert psychologist's \$600 trial retainer fee. The record establishes that the trial was postponed based upon defendant's representation that the matter was settled, and that the retainer fee was necessary to secure the expert psychologist's appearance on the adjourned date. We agree with defendant, however, that the court improvidently exercised its discretion in ordering defendant to pay all of the Law Guardian's fees both with respect to the trial as well as all post-trial proceedings. "Although the matter of counsel fees is entrusted to the sound discretion of the trial court, it is 'nonetheless to be controlled by the equities of the case and the financial circumstances of the parties' " (*Kavanakudiyil v Kavanakudiyil*, 203 AD2d 250, 252). Here, defendant's net income is \$50,790 per year, while plaintiff's net income is \$69,948 per year. Thus, the directive that defendant pay all of the Law Guardian's fees is not required to redress any

economic disparity between the parties. Moreover, aside from defendant's refusal to sign a stipulation of settlement, there is no indication that defendant "engaged in any dilatory or obstructionist tactics in defending" the divorce action or seeking increased visitation (*see Kwong-Yu Lee v Oi Wa Chan*, 245 AD2d 270), and such an award should not punish a party for deciding to proceed to trial rather than agree to a settlement (*see generally Comstock v Comstock*, 1 AD3d 307, 308). We thus conclude in the exercise of our discretion that the Law Guardian's fees should be divided equally between the parties. We therefore modify the judgment accordingly, and we remit the matter to Supreme Court to determine the amount to be paid by each party.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1573

CA 09-01144

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

DEBORAH HIMMELSBACH, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PATRICK GEORGE, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL J. GUARASCI, WILLIAMSVILLE (BETHANY A. RUBIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (LAUREN MONFORTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 8, 2008 in a personal injury action. The order denied defendant's motion to dismiss the complaint, which was treated by the court as a motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle that she was operating collided with a vehicle operated by defendant. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (5), based on a release executed by plaintiff prior to the commencement of the action. Pursuant to the terms thereof, plaintiff released defendant from "any and all claims" on account of "known and unknown personal injuries." We conclude that Supreme Court erred in denying defendant's motion, which was treated by the court as a motion for summary judgment pursuant to CPLR 3211 (c). Defendant met his initial burden on the motion by submitting documentary evidence, i.e., the release, establishing that the action was barred by plaintiff's execution of that document (see CPLR 3211 [a] [5]; 3212 [b]; see generally *Kavoukian v Kaletta*, 294 AD2d 646, 646-647). In opposition to the motion, plaintiff contended that the release was unenforceable because it was the result of a mistaken belief concerning the nature and extent of her injuries. It is well established that a general release may be set aside where there has been, inter alia, a mutual mistake (see *Mangini v McClurg*, 24 NY2d 556, 563; *Schroeder v Connelly*, 46 AD3d 1439, 1440), and that, "[i]n the instance of mutual mistake, the burden of persuasion is on the one who would set the release aside" (*Mangini*, 24 NY2d at 563). Here, plaintiff failed to meet that burden. With respect to allegations of mutual mistake concerning the

releasor's injuries at the time of the release, "there has been delineated a sharp distinction between injuries unknown to the parties and mistake as to the consequences of a known injury. A mistaken belief as to the nonexistence of [a] presently existing injury is a prerequisite to avoidance of a release" (*id.* at 564).

Here, plaintiff contended that, at the time she executed the release, she was unaware that she had multiple herniated discs in her cervical, thoracic and lumbar spine. Contrary to plaintiff's contention, the record contains MRIs of plaintiff's cervical and lumbar spine that predated the execution of the release and revealed herniated discs at C5-6, T3-4, L3-4, and L4-5, as well as annular tears at T4-5, L5-S1, L2-3, and T11-12. Plaintiff also contended that she was unaware when she executed the release that her injuries would require surgery. Because those injuries were known, however, her alleged lack of knowledge that she would be required to undergo surgery "is merely as to the consequence, future course, or sequelae of a known injury, [and] the release will stand" (*id.* at 564). Indeed, while the evidence submitted by plaintiff establishes that she underwent a discectomy at C5-6 after execution of the release, the injury to that portion of her spine was reflected in the earlier MRI of her cervical spine. Contrary to the contention of plaintiff, the expert affidavit submitted by her was insufficient to raise an issue of fact with respect to mutual mistake. Although plaintiff's expert opined that MRIs taken after plaintiff executed the release revealed injuries to plaintiff's spine that were "not obviously present" in the previous MRIs, plaintiff did not submit those MRIs and her expert failed to identify how the alleged subsequently discovered injuries were "different injuries . . . [and not] unanticipated consequences of known injuries" (*id.* at 568).

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

1576

CA 09-00868

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

CHRISTINE A. GRUBEA, PLAINTIFF-RESPONDENT,

V

ORDER

PETER D. GRUBEA, DEFENDANT-APPELLANT.

PETER D. GRUBEA, BUFFALO, DEFENDANT-APPELLANT PRO SE.

WILLIAM R. HITES, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 26, 2009 in a divorce action. The order, among other things, directed defendant to pay plaintiff arrears for the distributive award.

Now, upon reading and filing the stipulation withdrawing appeal signed by defendant and the attorney for plaintiff on January 9, 2010,

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1577

CA 08-01863

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

CHARLES R. MCLAUGHLIN AND CHERYL MCLAUGHLIN,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

MIDROX INSURANCE COMPANY, DEFENDANT-APPELLANT,
RONALD D. BLODGETT, DAVID J. BLODGETT,
RONALD D. BLODGETT AND DAVID J. BLODGETT,
DOING BUSINESS AS BLODGETT BROTHERS PARTNERSHIPS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

TOWNE, RYAN & PARTNERS, PC, ALBANY (AMANDA R. STERN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

JONES AND SKIVINGTON, GENESEO (PETER K. SKIVINGTON OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County
(William F. Kocher, A.J.), entered November 1, 2007 in a personal
injury action. The order, inter alia, denied the cross motion of
defendant Midrox Insurance Company for summary judgment.

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

Same Memorandum as in *McLaughlin v Midrox Ins. Co.* ([appeal No.
2] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1578

CA 08-02196

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

CHARLES R. MCLAUGHLIN AND CHERYL MCLAUGHLIN,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

MIDROX INSURANCE COMPANY, DEFENDANT-APPELLANT,
RONALD D. BLODGETT, DAVID J. BLODGETT,
RONALD D. BLODGETT AND DAVID J. BLODGETT,
DOING BUSINESS AS BLODGETT BROTHERS PARTNERSHIPS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

TOWNE, RYAN & PARTNERS, PC, ALBANY (AMANDA R. STERN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

JONES AND SKIVINGTON, GENESEO (PETER K. SKIVINGTON OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Ontario County
(William F. Kocher, A.J.), entered March 3, 2009 in a personal injury
action. The judgment, inter alia, directed defendant Midrox Insurance
Company to pay plaintiffs the sum of \$1 million.

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

Memorandum: Plaintiffs commenced this action seeking a
determination that defendant Midrox Insurance Company (Midrox) was
obligated under a farmowner's insurance policy issued to the remaining
defendants, Ronald D. Blodgett and David J. Blodgett, doing business
as the Blodgett Brothers Partnerships (hereafter, Blodgett
defendants), to indemnify the Blodgett defendants in the underlying
personal injury action and requesting judgment against Midrox in the
amount of \$1 million. In the underlying personal injury action,
plaintiffs sought damages from the Blodgett defendants for injuries
sustained by plaintiff Charles R. McLaughlin when the motorcycle he
was operating collided with a pickup truck operated by Ronald
Blodgett. Midrox disclaimed coverage for the accident on the ground
that the accident occurred off the insured premises while Blodgett was
operating a vehicle subject to motor vehicle registration. The
underlying action ultimately settled, and judgment was entered against

the Blodgett defendants in the amount of \$1 million. Neither Midrox nor the Blodgett defendants, however, responded to plaintiffs' demand for payment pursuant to Insurance Law § 3420 (a) (2).

Plaintiffs moved for summary judgment on the complaint, and Midrox cross-moved for summary judgment dismissing the complaint on the ground that it properly disclaimed coverage. In appeal No. 1, Midrox appeals from an order granting plaintiffs' motion in part and denying its cross motion in its entirety. The court determined that the pickup truck was registered as an agricultural truck pursuant to Vehicle and Traffic Law § 401 (7) (E) (2) and was properly operated on public highways only for the purposes set forth in that subdivision (see § 401 [7] [E] [3]), but the court further determined that there was an issue of fact whether the accident occurred on insured premises. In appeal No. 2, Midrox appeals from a subsequent order pursuant to which the court determined following a hearing that the policy provides coverage for the accident and that Midrox shall pay plaintiffs the sum of \$1 million. We note that, in appeal No. 2, Midrox appeals from the order rather than the subsequent judgment. Nevertheless, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the judgment (see *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; see also CPLR 5520 [c]). We further note that the order in appeal No. 1 is subsumed in the final judgment in appeal No. 2, and thus the appeal by Midrox from the order in appeal No. 1 must be dismissed (see *Hughes*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; see also CPLR 5501 [a] [1]).

We conclude that the court properly determined that the farmowner's policy provided coverage for the subject accident. The incidental liability provisions of the policy cover liability for bodily injury and property damage that "occurs on the *insured premises* and results from the ownership, maintenance, use, loading or unloading of . . . *motorized vehicles* not subject to *motor vehicle* registration because of their type or use" Pursuant to the policy, the "[i]nsured premises" include the Blodgett defendants' main farm as identified in the "Described Location" section as well as "any premises used . . . in connection with the described location," the "approaches and access ways immediately adjoining the *insured premises*," and "other land [the insured] use[s] for *farming* purposes"

Midrox contends that its policy does not provide coverage because the accident occurred on a public roadway while Ronald Blodgett was driving a pickup truck. We reject that contention. In *Nationwide Mut. Ins. Co. v Erie & Niagara Ins. Assn.* (249 AD2d 898), we interpreted a farmowner's insurance policy that was substantially similar, if not identical, to the Midrox policy. There, the insured's employee was involved in an accident on a public roadway while driving a pickup truck between two farms operated by the insured (*id.* at 898). We further concluded that the various definitions of "insured premises" were "broad enough to include public roadways used by the insured to transport workers and materials between the insured's

farms" (*id.*). Here, the record establishes that, at the time of the accident, Ronald Blodgett was driving the pickup truck between the Blodgett defendants' main farm and leased farm property, which were approximately nine miles from each other.

We further reject the contention of Midrox that our decision in *Nationwide Mut. Ins. Co.* does not apply because the pickup truck was registered as an agricultural truck (Vehicle and Traffic Law § 401 [7] [E]) rather than as a farm vehicle (§ 401 [13]). The Blodgett defendants had the option of registering the truck as either a farm vehicle or an agricultural truck, and the fact that they elected to register the truck as an agricultural vehicle does not, in our view, deprive them of coverage under the policy inasmuch as the pickup truck was used exclusively for farm purposes and the accident occurred along the most direct route between the two farm parcels. Thus, the pickup truck was not subject to regular motor vehicle registration because of its exclusive use as a farm vehicle (*see Nationwide Mut. Ins. Co.*, 249 AD2d at 898).

There is likewise no merit to the contention of Midrox that the term "premises" within the meaning of the policy is not intended to encompass public roadways. That restrictive interpretation is not supported by the language of the policy, which neither defines "premises" nor excludes public roadways from its purview (*cf. Estate of Belmar v County of Onondaga*, 147 AD2d 900, *lv denied* 74 NY2d 612). Construing the policy in favor of the insureds and resolving all ambiguities in the insureds' favor, as we must (*see United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232), we conclude that the accident occurred on the "insured premises" within the meaning of one or more of the policy's alternative definitions of that phrase (*see Nationwide Mut. Ins. Co.*, 249 AD2d at 898).

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

1579

CA 08-02420

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

RUBY JORDAN, FORMERLY KNOWN AS RUBY PREMO,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD PREMO, DEFENDANT-APPELLANT.

WELDON & TRIMPER LAW FIRM, WATERTOWN, D.J. & J.A. CIRANDO, ESQS.,
SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HECTOR LAW OFFICE, WATERTOWN (LIONEL LEE HECTOR OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated October 21, 2008. The order granted the motion of plaintiff to reopen the action for divorce.

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

Memorandum: Supreme Court properly invoked its "inherent power to exercise control over its judgments" in granting the motion of plaintiff seeking, inter alia, to reopen the underlying divorce action to address the issue of her entitlement to a share of defendant's pension (*Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739, 742). In support of her motion, plaintiff submitted evidence establishing that the parties agreed during the trial of the divorce action that plaintiff would receive her share of defendant's pension in accordance with the formula set forth in *Majauskas v Majauskas* (61 NY2d 481) but that the judgment of divorce, prepared by defendant's attorney, did not include a provision distributing defendant's pension pursuant to the parties' agreement. Contrary to defendant's contention, the delay by plaintiff in bringing the motion did not warrant denial of the motion inasmuch as defendant was not prejudiced by the delay (*see generally Columbus Realty Inv. Corp. v D & S Roofing & Siding Corp.*, 257 AD2d 592).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1606

KA 07-00520

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH R. MCAVOY, DEFENDANT-APPELLANT.

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered December 18, 2006. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the second degree (two counts), endangering the welfare of a child (three counts), unlawfully dealing with a child in the first degree, and sexual abuse in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts each of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a], [b]) and sexual abuse in the second degree (§ 130.60 [2]), three counts of endangering the welfare of a child (§ 260.10 [1]), and one count of unlawfully dealing with a child in the first degree (§ 260.20 [2]). Defendant contends that County Court erred in refusing to suppress his statements to the police. We reject that contention. "The credibility determinations of the suppression court receive deference and will not be disturbed if supported by the record" (*People v Button*, 56 AD3d 1043, 1044, *lv dismissed* 12 NY3d 781; *see People v Prochilo*, 41 NY2d 759, 761; *People v Timmons*, 54 AD3d 883, 885, *lv denied* 12 NY3d 822). Here, the evidence at the suppression hearing established that defendant voluntarily accompanied a police officer to the police station and waived his *Miranda* rights, that the questioning lasted only 30 minutes, and that defendant received no promises and was not threatened in any way (*see Button*, 56 AD3d at 1044; *People v Pennick*, 2 AD3d 1427, 1428, *lv denied* 1 NY3d 632; *People v Kemp*, 266 AD2d 887, 887-888, *lv denied* 94 NY2d 921).

We also reject the contention of defendant that the court erred in denying his motion to sever the counts of the indictment. The offenses were properly joined because they involved incidents in which

proof with respect to one crime would be material and admissible as evidence in chief in a trial with respect to the other crimes, and they all involved the same or similar statutory provisions (see CPL 200.20 [2] [b], [c]; *People v Comfort*, 31 AD3d 1110, 1112, *lv denied* 7 NY3d 847; *People v Cassidy*, 16 AD3d 1079, 1081, *lv denied* 5 NY3d 760). Defendant "failed to meet his burden of submitting sufficient evidence of prejudice from the joinder to establish good cause to sever" (*Cassidy*, 16 AD3d at 1081; see CPL 200.20 [3]; *People v Vasquez*, 19 AD3d 1103, 1103-1104, *lv denied* 5 NY3d 811).

In his motion for a trial order of dismissal, defendant failed to raise the majority of the specific challenges now raised on appeal and thus failed to preserve for our review the majority of his challenges to the legal sufficiency of the evidence (see *People v Gray*, 86 NY2d 10, 19). In any event, all of his challenges lack merit (see generally *People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Contrary to defendant's contention, minor inconsistencies in the testimony of the People's witnesses do not render the verdict against the weight of the evidence (see *People v Hawkins*, 41 AD3d 1314, 1315, *lv denied* 9 NY3d 923; *People v Lauderdale*, 13 AD3d 1173).

Defendant further contends that he was deprived of a fair trial based on improper remarks by the court and by prosecutorial misconduct on summation. Defendant failed to preserve his contention for our review with respect to the majority of the instances of alleged misconduct (see CPL 470.05 [2]), and we decline to exercise our power to address those instances as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). In any event, even had defendant preserved all of those instances for our review, we would nevertheless conclude that reversal is not warranted. While some of the remarks were arguably improper, they were not so egregious to deprive defendant of a fair trial (see generally *People v Hightower*, 286 AD2d 913, 915, *lv denied* 97 NY2d 656). Furthermore, with respect to the prosecutor's alleged misconduct on summation, the court alleviated any prejudice arising therefrom "by instructing the jury that the comments and summations of the prosecutor and defense counsel do not constitute evidence" (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854).

Contrary to the further contentions of defendant, he received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147), and the sentence is not unduly harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1607

KA 07-00939

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBBIE D. OWENS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

ROBBIE D. OWENS, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 20, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (four counts), promoting prostitution in the second degree (two counts), compelling prostitution and endangering the welfare of a child.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of, inter alia, four counts of rape in the first degree (Penal Law § 130.35 [1]) and, in appeal No. 2, he appeals from an order denying his pro se motion pursuant to CPL 440.10 to vacate that judgment. We granted leave to appeal from the order in appeal No. 2, and we now affirm both the judgment and order.

We reject defendant's contention that a new trial is warranted because the People failed to disclose *Brady* material in a timely manner. The two documents in question contained prior inconsistent statements of the complainant concerning the dates and locations of the purported rapes, and they impeached the credibility of a prosecution witness whose testimony was determinative of guilt or innocence. Thus, the documents in fact constituted exculpatory evidence subject to disclosure under *Brady* (see *People v Baxley*, 84 NY2d 208, 213, *rearg dismissed* 86 NY2d 886; *People v Harris*, 35 AD3d 1197). We conclude, however, that defendant's constitutional right to a fair trial was not violated because the documents were disclosed to defendant at a time when he had a meaningful opportunity to use them

(see *People v Cortijo*, 70 NY2d 868, 870; *People v Wynn*, 55 AD3d 1378, 1379, *lv denied* 11 NY3d 901).

Contrary to defendant's further contention, Supreme Court properly refused to admit in evidence portions of a police report allegedly containing a prior inconsistent statement of the complainant, inasmuch as defendant failed to lay a proper foundation for the admission of that report (see *People v Duncan*, 46 NY2d 74, 80-81, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910, *rearg dismissed* 56 NY2d 646; *People v Laurey*, 24 AD3d 1107, 1109, *lv denied* 6 NY3d 815). We further conclude that the court properly refused to admit in evidence certain portions of a medical report that also purportedly contained a prior inconsistent statement of the complainant. "Although defendant claims [that] he was not offering this information for its truth, but [instead was offering it] to show [that the complainant made the statement], it contained multiple layers of hearsay, and depended, for its relevancy, on at least some level being true" (*People v Alvarez*, 44 AD3d 562, 564, *lv denied* 9 NY3d 1030).

We reject defendant's contention that the court erred in allowing a social worker to testify as a rape trauma expert. "The qualification of a witness to testify as an expert rests in the discretion of the court, and its determination will not be disturbed in the absence of serious mistake, an error of law or an abuse of discretion" (*People v Visser*, 212 AD2d 1009; see *People v Page*, 225 AD2d 831, 833, *lv denied* 88 NY2d 883). Through her testimony, the social worker established that her "extensive training and experience rendered her qualified to provide such [testimony]" (*People v Lewis*, 16 AD3d 173, 173, *lv denied* 4 NY3d 888; see *People v Bassett*, 55 AD3d 1434, 1436, *lv denied* 11 NY3d 922). In any event, " '[p]ractical experience may properly substitute for academic training in determining whether an individual has acquired the training necessary to be qualified as an expert' " (*People v Paun*, 269 AD2d 546, *lv denied* 95 NY2d 801).

Finally, 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 convicting defendant of those crimes is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495), and we further conclude that defendant was afforded meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147).

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

1608

KA 08-00914

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBBIE D. OWENS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

ROBBIE D. OWENS, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY 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 April 10, 2008. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment in appeal No. 1.

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

Same Memorandum as in *People v Owens* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1609

KA 08-01145

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CLARENCE CARR, JR., DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 21, 2007. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). We previously affirmed the judgment convicting defendant's son of, inter alia, the attempted murder of the victim herein (*People v Carr*, 59 AD3d 945, lv granted 12 NY3d 852). We reject the challenge by defendant to Supreme Court's denial of his request for a missing witness charge with respect to the victim's companions inasmuch as the request was not timely (*see id.* at 946; *see generally People v Gonzalez*, 68 NY2d 424, 427). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see CPL 470.05 [2]*), and we reject that contention in any event for the same reasons as those set forth in our decision concerning defendant's son (*see Carr*, 59 AD3d at 946).

We reject defendant's further contention that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence, which included a surveillance video, established that defendant and his son chased the victim through a store and that, as the victim was exiting the store, defendant held a large knife over his head. A security guard at a nearby apartment complex testified that the victim was lying on the sidewalk when defendant's son shot him and defendant struck him with a knife. Indeed, defendant testified that he struck the victim in the

shoulder with a knife. The medical testimony presented by the People established that the victim sustained lacerations and that the gunshot wounds were life-threatening. We note that defendant was charged and convicted as an accomplice, and we therefore reject his contention that the evidence is legally insufficient to establish the element of intent with respect to the attempted murder count (*see id.* at 495), as well as the remaining counts of criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and criminal possession of a weapon in the third degree (§ 265.02 [1], [former (4)]) in connection with the accessorial possession of the gun (*see generally Bleakley*, 69 NY2d at 495).

Defendant also contends that the verdict is against the weight of the evidence because, according to his trial testimony, his actions were justified. In support of that contention, defendant relies on his testimony that one of the victim's companions threatened to shoot him when they left the store and that he was fearful of that group of men because they had attacked both himself and his son approximately one year earlier. He further testified that he had been stabbed and shot during that incident. In addition, defendant testified that he believed that the victim and one of his companions had a gun during the instant incident, based upon their hand gestures. Nevertheless, even assuming, *arguendo*, that a different result would not have been unreasonable (*see id.*), we reject 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 jury did not fail to give the evidence the weight it should be accorded (*see Bleakley*, 69 NY2d at 495). Finally, the sentence is not unduly harsh or severe.

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

1610

KA 08-02672

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL IGNATOWSKI, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered October 1, 2008. The judgment convicted defendant, upon his plea of guilty, of failure to register as a sex offender (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of failure to register as a sex offender (Correction Law § 168-f [3]). Defendant failed to preserve for our review his contention that Supreme Court erred in imposing a surcharge and fees (*see* CPL 470.05 [2]; *People v King*, 57 AD3d 1495), 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]). Defendant further contends that the court erred in imposing an enhanced sentence without affording him an opportunity to withdraw his plea. Although defendant failed to preserve his contention for our review by failing to object to the enhanced sentence or to move to withdraw his plea or to vacate the judgment of conviction (*see People v Fortner*, 23 AD3d 1058; *People v Sundown*, 305 AD2d 1075), we nevertheless exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The record establishes that defendant was not informed at the time of the plea that the court could impose an enhanced sentence in the event that he failed to appear at sentencing (*see Fortner*, 23 AD3d 1058; *Sundown*, 305 AD2d at 1076; *People v Ortiz*, 244 AD2d 960, 961). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing. The sentence promised in accordance with the plea bargain, however, is illegal.

Thus, the court upon remittal may impose a lesser sentence than that promised and, in that event, the court must "entertain a motion by the People, should the People be so disposed, to vacate the plea and set aside the conviction in its entirety" (*People v Irwin*, 166 AD2d 924, 925; see *People v Tuszynski*, 57 AD3d 1380, 1381). "Further, should the People be so disposed, they may withdraw their consent to the waiver of indictment" (*People v Hamilton*, 49 AD3d 1163, 1164-1165; see CPL 195.10 [1] [c]). Alternatively, the court upon remittal may impose a greater sentence than that promised and, in that event, the court must afford defendant the opportunity to withdraw his plea (see generally *People v Martin*, 278 AD2d 743, 744). In light of our determination, we do not address defendant's remaining contentions.

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

1611

KAH 08-02380

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

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

V

MEMORANDUM AND ORDER

KEVIN HALE, SUPERINTENDENT, ORLEANS COUNTY JAIL
AND NEW YORK STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR
PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James H. Dillon, J.), entered September 11, 2008. The judgment, inter alia, dismissed the petition for a writ of habeas corpus.

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

Memorandum: Petitioner appeals from a judgment vacating a writ of habeas corpus and dismissing his petition. This appeal has been rendered moot by petitioner's re-release to parole supervision (see *People ex rel. Hampton v Dennison*, 59 AD3d 951, lv denied 12 NY3d 711; *People ex rel. Alexander v Walsh*, 303 AD2d 1015, lv denied 100 NY2d 505). In any event, petitioner's contentions with respect to the preliminary parole revocation hearing are rendered moot by the determination following the final parole revocation, at which petitioner admitted that he violated conditions of his parole (see *Alexander*, 303 AD2d 1015). No exception to the mootness doctrine applies herein (see *id.*; see generally *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1614

CAF 09-01291

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

IN THE MATTER OF NICO S.C.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

ARDETH L. HOUDE, LAW GUARDIAN, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (TIMOTHY M. LEXVOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered February 26, 2009 in a proceeding pursuant to Family Court Act article 3. The amended order adjudicated respondent a juvenile delinquent.

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

Memorandum: On appeal from an order adjudicating him to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree (Penal Law § 120.00 [2]), respondent contends that the evidence is legally insufficient to support the finding that his acts constituted reckless assault. We note at the outset that, although respondent appeals from the order rather than the subsequent amended order, in the exercise of our discretion we treat the notice of appeal as valid and deem the appeal as taken from the amended order (*see Matter of Steven M.*, 37 AD3d 1072; *see also* CPLR 5520 [c]).

In any event, we reject respondent's contention. Both respondent and his mother testified that, while they were arguing with each other, respondent grabbed his mother's arm. After respondent and his mother fell to the floor, respondent held her wrists and bit her shoulder. Even assuming, *arguendo*, that we credit the testimony of respondent that he was attempting to calm his mother down by subduing her, we conclude the evidence is legally sufficient to support Family Court's determination that respondent consciously disregarded a substantial and unjustifiable risk that his mother would sustain a physical injury (*see* § 15.05 [3]; § 120.00 [2]; *People v Gordon*, 34 AD3d 316, *lv denied* 8 NY3d 880; *see also Matter of Jehadh S.*, 24 AD3d 128). We further conclude that the evidence is legally sufficient to support the court's finding that respondent's mother sustained a physical injury, *i.e.*, substantial pain, as a result of respondent's

conduct (see § 10.00 [9]). The photographs presented by the Presentment Agency support the testimony of respondent's mother that she sustained a bite mark on her right shoulder and extensive bruising on her shoulders, arms and wrists. Further, respondent's mother testified that she sought medical treatment for her injuries, which included pain and swelling of her wrists and left shoulder (see *Jehadh S.*, 24 AD3d 128; *People v Bowen*, 17 AD3d 1054, 1055-1056, *lv denied* 5 NY3d 759). Finally, we conclude that the court was entitled to credit the testimony of respondent's mother that on a scale of 1 to 10, she rated her pain level at 7 to 8, and that the pain lasted for several days. Thus the court properly determined that the injuries caused respondent's mother substantial pain (see *People v Coombs*, 56 AD3d 1195, 1196, *lv denied* 12 NY3d 782; see generally *People v Guidice*, 83 NY2d 630, 636).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1615

CA 08-02261

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

DOUGLAS WARNEY, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 114826.)

NEUFELD SCHECK & BRUSTIN LLP, NEW YORK CITY (DEBORAH L. CORNWALL OF COUNSEL), AND EASTON THOMPSON KASPEREK, LLP, ROCHESTER, FOR CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgenshi Minarik, J.), entered October 16, 2008. The order granted defendant's motion and dismissed the claim.

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

Memorandum: The Court of Claims properly granted defendant's motion to dismiss this claim seeking damages for unjust conviction and imprisonment pursuant to Court of Claims Act § 8-b. The claim was brought after claimant's conviction of two counts of murder in the second degree was vacated based on newly found evidence, i.e., the DNA analysis of the blood evidence from the crime scene that implicated another person. Claimant had confessed to the crimes, which in large part led to his conviction (*People v Warney*, 299 AD2d 956, lv denied 99 NY2d 633). The new evidence was discovered after claimant had been incarcerated for a period of time, whereupon the person implicated by the new evidence confessed and pleaded guilty to the crimes. "To survive [defendant's] dismissal motion, . . . claimant [was required by Court of Claims Act § 8-b (3) to] state facts in sufficient detail to permit the court to find that [he] was likely to succeed at trial in proving[, inter alia,] that [he] by [his] own conduct [did not] cause or bring about [the] conviction" (*Reed v State of New York*, 78 NY2d 1, 7). "[F]or example, an innocent criminal defendant may cause or bring about his or her own conviction by making an uncoerced false confession of guilt that is presented to the jury at trial" (*Donnell v State of New York*, 26 AD3d 59, 62-63; see generally *Ausderau v State of New York*, 130 Misc 2d 848, 851-852, affd 127 AD2d 980, lv denied 69 NY2d 613). We therefore conclude that claimant has failed to state facts in sufficient detail to permit the court to find that he is

likely to succeed at trial in proving that he did not by his own conduct cause or bring about his conviction (see § 8-b [4]). Indeed, he merely surmises that his confession must have been coerced because it was later shown to be false when someone else confessed to the crime and, apart from claimant's actual confession, there was evidence that claimant approached the police in the first instance with information about the crimes and made incriminating statements to police officers.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1618

CA 08-02178

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

ROGER CARROW, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

STEPHEN BOGARD, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (JOHN WALLACE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, A.J.), entered October 7, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while erecting trusses on a pole barn being constructed on residential property owned by defendant. Defendant hired plaintiff to erect the trusses, and it is undisputed that defendant provided no direction or instructions with respect to the manner in which the work was to be performed. On the day of the accident, defendant was out of town on a fishing trip, and plaintiff and his crew made all decisions while erecting the trusses. The accident occurred when plaintiff erroneously cut the main supports for the trusses, causing them to collapse.

We conclude that Supreme Court properly granted those parts of defendant's motion for summary judgment dismissing the Labor Law causes of action, alleging violations of Labor Law § 240 (1) and § 241 (6). Contrary to plaintiff's contention, the homeowner exemption contained in those statutes applies to preclude liability against defendant inasmuch as he falls within the exemption for " 'owners of one and two-family dwellings who contract for but do not direct or control the work' " (*Bartoo v Buell*, 87 NY2d 362, 367; see generally *Schultz v Noeller*, 11 AD3d 964). Here, defendant established that he did not direct or control " 'the method and manner in which the work [was] performed' " (*Gambee v Dunford*, 270 AD2d 809, 810; see *Miller v Shah*, 3 AD3d 521, 522; *Soskin v Scharff*, 309 AD2d 1102, 1104; *Kostyj v*

Babiarz, 212 AD2d 1010), and plaintiff failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude that the court properly granted that part of the motion seeking summary judgment dismissing the common-law negligence cause of action. Defendant established that he did not have authority to control the injury-producing work (see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *Farrell v Okeic*, 266 AD2d 892; see generally *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352), and plaintiff failed to raise a triable issue of fact (see generally *Zuckerman*, 49 NY2d at 562).

In view of our determination, we do not address plaintiff's remaining contentions.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1621

CA 09-01435

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

PAUL CWIKLINSKI AND LISE CWIKLINSKI,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

SEARS, ROEBUCK & CO., INC., EMERSON
ELECTRIC CO., AND VERMONT AMERICAN
CORPORATION, DEFENDANTS-APPELLANTS.

PHILLIPS LYTTLE LLP, BUFFALO (MICHAEL B. POWERS OF COUNSEL), FOR
DEFENDANTS-APPELLANTS SEARS, ROEBUCK & CO., INC. AND EMERSON ELECTRIC
CO.

BROWN & KELLY, LLP, BUFFALO (CAROLYN M. HENRY OF COUNSEL), FOR
DEFENDANT-APPELLANT VERMONT AMERICAN CORPORATION.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeals from an amended order of the Supreme Court, Erie County (Joseph R. Glowonia, J.), entered January 29, 2009 in a personal injury action. The amended order, insofar as appealed from, denied in its entirety the motion of defendant Vermont American Corporation for summary judgment and denied in part the motion of defendants Sears, Roebuck & Co., Inc. and Emerson Electric Co. for summary judgment.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting those parts of the motion of defendant Vermont American Corporation and the motion of defendants Sears, Roebuck & Co., Inc. and Emerson Electric Co. with respect to the negligence and strict products liability causes of action insofar as they are predicated on a manufacturing defect and the failure to warn and dismissing those causes of action to that extent and as modified the amended order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Paul Cwiklinski (plaintiff) while he was using a molding head cutter attached to a table saw. The molding head cutter was manufactured by defendant Vermont American Corporation (Vermont), and the table saw was manufactured by defendant Emerson Electric Co. (Emerson). Plaintiff purchased both products from defendant Sears, Roebuck & Co., Inc. (Sears) under its "Craftsman" label. He had used the table saw on about 30 occasions prior to the accident without incident and had used the molding head cutter two or three times. On

the day of the accident, plaintiff attached the molding head cutter to the table saw to make a non-through cut in a test piece of wood, which required the removal of the blade guard on the table saw. Plaintiff used both hold downs and a push block. The saw began to "chatter" as plaintiff pushed through the piece of wood and, after he placed his left hand on the piece of wood in order to steady it, the wood kicked back. Plaintiff's left hand then came in contact with the saw blade, which caused the injury. Defendants moved for summary judgment dismissing the complaint, and Supreme Court denied Vermont's motion in its entirety and granted that part of the motion of Sears and Emerson for summary judgment dismissing the breach of warranty cause of action against them with respect to the table saw.

We agree with defendants that the court erred in denying those parts of their motions for summary judgment dismissing the negligence and strict products liability causes of action insofar as they are predicated on a manufacturing defect, and we therefore modify the amended order accordingly. Defendants established that the molding head cutter and table saw had no manufacturing or assembly defect, and plaintiffs failed to raise an issue of fact (see *Cramer v Toledo Scale Co.*, 158 AD2d 966, 967; see generally *Caprara v Chrysler Corp.*, 52 NY2d 114, 123-124, rearg denied 52 NY2d 1073). We further agree with defendants that the court erred in denying those parts of their motions for summary judgment dismissing the negligence and strict products liability causes of action insofar as they are predicated on the failure to warn, and we therefore further modify the amended order accordingly. "There is no duty to warn of an open and obvious danger of which the product user is actually aware or should be aware as a result of ordinary observation or as a matter of common sense" (*Felle v W.W. Grainger, Inc.*, 302 AD2d 971, 972; see *Liriano v Hobart Corp.*, 92 NY2d 232, 241-242). Here, plaintiff admitted that he read the instruction manuals, and it can only be concluded that the danger in placing one's hands near an unguarded blade is open and obvious (see *Lamb v Kysor Indus. Corp.*, 305 AD2d 1083, 1084-1085; *Baptiste v Northfield Foundry & Mach. Co.*, 184 AD2d 841, 843; see also *Conn v Sears, Roebuck & Co.*, 262 AD2d 954, 955, lv denied 94 NY2d 755).

Contrary to defendants' further contentions, however, the court properly denied those parts of their motions for summary judgment dismissing the negligence and strict products liability causes of action insofar as they are predicted on a design defect. Defendants met their initial burdens by submitting the affidavits of experts stating that there was no feasible guard that could have been used with the molding head cutter without hindering the non-through cut operation or without putting the user at further risk, and explaining why a specified guard known as the Uniguard would not have worked. Defendants thus established that, when the molding head cutter and table saw left the manufacturers' hands, they were in a condition "reasonably contemplated by the ultimate consumer" and were reasonably safe for their intended use (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 479; see generally *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108-109). In opposition to the motions, however, plaintiffs raised triable issues of fact by submitting the affidavits

of an expert who stated that there were several appropriate, workable guards on the market that could have prevented the accident, including the Uniguard. The expert further stated that the failure to sell the molding head cutter without requiring a guard and to sell the table saw without an accompanying guard suitable for the type of cutting operation being performed by plaintiff rendered the products defective and not reasonably safe for their intended use. Plaintiffs thus raised triable issues of fact whether the products were defectively designed based on the alleged lack of adequate guarding and whether there were feasible alternative designs when they were manufactured (see *Ganter v Makita U.S.A.*, 291 AD2d 847, 847-848; *Sanchez v Martin Maschinenbau GmbH & Co.*, 281 AD2d 284; cf. *Lamb*, 305 AD2d at 1084). We have considered defendants' remaining contentions and conclude that they are without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1623

CA 09-00107

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

STEVEN RACZKA AND DIANE RACZKA,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

DAVID F. RAMIREZ, DEFENDANT,
ANDREW C. BRIND'AMOUR, SANDRA BRIND'AMOUR,
ELLICOTT CREEK CONSTRUCTION, INC., ALLIED
BUILDERS, INC., AND J & M DISTRIBUTING
CO., INC., DOING BUSINESS AS CERTO BROTHERS
DISTRIBUTING COMPANY, DEFENDANTS-RESPONDENTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (STEPHEN R. FOLEY OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

COHEN & LOMBARDO, P.C., BUFFALO (NEIL R. SHERWOOD OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS ANDREW C. BRIND'AMOUR AND SANDRA BRIND'AMOUR.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL),
FOR DEFENDANT-RESPONDENT ELLICOTT CREEK CONSTRUCTION, INC.

GOLDBERG SEGALLA LLP, BUFFALO (DENNIS P. GLASCOTT OF COUNSEL), FOR
DEFENDANT-RESPONDENT ALLIED BUILDERS, INC.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF
COUNSEL), FOR DEFENDANT-RESPONDENT J & M DISTRIBUTING CO., INC., DOING
BUSINESS AS CERTO BROTHERS DISTRIBUTING COMPANY.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered August 4, 2008 in a personal injury action. The order, among other things, granted the motions of defendants Andrew C. Brind'Amour, Sandra Brind'Amour, Ellicott Creek Construction, Inc., Allied Builders, Inc., and J & M Distributing Co. Inc., doing business as Certo Brothers Distributing Company, for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Steven Raczka (plaintiff) when he was struck by a vehicle owned by Andrew C. Brind'Amour (hereafter, Brind'Amour) and Sandra Brind'Amour (collectively, Brind'Amour defendants) and operated by defendant David F. Ramirez. On the day of the accident, plaintiff

and other union members were picketing a construction site owned by defendant J & M Distributing Co., Inc., doing business as Certo Brothers Distributing Company (Certo). Defendant Allied Builders, Inc. (Allied) was the general contractor on the construction site, and defendant Ellicott Creek Construction, Inc. (Ellicott Creek) was a subcontractor.

Non-union employees of Ellicott Creek were required to pass through the picket line in order to report for work at the construction site. Plaintiff was among the group of picketers that confronted one of Ellicott Creek's employees, Daryl Ragalski. Brind'Amour, in his capacity as project superintendent for Allied, was present at the gate area at that time in order to observe and photograph the status of the picketing situation. Three Ellicott Creek employees, including Ramirez, observed the situation developing between Ragalski and the picketers and ran to assist Ragalski. Ramirez was subsequently beaten and kicked in the head by two or three picketers. Brind'Amour thereafter was able to remove Ramirez from the situation and stood between the picketers and Ramirez. As the brawl continued, Brind'Amour attempted to protect Ramirez while the picketers engaged in a verbal onslaught directed at Ramirez. Upon hearing yelling behind him, Brind'Amour turned around and observed Ramirez in the driver's seat of Brind'Amour's truck, and he further observed that two Ellicott employees were attempting to remove Ramirez from the truck. In an attempt to flee from the construction site and to reach the street in order to escape from the picketers, Ramirez then drove Brind'Amour's truck through the gate at the construction site and, as he passed through the picketers, Ramirez struck plaintiff.

Ramirez subsequently pleaded guilty to unauthorized use of a vehicle in the third degree (Penal Law § 165.05 [1]) and reckless endangerment in the second degree (§ 120.20). During his plea allocution, Ramirez admitted that he did not have Brind'Amour's permission or consent to drive the truck and that he acted recklessly, in conscious disregard of a substantial and unjustifiable risk of serious injury to another person.

The Brind'Amour defendants, Certo and Allied moved for summary judgment dismissing the complaint and all cross claims against them, and Ellicott Creek moved for summary judgment dismissing the complaint against it. In support of their motions, those defendants contended that they did not owe plaintiff a duty of care. They further contended that, even assuming, arguendo, that they did owe plaintiff such a duty, the actions of Ramirez constituted a superseding intervening cause that broke the causal connection between their alleged acts and omissions and the accident. We conclude that Supreme Court properly granted the motions.

"In cases arising out of injuries sustained on another's property, the scope of the . . . duty [owed by the property owner and permittees] is defined by past experience and the likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor" (*Maheshwari v City of New York*, 2 NY3d 288,

294 [internal quotation marks omitted]). Here, the unauthorized use by Ramirez of the truck owned by Brind'Amour and his reckless disregard of the risk of serious injury in driving through the picketers was not a foreseeable result of any alleged security breach. We reject plaintiffs' contention that Brind'Amour's first supplemental affidavit submitted in the action commenced by Allied seeking an injunction with respect to the unlawful picketing of the construction site may be read to contain an admission that physical assaults had been occurring at the work site for two days prior to the date of the accident. Rather, Brind'Amour's affidavit was submitted to provide a historical and cumulative representation of the events at the construction site beginning two days prior to the date of the accident. Thus, we conclude that Certo, Allied and Ellicott Creek owed no duty to protect plaintiff from the indiscriminate and spontaneous actions of Ramirez (*see id.*).

In any event, even assuming, arguendo, that Certo, Allied and Ellicott Creek owed a duty of care to plaintiff and breached that duty, we conclude that plaintiff's injuries were not the result thereof but, instead, were caused by Ramirez's independent and intervening criminal actions. Those actions were "extraordinary and not foreseeable or preventable in the normal course of events" (*id.* at 295).

We reject plaintiffs' further contention that the Brind'Amour defendants are liable for Ramirez's actions pursuant to the "key in the ignition" statute (*see* Vehicle and Traffic Law § 1210). That statute provides an exception to the common-law rule that "the owner of a stolen vehicle [is] not liable, as a matter of law, for the negligence of a thief" (*Epstein v Mediterranean Motors*, 109 AD2d 340, 343, *affd* 66 NY2d 1018). That exception, however, applies only to vehicles on public highways, on private roads open to public vehicle traffic and in parking lots (*see* § 1100 [a]; *Epstein*, 109 AD2d at 343-344). Here, the record establishes that the unauthorized use by Ramirez of Brind'Amour's truck occurred when the truck was located inside the gate to the construction site, which constituted private property. Inasmuch as we conclude that there is no basis upon which to impose liability against the Brind'Amour defendants for Ramirez's unauthorized use of the truck, we further conclude that there is no basis upon which to impose vicarious liability against Allied for the conduct of Brind'Amour in the course of his employment with Allied (*see Wright v Shapiro*, 35 AD3d 1253, 1254).

Finally, we reject plaintiffs' contention that Ellicott Creek is vicariously liable for the criminal acts of Ramirez, its employee (*see generally Adams v New York City Tr. Auth.*, 211 AD2d 285, 286, 297, *affd* 88 NY2d 116).

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

1624

TP 09-01031

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

IN THE MATTER OF HELPING HANDS OF WNY, INC.,
PETITIONER,

V

MEMORANDUM AND ORDER

GLADYS CARRION, COMMISSIONER, NEW YORK STATE
OFFICE OF CHILDREN AND FAMILY SERVICES, AND
RICHARD E. DAVIDSON, BUREAU OF SPECIAL HEARINGS,
RESPONDENTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ANTHONY J. CERVI OF
COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF
COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Paula L. Feroletto, J.], dated May 19, 2009) to review a determination of respondents. The determination denied petitioner's application for a license to operate a daycare center.

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 denying its application for a license to operate a daycare center. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see Matter of Gates of Goodness & Mercy v Johnson*, 49 AD3d 1295; *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, 231). The evidence presented at the hearing established that the proposed site for the daycare center did not comply with the relevant provisions of the New York State Uniform Fire Prevention and Building Code and other safety regulations (*see* 18 NYCRR 418-1.3 [o]; 418-1.4 [h]), and that the proposed director of the daycare center did not meet the minimum qualifications set forth in 18 NYCRR 418-1.13 (g).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1629

KA 08-02137

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARLOS L. RIVERA, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 15, 2008. The judgment convicted defendant, upon a jury verdict, of arson in the second degree, assault in the second degree (two counts), reckless endangerment in the first degree (two counts), criminal mischief in the second degree, burglary in the second degree, assault in the third degree and menacing in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, arson in the second degree (Penal Law § 150.15). Defendant failed to preserve for our review his contention that he was denied a fair trial when the prosecutor failed to correct the testimony of a witness who stated that he had not been offered a benefit for his testimony, and compounded that error by making misleading comments during summation concerning that witness's testimony (*see People v Hendricks*, 2 AD3d 1450, lv denied 2 NY3d 762). In any event, we conclude that the error is harmless inasmuch as there is no reasonable possibility that it might have contributed to the verdict (*see People v Pressley*, 91 NY2d 825, 827; *cf. People v Colon*, 13 NY3d 343, 349-350). Defendant also failed to preserve for our review his contention that County Court erred in instructing the jury with respect to the counts charging him with assault in the second degree (§ 120.05 [6]), burglary in the second degree (§ 140.25 [2]) and reckless endangerment in the first degree (§ 120.25) under the seventh count of the indictment (*see CPL 470.05 [2]; People v Pettine*, 50 AD3d 1517). 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]*). Defendant's further contention that the evidence is legally insufficient to support the conviction of two counts of assault in the second degree, one count of menacing in the second

degree (§ 120.14 [1]), and reckless endangerment in the first degree under the seventh count of the indictment is also unpreserved for our review (see *People v Gray*, 86 NY2d 10, 19).

We reject the contention of defendant that he was denied effective assistance of counsel. "[D]efendant failed to meet his burden of demonstrating the absence of strategic or other legitimate explanations for [defense] counsel's alleged shortcomings" (*People v Childres*, 60 AD3d 1278, 1278, lv denied 12 NY3d 913 [internal quotation marks omitted]). Finally, defendant correctly concedes that he failed to preserve for our review his further contention that, based on Penal Law § 60.27 (5) (a), the court was not authorized to order restitution in excess of \$15,000 (see generally *People v Peck*, 31 AD3d 1216, lv denied 9 NY3d 992; *People v Melino*, 16 AD3d 908, 911, lv denied 5 NY3d 791). In any event, we conclude that the court properly ordered restitution in an amount sufficient to compensate the victims for their "actual out-of-pocket loss" caused by defendant's criminal conduct (§ 60.27 [1]; see generally *People v Horne*, 97 NY2d 404, 412; *People v Denno*, 56 AD3d 902, 903-904, lv denied 12 NY3d 757). In his brief, defendant failed to challenge the restitution order on any other ground, including the court's failure to conduct a hearing on the amount of restitution or the recipients thereof. We thus conclude that he has abandoned any such challenges (see generally *People v Purcelle*, 282 AD2d 824, 825; *People v Mathews*, 176 AD2d 1135, 1136).

All concur except HURLBUTT, J.P., who is not participating, and FAHEY, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part and would modify the judgment because, in my view, County Court erred in ordering defendant to pay restitution totaling \$402,801, including a surcharge, without conducting a hearing. I note at the outset that, although defendant concedes that he failed to preserve his contention for our review (see CPL 470.05 [2]), I conclude that his contention warrants the exercise of our power to review the contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Pursuant to Penal Law § 60.27 (1), a court may "require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby" Further, section 60.27 (5) (a) provides that, when a defendant is convicted of a felony, the amount of restitution shall not exceed \$15,000. The court may in its discretion exceed that limit, however, provided "that the amount in excess [is] limited to the return of the victim's property, including money, or the equivalent value thereof" (§ 60.27 [5] [b]). Arson victims are entitled to restitution for out-of-pocket expenses incurred as a result of a fire (see generally *People v Hall-Wilson*, 69 NY2d 154, 156-158; *People v Wojes*, 306 AD2d 754, 758, lv denied 100 NY2d 600).

In the absence of a restitution hearing we are, under these circumstances, unable to determine the proper amount of restitution.

Indeed, without a hearing there is no evidence in the record to support the court's determination to exceed the statutory limit for restitution. I therefore would modify the judgment by vacating the amount of restitution ordered, and I would remit the matter to County Court for a hearing to determine the amount of restitution.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1641

CA 09-01370

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

CHARLES DRAKE AND CHRISTINE DRAKE, AS
PARENTS AND NATURAL GUARDIANS OF PATRICIA
DRAKE, A MINOR, TERRY CAMPBELL AND TERESA
GIARDINA, AS PARENTS AND NATURAL GUARDIANS
OF TARA CAMPBELL, A MINOR, ROXANNA HENSHAW,
AS PARENT AND NATURAL GUARDIAN OF ASHLEY
HENSHAW, A MINOR, PLAINTIFFS-RESPONDENTS,
AND LORRIE NEWMAN, AS PARENT AND NATURAL
GUARDIAN OF BRITTANY NEWMAN, A MINOR,
PLAINTIFF-APPELLANT,

ORDER

V

BERTHA HOFFMAN AND CAMPBELL-SAVONA CENTRAL
SCHOOL DISTRICT,
DEFENDANTS-APPELLANTS-RESPONDENTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMÉE LAFEVER KOCH OF COUNSEL),
FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

JACOB P. WELCH, CORNING, FOR PLAINTIFFS-RESPONDENTS AND PLAINTIFF-
APPELLANT.

Appeals from an order of the Supreme Court, Steuben County
(Marianne Furfure, A.J.), entered September 16, 2008. The order,
inter alia, granted in part the motion of defendants for summary
judgment dismissing the complaint.

Now, upon reading and filing the stipulation discontinuing the
appeals signed by the attorneys for the parties on January 7 and 10,
2010,

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

All concur except HURLBUTT, J.P., who is not participating.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1664

KA 09-01432

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL P. ANZALONE, DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (THOMAS A. DESIMON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered January 10, 2008. The judgment convicted defendant, upon a jury verdict, of attempted arson in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of attempted arson in the second degree (Penal Law §§ 110.00, 150.15), defendant contends that the conviction is not supported by legally sufficient evidence based on the circumstantial evidence standard charged to the jury. The general motion by defendant for a trial order of dismissal is insufficient to preserve his contention for our review (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit. The appropriate standard of review is not the circumstantial evidence standard but, rather, it is "whether the evidence, viewed in the light most favorable to the People, could lead a rational trier of fact to conclude that the elements of the crime have been proven beyond a reasonable doubt" (*People v Cabey*, 85 NY2d 417, 421; *see People v Pichardo*, 34 AD3d 1223, 1224). Here, the evidence is legally sufficient to establish that defendant was the individual who attempted to start a fire in the building in question (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, County Court properly admitted in evidence a videotape reconstructing the incident. The videotape was relevant, and the People "established that there was 'substantial similarity' between the conditions under which the [reconstruction was] conducted and the conditions at the time of the event in question" (*Matter of Luis C.*, 222 AD2d 268, 269, quoting

People v Cohen, 50 NY2d 908, 910, rearg denied 50 NY2d 1060, cert denied 461 US 930; see *People v Wooten*, 283 AD2d 931, 933, lv denied 96 NY2d 943). "Any difference between the [videotape] and the circumstances under which the [attempted arson] occurred went to the question of weight rather than admissibility" (*People v Davis*, 10 AD3d 583, 583, lv denied 4 NY3d 743; see *People v Pierce*, 270 AD2d 94, 95, lv denied 95 NY2d 837). Defendant failed to preserve for our review his contention that the prosecutor engaged in misconduct during summation by making a comment that shifted the burden of proof to defendant (see *People v Coleman*, 32 AD3d 1239, 1240, lv denied 8 NY3d 844; *People v Pierce*, 219 AD2d 856, lv denied 87 NY2d 850). In any event, that contention lacks merit inasmuch as the allegedly improper comment by the prosecutor was merely fair comment on the evidence (see *Coleman*, 32 AD3d at 1240). Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1667

KA 08-01267

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GREGORY HILL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, J.), rendered May 14, 2008. The judgment convicted defendant, upon a jury verdict, of 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 a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the verdict is repugnant because he was found guilty of assault but was acquitted of criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject that contention. "As long as '[Supreme Court's] charge did not preclude the jury from concluding that defendant initially possessed the [dangerous instrument] without intending to use it unlawfully against another[] but decided to [use the dangerous instrument] as events unfolded,' a verdict finding defendant guilty of intentional assault but not guilty of possession with unlawful intent is not repugnant" (*People v Afrika*, 291 AD2d 880, 881, *lv denied* 98 NY2d 648). Defendant further contends that the court erred in refusing to suppress his statements to the police because they were the fruit of the alleged unlawful entry into his apartment. We reject that contention as well. The warrantless entry was not unlawful, inasmuch as the People established that there were exigent circumstances justifying the entry (*see People v Stevens*, 57 AD3d 1515, *lv denied* 12 NY3d 822; *cf. People v Kilgore*, 21 AD3d 1257, 1257-1258). The police detectives observed that the victim was nearby and that his head was bleeding, and they had reason to believe that the suspect was inside the apartment with a claw hammer, which constitutes a dangerous weapon (*see Stevens*, 57 AD3d 1515; *see also People v Pollard*, 304 AD2d 476, *lv denied* 100 NY2d 585; *People v Manning*, 301 AD2d 661, 662-663, *lv denied* 99 NY2d 656).

Defendant contends that he was denied a fair trial and due process because the court did not read a jury note verbatim to defense counsel before summoning the jury to the courtroom. "[D]efense counsel's failure to object at a time when the court could have corrected the alleged error . . . renders defendant's contention unpreserved for our review" (*People v Samuels*, 24 AD3d 1287, lv denied 7 NY3d 817; see also *People v Starling*, 85 NY2d 509, 516; cf. *People v DeRosario*, 81 NY2d 801, 803). In any event, the record establishes that defense counsel fully understood the contents of the note before the jury was summoned and that the court read the note in open court before responding to it. Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1668

KA 08-00542

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN J. BARLOW, SR., DEFENDANT-APPELLANT.

CRAIG P. SCHLANGER, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (David J. Roman, J.), rendered October 16, 2007. 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 reversed on the law, the plea is vacated, and the matter is remitted to Oswego County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). We agree with defendant that the plea is invalid based on the factual insufficiency of the plea allocution. We note at the outset that defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution by failing to move to withdraw his plea or to vacate the judgment of conviction (see *People v Lopez*, 71 NY2d 662, 665). Nevertheless, we conclude that this case falls within the narrow exception to the preservation requirement because "defendant's recitation of the facts underlying the crime pleaded to clearly cast[] significant doubt upon the defendant's guilt," and County Court failed to conduct the requisite further inquiry to ensure that the plea was knowingly and voluntarily entered (*id.* at 666; *People v Hall*, 50 AD3d 1467, 1468, *lv denied* 11 NY3d 789). Where, as here, the defendant enters the residence of an individual in violation of an order of protection, "the 'intent to commit a crime therein' element of burglary cannot be satisfied by intended conduct that would be innocuous if the order of protection did not prohibit it" (*People v VanDeWalle*, 46 AD3d 1351, 1352, *lv denied* 10 NY3d 845). Although defendant admitted during the plea colloquy that he remained in the residence of the victim, his estranged wife, in violation of an order of protection, the plea colloquy does not establish that defendant intended to commit any further crime therein. Indeed, defendant challenged the People's

allegations that he had committed further criminal conduct. We also agree with defendant that his purported waiver of the presentence investigation and written report of the investigation pursuant to CPL 390.20 (4) (a) was invalid. Such a waiver is not authorized where, as here, an indeterminate sentence of imprisonment is to be imposed (*see id.*). In light of our determination, we do not reach defendant's remaining contention.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1669

KA 09-01057

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID HEIL, DEFENDANT-APPELLANT.

REDMOND & PARRINELLO, LLP, ROCHESTER (BRUCE FREEMAN 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 (Alex R. Renzi, J.), rendered November 21, 2007. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts) and endangering the welfare of a child.

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, that part of the motion seeking to dismiss count three of the indictment is granted, that count of the indictment is dismissed, and a new trial is granted on counts one and two of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]). The conviction stems from defendant's alleged abuse in April 2000 of a third-grade student in an elementary school where defendant was employed as a teacher. Defendant failed to preserve for our review his contention that the conviction of the sexual abuse counts is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject the contention of defendant that County Court erred in denying those parts of his omnibus motion seeking to dismiss the counts of sexual abuse as time-barred. The period of limitation for those felonies is five years (*see CPL 30.10 [2] [b]*), but prosecutions involving a sexual offense under Penal Law article 130 that are committed against a child less than 18 years of age "shall not begin to run until the child has reached the age of eighteen or the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment, whichever occurs earlier" (CPL 30.10

[3] [f]). Here, the offense was not reported to law enforcement until October 2006 and defendant was indicted one month later, well within the applicable period of limitation (see CPL 30.10 [2] [b]; [3] [f]). We reject defendant's contention that the period of limitation began to run in April 2000, when the school district was notified of the incident, inasmuch as the school district was not an agent of a law enforcement agency (*cf. People v Rivera*, 298 AD2d 612, 614, *lv denied* 99 NY2d 619). Defendant's related due process contention is similarly without merit (*cf. id.*). We agree with defendant, however, that the court erred in denying that part of defendant's omnibus motion seeking to dismiss the count of endangering the welfare of a child as time-barred. The period of limitation for that misdemeanor was two years (see CPL 30.10 [2] [c]), and the tolling provision of CPL 30.10 (3) (f) does not apply to that offense (see generally *People v Rogner*, 265 AD2d 688). We therefore dismiss the third count of the indictment.

Defendant failed to preserve for our review his contention that certain testimony of a teacher was improperly admitted because it was hearsay and improper opinion testimony. "A party's failure to specify the basis for [his or her] general objection renders [the party's] argument unpreserved for . . . [appellate] review" (*People v Everson*, 100 NY2d 609, 610; see *People v Jacque*, 2 AD3d 1362, *lv denied* 2 NY3d 741; *People v Pierre*, 300 AD2d 1070, *lv denied* 99 NY2d 631). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]), and we agree with defendant that the court erred in admitting that testimony. The teacher testified that she entered defendant's classroom after school hours, after the alleged sexual abuse occurred. The testimony of the teacher concerning her observations, i.e., that the lights were not on in the room and the victim was sitting on defendant's lap at defendant's desk, was neither hearsay nor was it improper. The teacher then testified that she "felt uncomfortable" after she left the classroom, whereupon the court sustained defense counsel's objection and instructed the jury to disregard that testimony. The court erred, however, in then allowing the teacher to testify that she told another teacher that she had left defendant's classroom and "felt really uncomfortable," inasmuch as that testimony constituted inadmissible hearsay.

Contrary to the People's contention, the error is not harmless. The evidence against defendant is not overwhelming and, because the teacher's testimony is highly prejudicial, there is a significant probability that defendant would have been acquitted if not for the error (see generally *People v Crimmins*, 36 NY2d 230, 241-242). The prosecutor elicited testimony from the teacher concerning the various teaching awards and accolades that she had received in her lengthy teaching career. The testimony of the teacher with respect to how she felt after leaving defendant's classroom was not relevant, but it may have led the jury to find that, if such a distinguished teacher believed that something was amiss between defendant and the victim, then it was more likely than not the abuse actually occurred. We therefore grant a new trial on counts one and two of the indictment. In light of our determination, we do not reach defendant's remaining

contentions.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1670

KA 08-02640

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES HUBEL, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered November 20, 2008. 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 reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, we conclude that Supreme Court properly assessed 25 points against defendant under the risk factor for sexual contact with the victim. The People met their burden of establishing by clear and convincing evidence that defendant engaged in deviate sexual intercourse, i.e., oral sexual contact (see § 168-n [3]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 8 [Nov. 1997]). We reject defendant's contention that the court erred in relying upon the facts set forth in the case summary in assessing points under that risk factor. It is well settled that "[t]he case summary constitutes reliable hearsay, which is properly considered by the court in determining a defendant's risk level" (*People v Sanney*, 56 AD3d 1220, 1220; see *People v Vaughn*, 26 AD3d 776, 777). Although "the case summary alone is not sufficient to satisfy the People's burden of proving the risk level assessment by clear and convincing evidence where . . . defendant contested the factual allegations related to [the] risk factor" in question (*People v Judson*, 50 AD3d 1242, 1243), here, defendant did not challenge the allegations of oral sexual contact contained in the case summary. Rather, defendant contended only that the accusatory instruments did not include any allegations of oral sexual contact and that he was not convicted of sodomy. In assessing defendant's risk level, however,

the court is "not limited to the crime of conviction" but may also properly consider, inter alia, the victim's statements (Risk Assessment Guidelines and Commentary, at 5).

We agree with defendant, however, that the court failed to comply with Correction Law § 168-n (3), pursuant to which the court was required to set forth the findings of fact and conclusions of law upon which it based its decision to grant the People's request for an upward departure to a level three risk. Here, in its decision the court merely recited in conclusory fashion that it reviewed all the relevant information presented by the parties and accepted the findings contained in the risk assessment instrument and the case summary, and that recitation was insufficient to fulfill the statutory mandate (see *People v Cullen*, 53 AD3d 1105). Inasmuch as the court's failure to set forth the findings of fact and conclusions of law upon which the court based its decision "preclud[es] meaningful appellate review of the propriety of the court's risk level assessment" (*People v Miranda*, 24 AD3d 909, 911; see *People v Sanchez*, 20 AD3d 693, 695), we reverse the order and remit the matter to Supreme Court for compliance with the statute (see *People v Smith*, 11 NY3d 797).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1671

KA 08-01368

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GARY T. BERGMAN, DEFENDANT-APPELLANT.

JOHN W. SPRING, JR., PHOENIX, FOR DEFENDANT-APPELLANT.

GARY T. BERGMAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered April 18, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and criminal mischief 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 burglary in the third degree (Penal Law § 140.20) and criminal mischief in the third degree (§ 145.05 [2]). The conviction arises from an incident in which defendant forcibly entered a bar after hours by breaking the glass windows in two entryway doors and pulling the alarm system off the wall. We reject defendant's contention that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). "In burglary cases [based on circumstantial evidence, as is the case herein], the defendant's intent to commit a crime within the premises may be inferred beyond a reasonable doubt from the circumstances of the entry" (*People v Gates*, 170 AD2d 971, 971-972, *lv denied* 78 NY2d 922 [internal quotation marks omitted]; *see People v Gaines*, 74 NY2d 358, 362 n 1). The fact that defendant used force in obtaining entry to the bar by breaking the glass windows in the entryway doors "amply supports the inference that he had criminal intent[, and t]hat inference is buttressed by numerous other factors, primarily defendant's unexplained and unauthorized presence on the premises" in the early hours of the morning (*Gates*, 170 AD2d at 972). Similarly, with respect to the criminal mischief count, defendant's intent to damage the property may be inferred from the circumstances of the incident (*see People v Bryant*, 13 AD3d 1170, *lv denied* 4 NY3d 884).

Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Based on the testimony of the witnesses, the photographs depicting the damaged property, and the DNA evidence placing defendant at the scene of the incident, it cannot be said that the jury failed to give the evidence the weight it should be accorded (see generally *id.*). Contrary to the further contention of defendant in his main and pro se supplemental briefs, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that he received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147; *People v Workman*, 277 AD2d 1029, 1032, lv denied 96 NY2d 764).

Finally, because defendant failed to include in the record on appeal the motion papers concerning the alleged denial of his right to a speedy trial, we are unable to review the merits of his contention concerning that alleged denial, raised in his pro se supplemental brief (see *People v Highsmith*, 254 AD2d 768, 770, lv denied 92 NY2d 983, 1033; see also *People v Velez*, 223 AD2d 414, lv denied 88 NY2d 855; *People v Calderon*, 223 AD2d 380, lv denied 87 NY2d 1017).

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

1675

CA 09-00898

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

PROGRESSIVE CASUALTY INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

HARCO NATIONAL INSURANCE COMPANY, BURDICK
PONTIAC-GMC, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (LAURENCE F. SOVIK OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

LEVENE GOULDIN & THOMPSON, LLP, BINGHAMTON (DAVID F. MCCARTHY OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered January 16, 2009 in a declaratory judgment action. The judgment, inter alia, granted the motion of plaintiff for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the declarations are vacated, the cross motion is granted, and judgment is granted in favor of defendants Harco National Insurance Company and Burdick Pontiac-GMC as follows:

It is ADJUDGED and DECLARED that plaintiff is obligated to provide primary coverage to defend and indemnify defendants Jason Webb and Justin Webb in the underlying action, and

It is further ADJUDGED and DECLARED that defendant Harco National Insurance Company is not obligated to defend or indemnify defendants Jason Webb or Justin Webb in the underlying action.

Memorandum: Defendant Jason Webb borrowed a loaner vehicle from defendant Burdick Pontiac-GMC (Burdick) while his own vehicle was being repaired by the car dealership. His son, defendant Justin Webb (collectively, Webb defendants), was driving the loaner vehicle when he collided with a vehicle operated by Andrea Walker. Walker thereafter commenced the underlying action against Justin Webb and Burdick seeking damages for injuries that she allegedly sustained in the accident.

The loaner vehicle was insured under a garage liability policy issued to Burdick by defendant Harco National Insurance Company (Harco), and the Webb defendants were insured under a family motor vehicle policy issued by plaintiff, Progressive Casualty Insurance Company (Progressive). The Harco policy contained what is commonly known as a "no liability clause," which provided coverage to a customer of its insured only if the customer "[h]as no other available insurance (whether primary, excess or contingent)" or "[h]as other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered 'auto' is principally garaged." The Progressive policy contained an "excess" clause, which stated that any insurance provided for a vehicle, other than a covered vehicle, "will be excess over any other valid and collectible insurance."

Progressive commenced this action seeking a declaration that Harco is obligated to provide primary coverage to defend and indemnify the Webb defendants in the underlying action, and Harco asserted a counterclaim seeking a declaration that Progressive is the primary insurance carrier for the Webb defendants and thus is obligated to defend and indemnify them to the limits of its policy. We conclude that Supreme Court erred in granting the motion of Progressive for summary judgment declaring that Harco is obligated to provide primary coverage and that any insurance coverage available to the Webb defendants from Progressive is excess coverage. Rather, the court should have granted the cross motion of Harco and Burdick for summary judgment declaring that Progressive is the primary insurer and that Harco is not obligated to defend or indemnify the Webb defendants in the underlying action.

We agree with Harco and Burdick that the Webb defendants are excluded from coverage pursuant to the express terms of the Harco policy. Under the Harco policy, a customer is excluded from the definition of an "insured" unless the customer possesses insufficient insurance to meet the minimum requirements set forth in New York's financial responsibility laws. In granting the motion of Progressive, the court relied on the general rule that, "[i]n cases in which one insurance policy has a no liability clause and the other insurance policy has an excess clause, . . . the no liability clause is not given effect" (*Kipper v Universal Underwriters Group*, 304 AD2d 62, 65; see *Utica Mut. Ins. Co. v Travelers Ins. Co.*, 213 AD2d 983, 984). That was error, inasmuch as "[a]n exception to the general rule arises [where, as here,] the no liability clause expressly provides that 'other available insurance' includes both primary and excess insurance coverage. In that case, the no liability clause is given effect and the excess insurance carrier is the primary carrier" (*Kipper*, 304 AD2d at 65; see *Mills v Liberty Mut. Ins. Co.*, 36 AD2d 445, *affd* 30 NY2d 546; *Davis v De Frank*, 33 AD2d 236, 241, *affd* 27 NY2d 924). Here, the Harco policy specifically provides that "other available insurance" includes "primary, excess or contingent insurance" (emphasis added), and it is undisputed that the liability limits contained in the Progressive policy exceed the minimum statutory requirements. Thus, the exception to the general rule applies, the no liability clause contained in the Harco policy is given effect, and Progressive is the

primary insurer for the Webb defendants (*see Davis*, 33 AD2d at 241).

There is no merit to Progressive's alternative contention that the "Other Insurance" clause set forth in the Harco policy renders Harco liable for coverage in this case. Contrary to the contention of Progressive, that clause does not in fact render Harco liable to provide insurance coverage with respect to all vehicles owned by Burdick. Rather, it simply clarifies that, where coverage exists under the substantive provisions of the Harco policy, coverage is primary with respect to all vehicles owned by Burdick and excess with respect to non-owned vehicles.

Finally, because the Harco policy does not provide coverage for the Webb defendants, there is no merit to Progressive's contention that Harco had a duty to provide a timely disclaimer for the subject accident (*see State Farm Mut. Auto. Ins. Co. v John Deere Ins. Co.*, 288 AD2d 294, 297). Thus, even assuming, *arguendo*, that the written disclaimer provided by Harco was insufficient, we conclude that "the failure to disclaim coverage does not create coverage which the policy was not written to provide" (*Zappone v Home Ins. Co.*, 55 NY2d 131, 134).

We thus conclude that the Progressive policy provides primary coverage for the subject accident and that Harco is not obligated to defend or indemnify the Webb defendants in the underlying action.

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

1676

CA 09-01318

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

PATRICIA IKEDA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DANIELLE M. TEDESCO AND JAMES R. TEDESCO,
DEFENDANTS-RESPONDENTS.

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Romano, J.), entered September 22, 2008 in a personal injury action. The order, among other things, granted those parts of defendants' motion to strike the note of issue and certificate of readiness and for an award of attorney fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the third ordering paragraph and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle she was driving was struck by a vehicle driven by defendant Danielle M. Tedesco and owned by defendant James R. Tedesco. On July 23, 2008, Supreme Court granted defendants' motion to compel plaintiff to provide a duly executed release permitting defendants to obtain various records and documents from the litigation files of plaintiff's counsel that were acquired and maintained in the course of a prior personal injury action. That same day, but before complying with the order to provide the release, plaintiff filed a note of issue and certificate of readiness, certifying therein that "[t]here are no outstanding requests for discovery."

Defendants moved to strike the note of issue and certificate of readiness inasmuch as plaintiff had not provided the release, and they requested an award of sanctions, attorney fees and the costs associated with their instant motion. The court granted defendants' motion to the extent that it struck the note of issue and certificate of readiness and awarded defendants \$500 "for the attorney fees incurred [by them] in bringing their motion."

We reject plaintiff's contention that, pursuant to CPLR 3402, a

party may file a note of issue and certificate of readiness "at any time after issue is first joined" Pursuant to 22 NYCRR 202.21 (a) and (b), a properly filed note of issue must be accompanied by a certificate of readiness, and there must be "no outstanding requests for discovery" (22 NYCRR 202.21 [b] [8]). Here, plaintiff filed the note of issue and certificate of readiness before she had provided the release in accordance with the order granting defendants' motion to compel her to do so. Thus, the court properly granted that part of defendants' motion to strike the note of issue and certificate of readiness (see 22 NYCRR 202.21 [e]). We agree with plaintiff, however, that the court erred in failing to comply with 22 NYCRR 130-1.2 in imposing the attorney fees as a sanction inasmuch as the court failed to set forth in a written decision "the conduct on which . . . the imposition [of sanctions] 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" (see *Leisten v Leisten*, 309 AD2d 1202, 1203; see also *Campbell v Obear*, 26 AD3d 877, 878). We therefore modify the order by vacating the award of attorney fees, and we remit the matter to Supreme Court for compliance with 22 NYCRR 130-1.2.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1678

CA 09-00038

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

PATRICIA MANCUSO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ALLERGY ASSOCIATES OF ROCHESTER,
DR. ERIC M. DREYFUSS, INDIVIDUALLY, AND
DR. BRUCE CORSELLO, INDIVIDUALLY,
DEFENDANTS-RESPONDENTS.

CHRISTINA A. AGOLA, ATTORNEYS AND COUNSELORS AT LAW, PLLC, ROCHESTER
(CHRISTINA A. AGOLA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (TRACEY B. EHLERS OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered October 7, 2008 in a defamation action. The order, insofar as appealed from, granted that part of 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 resulting from allegedly defamatory statements made by defendant Dr. Bruce Corsello, an owner and partner of defendant Allergy Associates of Rochester (Allergy Associates), to plaintiff's coworkers. Defendant Dr. Eric M. Dreyfuss is also an owner and partner of Allergy Associates. Supreme Court properly granted that part of the motion of defendants for summary judgment dismissing the complaint. With respect to plaintiff's first cause of action, for slander per se, "[a] communication made by one person to another upon a subject in which both have an interest is protected by a qualified privilege" (*Stillman v Ford*, 22 NY2d 48, 53; see *Anas v Brown*, 269 AD2d 761, 762). Thus, even assuming, arguendo, that defendant made the statements as alleged in plaintiff's complaint, we conclude that defendants met their initial burden by establishing that the alleged statements were protected by a qualified privilege. "It is uncontested here that the statement[s] at issue [were] communicated to a limited number of people, all of whom were . . . employees [of Allergy Associates] who had worked with plaintiff and who had a legitimate interest in knowing that a serious sanction had been imposed for [a] violation" of professional regulations (*Bisso v De Freest*, 251 AD2d 953, 953; see *Anderson v Our Lady of Mercy Med. Ctr.*, 31 AD3d 270).

We agree with plaintiff, however, that the court erred in applying a clear and convincing standard in reviewing whether plaintiff met her burden of overcoming defendants' qualified privilege, although we ultimately conclude that the court properly granted that part of defendants' motion with respect to the first cause of action. Where, as here, a plaintiff is a private individual and the allegedly defamatory statements are not a matter of legitimate public concern, the more stringent First Amendment protections associated with public officials or affairs are not implicated (see generally *Dun & Bradstreet, Inc. v Greenmoss Bldrs., Inc.*, 472 US 749, 761-763; *New York Times Co. v L. B. Sullivan*, 376 US 254, 279-280; *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199). Thus, the clear and convincing standard does not apply herein but, rather, the preponderance of the evidence standard applies, such that a triable issue of fact is raised only if, based upon a preponderance of the evidence, a trier of fact "could reasonably conclude that 'malice was the one and only cause for the publication' " (*Liberman v Gelstein*, 80 NY2d 429, 439). To the extent that our decision in *Teixeira v Korth* (267 AD2d 958, 959) holds otherwise, it is no longer to be followed. As noted, we conclude in this case that defendants met their initial burden, and we further conclude that plaintiff failed to raise a triable issue of fact whether the statements were motivated solely by malice. Absent such a showing, "it matters not that [Dr. Corsello may have] also despised plaintiff" (*Liberman*, 80 NY2d at 439; see generally *Matter of Williams v County of Genesee*, 306 AD2d 865, 868).

We further conclude that the court properly granted that part of defendants' motion with respect to the remaining cause of action, for prima facie tort. Plaintiff failed to allege special damages with the required specificity (see *Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143; *Epifani v Johnson*, 65 AD3d 224, 233). Indeed, the complaint contains only the general statement that plaintiff was "damaged in the amount of not less than [\$1 million]." "[D]amages pleaded in such round sums, without any attempt at itemization, must be deemed allegations of general damages" (*Leather Dev. Corp. v Dun & Bradstreet*, 15 AD2d 761, *affd* 12 NY2d 909). Moreover, plaintiff failed to allege that the sole motivation of Dr. Corsello was " 'disinterested malevolence,' " which is a required element for plaintiff's recovery in prima facie tort (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333; see *Morrison v Woolley*, 45 AD3d 953, 954).

Finally, plaintiff contends that defendants' motion should have been denied insofar as it sought summary judgment dismissing the complaint because "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212 [f]). We reject that contention, based on plaintiff's "failure to demonstrate that the discovery being sought is anything more than a fishing expedition" (*Greenberg v McLaughlin*, 242 AD2d 603, 604).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1680

CA 09-00959

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

ROBIN BURNS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THOMAS E. BURNS, DEFENDANT-RESPONDENT.

FRANCIS W. TESSEYMAN, JR., BUFFALO, FOR PLAINTIFF-APPELLANT.

WILLIAM R. HITES, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered July 30, 2008 in a divorce action. The judgment, inter alia, directed defendant to pay to plaintiff child support and maintenance.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by providing that defendant's pro rata share of the child support obligation and the uninsured medical costs of the children is 67% and plaintiff's pro rata share of the child support obligation and the uninsured medical costs of the children is 33% and that defendant shall pay to plaintiff the amount of \$88.92 per week for child support and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff appeals from a judgment of divorce that, inter alia, directed defendant to pay to plaintiff \$61.50 per week in child support and \$19,500 per year in maintenance for a period of three years, distributed the parties' debts and assets, and denied plaintiff's request for counsel fees. Contrary to plaintiff's contention, we conclude that Supreme Court did not abuse its discretion in refusing to award child support on the parties' combined income in excess of \$80,000 (*see generally Matter of Cassano v Cassano*, 85 NY2d 649, 655). In deciding to limit the child support award to the first \$80,000 in combined parental income, the court properly relied on the factors set forth in Domestic Relations Law § 240 (1-b) (f) including, inter alia, the fact that the parties' financial resources after the payment of maintenance would be roughly equivalent, the fact that each parent would have one child living with him or her, and the fact that there would be no change in the children's standard of living as a result of the divorce (*see generally Bast v Rossoff*, 91 NY2d 723, 727). The court also found significant the fact that the additional parenting responsibilities of defendant following the divorce will likely impact his ability to enhance his salary by working overtime.

We agree with plaintiff, however, that the court erred in including the amount of maintenance awarded to her in her income for the purpose of calculating the parties' respective child support obligations (see *Johnston v Johnston*, 63 AD3d 1555; *Frost v Frost*, 49 AD3d 1150, 1152; *Huber v Huber*, 229 AD2d 904, 904-905), and that the court applied the incorrect child support percentage in its calculation of child support. In split custody situations, the court must "determine the basic child support obligation on a per household basis with the controlling percentage for each such home determined according to how many children are living with the same custodial parent . . . [and the court must then] prorate the basic child support obligation in proportion to each parent's income" (*Matter of DeVoe v Erck*, 226 AD2d 1111, 1112 [internal quotation marks omitted]). We therefore modify the judgment by providing that defendant's pro rata share of the child support obligation and the uninsured medical costs of the children is 67% and plaintiff's pro rata share of the child support obligation and the uninsured medical costs of the children is 33% and that defendant shall pay to plaintiff the amount of \$88.92 per week for child support.

We reject the further contention of plaintiff that the court abused its discretion in awarding her only \$19,500 per year in maintenance for a period of three years after the sale of the marital residence. Here, the record establishes that the court properly considered the statutory maintenance factors, including the fact that plaintiff is self-supporting and has the capacity to increase her earnings in the future (see Domestic Relations Law § 236 [B] [6] [a]; *Mayle v Mayle*, 299 AD2d 869). We thus conclude that the court's maintenance award "reflects an appropriate balancing of plaintiff's needs and defendant's ability to pay" (*Torgerson v Torgerson*, 188 AD2d 1023, 1024, lv denied 81 NY2d 709).

We further conclude that the court did not abuse its broad discretion in distributing the parties' debts (see *Corless v Corless*, 18 AD3d 493, 494; see also *Evans v Evans*, 55 AD3d 1079, 1081). The court properly considered the factors set forth in Domestic Relations Law § 236 (B) (5) (d) and allocated marital debts in roughly the same proportion as it distributed the parties' limited marital assets, with a distributive award that slightly favored plaintiff. In making the distribution, the court did not credit defendant for the \$11,000 reduction in the mortgage principal on the marital home during the pendency of the action, and it equally divided the proceeds from the sale of the marital home. Finally, we reject the contention of plaintiff that the court abused its discretion in denying her request for counsel fees.

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

1681.1

CA 08-02270

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

NICOLE S. MAURER, PLAINTIFF-RESPONDENT,

V

ORDER

TOPS MARKETS, LLC, DEFENDANT-APPELLANT.

NICOLE S. MAURER, PLAINTIFF-RESPONDENT,

V

RAYMOND E. KISER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR
DEFENDANT-APPELLANT TOPS MARKETS, LLC.

RIVKIN RADLER LLP, UNIONDALE (MELISSA M. MURPHY OF COUNSEL), FOR
DEFENDANT-APPELLANT RAYMOND E. KISER.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered December 7, 2007 in a personal injury action. The order denied the motions of defendants for post-trial relief.

Now, upon reading and filing the stipulation discontinuing appeals signed by the attorneys for plaintiff and defendant Raymond E. Kiser on January 5, 2010,

It is hereby ORDERED that said appeal taken by defendant Raymond E. Kiser is unanimously dismissed upon stipulation and the appeal taken by defendant Tops Markets, LLC is dismissed without costs (see *Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; see also CPLR 5501 [a] [1], [2]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1681.2

CA 08-02321

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

NICOLE S. MAURER, PLAINTIFF-RESPONDENT,

V

ORDER

RAYMOND E. KISER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RIVKIN RADLER LLP, UNIONDALE (MELISSA M. MURPHY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered April 10, 2008 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant for a set-off for future Social Security benefits for plaintiff.

Now, upon reading and filing the stipulation discontinuing appeals signed by the attorneys for the parties on January 5, 2010,

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1681.3

CA 08-02271

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

NICOLE S. MAURER,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

TOPS MARKETS, LLC,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 3.)

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered June 20, 2008 in a personal injury action. The judgment awarded plaintiff money damages against defendant upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the collateral source offset to \$15,391.35 and increasing the award for past damages to \$113,608.65 and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained when she slipped and fell on water on the floor of the floral department of a grocery store owned by defendant Tops Markets, LLC (Tops). Approximately eight months after that accident, plaintiff sustained further injuries in a motor vehicle accident and commenced a separate action against the driver of the other vehicle, Raymond E. Kiser, to recover damages for injuries sustained in the motor vehicle collision. The two actions were joined solely for the purposes of trial, and Tops appeals and plaintiff cross-appeals from a judgment entered upon a jury verdict finding, inter alia, that Tops was negligent and awarding damages to plaintiff.

We note at the outset that the contentions of Tops concerning Supreme Court's charge on premises liability are unpreserved for our review inasmuch as Tops failed to raise those specific objections at trial (*see Fitzpatrick & Weller, Inc. v Miller*, 21 AD3d 1374, 1375; *Donaldson v County of Erie*, 209 AD2d 947, 948). "Where, as here, the charge is not fundamentally flawed, [Tops'] failure to object to the charge at trial and before the jury retire[d] precludes [our] review

of [those] contention[s]" (*Fitzpatrick*, 21 AD3d at 1375 [internal quotation marks omitted]). Tops further contends that the court erred in refusing to add a question to the verdict sheet. Even assuming, arguendo, that Tops preserved that contention for our review (*cf. Brown v Dragoon*, 11 AD3d 834, 835, *lv denied* 4 NY3d 710; *Cavallaro v Somaskanda* [appeal No. 2], 280 AD2d 1002, 1003), we conclude that any alleged error in the verdict sheet does not warrant reversal inasmuch as "no basis exists to warrant a finding of juror confusion or inconsistency in the verdict" (*Szeztaye v LaVacca*, 179 AD2d 555, 556; see *Williams v Brosnahan*, 295 AD2d 971, 974). The propriety of questions on a verdict sheet "must be examined in the context of the court's charge" (*Szeztaye*, 179 AD2d at 555) and, in this case, the court's charge properly set forth the three necessary elements of premises liability.

Tops also failed to preserve for our review its contention that the jury verdict is inconsistent inasmuch as Tops failed to object to the verdict on that ground before the jury was discharged (see *Kunzman v Baroody*, 60 AD3d 1369, 1370; *Everding v Bombard*, 272 AD2d 937, 938) and, in any event, the challenged portions of the verdict are "supported by a fair interpretation of the evidence and [are] not inconsistent" (*Howell v Cecilia*, 45 AD3d 1406, 1407). Contrary to the further contention of Tops, there is no evidence in the record of an impermissible jury compromise.

We further conclude that there is no merit to the contention of Tops that the jury verdict on liability with respect to Tops is against the weight of the evidence. Here, it cannot be said that "the evidence so preponderate[d] in favor of [Tops] that [the verdict with respect to Tops] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]; see *Homan v Herzig* [appeal No. 2], 55 AD3d 1413, 1414). Indeed, plaintiff presented the testimony of several Tops employees who stated that there was a recurring condition of water on the floor in the floral department as a result of water dripping from flower bouquets. In light of the testimony that Tops had actual knowledge of a recurring condition of water on the floor in the area where plaintiff fell, Tops may be " 'charged with constructive notice of each specific reoccurrence of the condition' " (*Chrisler v Spencer*, 31 AD3d 1124, 1125; see *Erikson v J.I.B. Realty Corp.*, 12 AD3d 344, 345; see generally *Chianese v Miller*, 98 NY2d 270, 278).

We agree with Tops, however, that the jury erred in indicating on the verdict sheet that the award of \$360,000 for future medical expenses was "intended to provide compensation" for a period of 15 years. Rather, we conclude that the future medical expenses awarded provides compensation for the remainder of plaintiff's lifetime. With that distinction, we conclude that the jury's award of \$360,000 for future medical expenses should not be disturbed. As plaintiff correctly contends, she was 32 years old at the time of trial, and the uncontroverted medical proof established that her cervical spine injury is permanent and will require a lifetime of medical treatment

and, ultimately, cervical fusion surgery.

With respect to plaintiff's cross appeal, we conclude that the awards for future economic loss and future pain and suffering do not deviate materially from what would be reasonable compensation (see CPLR 5501 [c]; *Iovine v City of New York*, 286 AD2d 372, 373). We agree with plaintiff, however, that the court erred in subtracting the \$34,203 that she received in social security benefits both from the judgment against Tops and that against Kiser. It is well settled that the purpose of CPLR 4545 (c) is to "eliminate double recoveries, not provide defendants . . . with an 'undeserved windfall' " (*Bryant v New York City Health & Hosps. Corp.*, 93 NY2d 592, 607; see *Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81, 87-88). Here, plaintiff was undercompensated because the sum of \$68,406 was subtracted from her total recovery despite the fact that she received only \$34,203 in social security benefits. We thus agree with plaintiff that the court should have prorated the single collateral source offset between Tops and Kiser. Tops' pro rata share of the total award of \$129,000 for past economic loss is 45%. We thus conclude that Tops is entitled to deduct only \$15,391.35 from the award for past economic loss, and we modify the judgment accordingly.

We have considered the remaining contentions of the parties and conclude that they are without merit.

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

1681.4

CA 08-02330

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

NICOLE S. MAURER, PLAINTIFF-RESPONDENT,

V

ORDER

RAYMOND E. KISER, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

RIVKIN RADLER LLP, UNIONDALE (MELISSA M. MURPHY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered June 20, 2008 in a personal injury action. The judgment awarded plaintiff money damages against defendant upon a jury verdict.

Now, upon reading and filing the stipulation discontinuing appeals signed by the attorneys for the parties on January 5, 2010,

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1682

KA 07-00396

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RODNEY FRAZIER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), 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 (Joseph E. Fahey, J.), rendered July 20, 2006. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, criminal possession of a weapon in the third degree and aggravated criminal contempt.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed for assault in the second degree and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for resentencing on the conviction of assault in the second degree.

Memorandum: Defendant appeals from a judgment convicting him of, inter alia, assault in the second degree (Penal Law § 120.05). Defendant failed to preserve for our review his contention that the conviction with respect to the assault count is not supported by legally sufficient evidence because his motions for trial orders of dismissal were not specifically directed toward the ground raised on appeal (*see People v Gray*, 86 NY2d 10, 19). In any event, we reject defendant's contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of that count 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, as the People correctly concede, County Court erred in failing to include a period of postrelease supervision when it imposed the sentence for assault in the second degree. " 'Although this issue was not raised [by defendant] before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983). "Because [the sentencing court] failed to pronounce the term of defendant's

mandatory postrelease supervision in his presence, this matter must be remitted . . . for a resentencing proceeding" (*People v Collado*, 11 NY3d 888, 889). We therefore modify the judgment by vacating the sentence imposed for assault in the second degree, and we remit the matter to County Court for resentencing on the conviction of assault in the second degree.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1683

KA 07-02561

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDON WEST, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (RICHARD W. YOUNGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered November 19, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and menacing in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and menacing in the second degree (§ 120.14 [1]). Defendant failed to preserve for our review his contention that County Court erred in agreeing with the People that he should not be adjudicated a youthful offender and, in any event, that contention lacks merit (*see People v Daniels*, 20 AD3d 940, *lv denied* 5 NY3d 805; *People v Mauricio*, 8 AD3d 1089, 1090, *lv denied* 3 NY3d 678). Likewise, the contention of defendant that he was prejudiced by prosecutorial misconduct is unpreserved for our review (*see People v Gordon*, 277 AD2d 1053, *lv denied* 96 NY2d 759), and it lacks merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1684

KA 07-02658

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN J. BUTLER, 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 (Frederick G. Reed, J.), rendered October 26, 2007. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the third degree, criminal contempt in the second degree, and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal mischief in the third degree (Penal Law § 145.05 [2]), criminal contempt in the second degree (§ 215.50), and endangering the welfare of a child (§ 260.10 [1]). The charges were the result of defendant's violation of a previously issued order of protection when defendant appeared at the residence of his former wife and threw a coffee table through her front window. Defendant contends that the evidence is legally insufficient to support the conviction of criminal mischief because the People failed to establish that the value of the damaged property exceeded \$250. We reject that contention. The People presented the testimony of a witness who estimated that the cost of repairing the window was \$1,024, and who testified that his estimate was based on his examination of the window and his 27 years of experience in repairing windows (see *People v Singleton*, 291 AD2d 869, lv denied 98 NY2d 640; *People v Smeraldo*, 242 AD2d 886, lv denied 91 NY2d 880; *People v Katovich*, 238 AD2d 751). Also 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).

" 'To the extent [that] defendant challenges the amount of the restitution order[] as lacking record support, [his] claim is not

properly before this Court for review because [he] did not request a hearing to determine [the proper amount of restitution] or otherwise challenge the amount of the restitution order[] during the sentencing proceeding' " (*People v Peck*, 31 AD3d 1216, 1216-1217, lv denied 9 NY3d 992, quoting *People v Horne*, 97 NY2d 404, 414 n 3).

Finally, the sentence is neither unduly harsh nor severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1685

KA 08-00915

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID C. CONNOLLY, 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 October 19, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We reject the contention of defendant that the record of the plea proceeding fails to establish that he knowingly, intelligently and voluntarily waived the right to appeal. "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, lv denied 5 NY3d 762). His valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (see *People v Diaz*, 62 AD3d 1252, lv denied 12 NY3d 924). It also encompasses his challenge to the factual sufficiency of the plea allocution with respect to the intent element of manslaughter in the first degree and his potential defense of lack of criminal responsibility (see *People v Morales*, 43 AD3d 1384, lv denied 9 NY3d 1008; *People v Winchester*, 38 AD3d 1336, 1337, lv denied 9 NY3d 853). In addition, by failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (see *People v Lopez*, 71 NY2d 662, 665; *People v Moorer*, 63 AD3d 1590, lv denied 13 NY3d 837). Although defendant initially denied that he intended to cause serious physical injury to the victim, the court fulfilled its obligation to conduct further inquiry with respect thereto, whereupon defendant admitted having that intent (see *Lopez*, 71 NY2d at 666; *Moorer*, 63 AD3d at 1590-1591).

The contention of defendant that the plea was not voluntarily entered survives his waiver of the right to appeal, but defendant failed to preserve that contention for our review because, as noted, he failed to move to withdraw the plea or to vacate the judgment of conviction (see *Diaz*, 62 AD3d 1252). In any event, that contention is lacking in merit. Nothing in the record of the plea proceeding suggests that defendant's diabetic condition interfered with defendant's ability to understand the proceeding and, indeed, defendant assured the court that he was in good condition, both mentally and physically (see *People v Quinones*, 63 AD3d 759, 760, *lv denied* 13 NY3d 799; *People v Sonberg*, 61 AD3d 1350, *lv denied* 13 NY3d 800). Contrary to the further contention of defendant, the information in the presentence report and presentence memorandum concerning his medical condition "did not obligate the court to conduct a sua sponte inquiry" into a possible defense (*People v Kelly*, 50 AD3d 921, 921, *lv denied* 10 NY3d 960; see *People v Sands*, 45 AD3d 414, *lv denied* 10 NY3d 816; *People v Bonilla*, 299 AD2d 934, 935, *lv denied* 99 NY2d 580).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1686

KA 07-00451

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID J. JONES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON 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. Aloï, J.), rendered January 26, 2007. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, criminal use of a firearm in the first degree (two counts), criminal possession of a weapon in the third degree and assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, *inter alia*, attempted murder in the second degree (Penal Law § 110.00, 125.25 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). We see no reason to disturb the jury's resolution of credibility issues against defendant (see *People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831). Defendant's contention with respect to an alleged *Rosario* violation is not preserved for our review, inasmuch as defense counsel was offered certain relief based on that alleged violation and did not renew the request for preclusion upon rejecting that offer (see generally CPL 470.05 [2]). 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 further contention of defendant that he was entitled to copies of recordings of telephone conversations that he had while he was in jail inasmuch as he could have used them to exculpate himself. The People did not move to enter those recordings in evidence at trial, nor in any event could defendant have used those recordings to exculpate himself if they contained hearsay information or prior consistent statements made by

defendant (*see People v Ciena*, 173 AD2d 408, *lv denied* 78 NY2d 964).
We have considered defendant's remaining contentions and conclude that
they are without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1687

KA 08-01836

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

THOMAS JEFFERY, DEFENDANT-RESPONDENT.

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

FIANDACH & FIANDACH, ROCHESTER (EDWARD L. FIANDACH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (John J. Connell, J.), dated June 7, 2007. The order granted that part of the motion of defendant seeking 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 that dismissed the indictment against defendant on the ground that the People failed to comply with the requirements of Vehicle and Traffic Law § 1194 (2) (f) and thus improperly presented evidence to the grand jury concerning defendant's refusal to submit to a chemical test. County Court determined that the remaining admissible evidence before the grand jury was legally insufficient. We agree with the People that the court erred in dismissing the indictment. Although the court properly concluded that the evidence of defendant's refusal to submit to a chemical test was erroneously presented to the grand jury (*see generally People v Thomas*, 46 NY2d 100, 108, *appeal dismissed* 444 US 891), we note that " 'dismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury' " (*People v Sheltray*, 244 AD2d 854, 855, *lv denied* 91 NY2d 897). We agree with the People that there were no such instances here. Furthermore, we reject defendant's contention that the grand jury proceedings were impaired by the presentation of the inadmissible evidence. It is well settled that "not every . . . elicitation of inadmissible testimony . . . renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the

remaining evidence is insufficient to sustain the indictment" (*People v Huston*, 88 NY2d 400, 409). We also agree with the People that the remaining admissible evidence was legally sufficient to support the indictment (see generally *People v Velasquez*, 65 AD3d 1266, 1266-1267; *People v Scroger*, 35 AD3d 1218, lv denied 8 NY3d 950; *People v Hamm*, 29 AD3d 1079, 1080). We therefore 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.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1690

CAF 08-02488

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

IN THE MATTER OF JEAN WELLINGTON,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ANTONIO RICCARDO, JR., RESPONDENT-RESPONDENT.

ABBIE GOLDBAS, UTICA, FOR PETITIONER-APPELLANT.

ROSEMARY O. NWAOKA, P.C., FAYETTEVILLE (ROSEMARY O. NWAOKA OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

JESSICA MANIERI, LAW GUARDIAN, HERKIMER, FOR BIANCA R. AND LUCIANO R.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), entered November 20, 2008 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.

Memorandum: Petitioner mother appeals from an order granting respondent father's motion to dismiss the petition seeking to modify certain stipulated provisions of the divorce judgment concerning visitation with the parties' children. The mother has not raised any issues with respect to that part of the order dismissing the petition insofar as it sought termination of the father's Wednesday visitation, and thus she is deemed to have abandoned any such issues (*see Matter of Walters v Francisco*, 63 AD3d 1610, 1611; *Ciesinski v Town of Aurora*, 202 AD2d 984). Family Court properly granted that part of the motion to dismiss the petition insofar as it sought an order directing the father to provide all transportation for visitation. The mother failed to establish a change in circumstances since the time of the stipulation sufficient to warrant the modification sought (*see Walters*, 63 AD3d at 1611; *Matter of Gridley v Syrko*, 50 AD3d 1560, 1561).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1695

CA 09-00072

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

CHARLES M. SHORT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PROGRESSIVE NORTHWESTERN INSURANCE COMPANY,
DEFENDANT-APPELLANT,
AND JEFFREY SUSSMAN, DEFENDANT-RESPONDENT.

LAW OFFICES OF DANIEL GUARASCI, WILLIAMSVILLE (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 12, 2008 in a declaratory judgment action. The judgment, among other things, declared that defendant Progressive Northwestern Insurance Company is obligated to defend and indemnify plaintiff in the underlying personal injury action.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the cross motion and vacating the declaration and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this declaratory judgment action seeking a declaration that defendant Progressive Northwestern Insurance Company (Progressive) is obligated to defend and indemnify him in connection with a motor vehicle accident that occurred when plaintiff was driving a vehicle owned by his girlfriend's father. Defendant Jeffrey Sussman, a passenger in that vehicle, allegedly sustained a serious brain injury in the accident. At the time of the accident, plaintiff was a named insured on an automobile liability policy issued to his grandmother by Progressive.

Supreme Court properly denied the motion of Progressive seeking a declaration that Progressive has no duty to defend or indemnify plaintiff based upon the failure of plaintiff to satisfy the notice requirement of the policy. There are triable issues of fact when notice of the accident was provided to Progressive on plaintiff's behalf and whether such notice was given "within a reasonable time

under all the circumstances" (*Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 129; see *Allstate Ins. Co. v Marcone*, 29 AD3d 715, 716-717, *lv dismissed* 7 NY3d 841). With respect to Sussman, we conclude that the court erred in granting the cross motion because the reasonableness of his delay and the sufficiency of his excuse in notifying Progressive of the accident based on his status as an injured party present issues of fact (see Insurance Law § 3420 [a] [3]; *Allstate Ins. Co.*, 29 AD3d at 717). We therefore modify the judgment accordingly.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1696

CA 09-01264

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

SMALL BUSINESS LOAN SOURCE, LLC,
PLAINTIFF-APPELLANT,

V

ORDER

KAIVAL KALI CORPORATION, KARUNA CORPORATION,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

DEILY, MOONEY & GLASTETTER, LLP, ALBANY (JOHN D. RODGERS OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

GEORGE T. WOLF, FAIRPORT, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Yates County (W. Patrick Falvey, A.J.), entered April 23, 2009 in a mortgage foreclosure action. The order denied the motion of plaintiff for leave to file a deficiency judgment.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1699

CAF 09-01175

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

IN THE MATTER OF BRUCE L. STEVENSON,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DEBORAH K. STEVENSON, RESPONDENT-APPELLANT.

JACQUELINE M. GRASSO, ESQ., LAW GUARDIAN,
APPELLANT.

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

JACQUELINE M. GRASSO, LAW GUARDIAN, BATAVIA, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 2, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted the petition and transferred physical custody of the parties' child to petitioner.

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

Memorandum: Family Court erred in granting the petition in which petitioner father sought to modify the existing custodial arrangement by transferring custody of the parties' child from respondent mother to him. The court granted the petition based primarily on its view that the father would foster a meaningful relationship between the child and the mother, while the mother would not do likewise. That was error. We conclude that the father failed to make a sufficient showing of a change in circumstances to warrant modification of the existing custody arrangement (*see Matter of Gridley v Syrko*, 50 AD3d 1560; *Stacey L.B. v Kimberly R.L.*, 12 AD3d 1124, lv denied 4 NY3d 704). A long-term custodial arrangement established by agreement, such as the arrangement herein, should not be modified unless it is demonstrated that "the custodial parent is unfit or perhaps less fit" (*Fox v Fox*, 177 AD2d 209, 211 [internal quotation marks omitted]), and that cannot be said with respect to the custodial parent. In addition, although we are mindful that the hearing court's determination is entitled to great respect (*see Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947), we conclude under the

circumstances of this case that the court erred in failing to consider the preference of the child, given his age and apparent maturity, to continue to reside with the mother (see *Matter of Suzanne T. v Arthur L.T.*, 12 Misc 3d 691, *affd* 30 AD3d 1105). " 'While the express wishes of children are not controlling, they are entitled to great weight, particularly where their age and maturity would make their input particularly meaningful' " (see *Matter of O'Connor v Dyer*, 18 AD3d 757, 757). Thus, under the circumstances of this case, we see no reason to disturb the existing custodial arrangement.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1700.1

CA 09-01814

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

MICHAEL TREGLIA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

COLGATE UNIVERSITY, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered May 28, 2009 in a personal injury action. The order denied defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he struck his head on an open window grate at defendant's gymnasium. Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint. Even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that plaintiff's submissions in opposition to the motion raise a triable issue of fact whether defendant had constructive notice of the allegedly defective condition of the window grate (*see Champagne v Peck*, 59 AD3d 1130; *George v New York City Tr. Auth.*, 41 AD3d 143; *Alexander v New York City Tr.*, 34 AD3d 312, 313-314). We reject the contention of defendant that it is entitled to judgment as a matter of law on the issue of proximate cause inasmuch as defendant failed to demonstrate that plaintiff's injury was not the result of the allegedly defective condition of the window grate (*see Powers v St. Bernadette's R.C. Church*, 309 AD2d 1219).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

1

KA 09-01775

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROYAL D. NUFFER, DEFENDANT-APPELLANT.

KATY KARLOVITZ, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Lewis County Court (Charles C. Merrell, J.), rendered March 13, 2009. The judgment convicted defendant, upon a jury verdict, of criminal contempt 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 contempt in the second degree (Penal Law § 215.50 [3]) arising from his violation of an order of protection issued by Family Court following defendant's divorce from the victim. We note at the outset that defendant's trial order of dismissal did not raise the grounds now advanced on appeal, and defendant thus failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). 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 defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contentions that County Court erred in failing to include in its jury charge the definition of the term "home" as used in the order of protection (*see CPL 470.05 [2]; see generally Family Ct Act § 759 [a]*), as well as a mistake of fact defense, based on his belief that the residence of the victim was not her "home" because she was absent therefrom (*see CPL 470.05 [2]; see generally Penal Law § 15.20 [1] [a]*). In any event, those contentions are without merit. Family Court Act § 759 does not define the term "home," and the meaning of that term is within the common understanding of the jury. Contrary to defendant's contention, the residence of the victim did not cease to be her "home" merely

because she was on an extended vacation at the time of the crime (see *People v Dewall*, 15 AD3d 498, 501, lv denied 5 NY3d 787). Further, defendant's incorrect belief concerning the legal status of the home of the victim based on her absence therefrom does not render the mistake of fact defense applicable.

We agree with defendant, however, that the court erred in reading back to the jury portions of the victim's testimony that had been stricken or with respect to which the court had sustained an objection (see *People v Porter*, 256 AD2d 363, 364, lv denied 93 NY2d 976; see also *People v Roman*, 149 AD2d 305, 307; see generally *People v McNab*, 144 Misc 2d 612, 616-617). Nevertheless, we conclude that the error is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (see *Porter*, 256 AD2d at 364; see generally *People v Crimmins*, 36 NY2d 230, 241-242). Defendant failed to preserve for our review his further contention that the prosecutor's opening statement was insufficient (see *People v Murry*, 24 AD3d 1319, lv denied 6 NY3d 815; *People v White*, 283 AD2d 964). In any event, we conclude that it was sufficient to apprise the jury of the nature of the case (see generally *People v Kurtz*, 51 NY2d 380, 383-384, cert denied 451 US 911).

Finally, we reject the contention of defendant that he was denied his right to effective assistance of counsel (see generally *People v Turner*, 5 NY3d 476, 480; *People v Baldi*, 54 NY2d 137, 147). The failure to make motions with little or no chance of success does not constitute ineffective assistance of counsel (see *People v Lewis*, 67 AD3d 1396; *People v DeHaney*, 66 AD3d 1040). Further, defense counsel's failure to move for an inspection of the grand jury minutes prior to trial does not alone constitute ineffective assistance (see *People v Coleman*, 5 AD3d 1070, 1072, lv denied 3 NY3d 672). In any event, we note that, after defense counsel reviewed a portion of the grand jury minutes provided to him as Rosario material, he successfully obtained a reduction of the first count of the indictment, and thereafter successfully obtained an acquittal of that reduced charge. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (see generally *Baldi*, 54 NY2d at 147).

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

2

KA 08-01885

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

THOMAS AQUINO, ALSO KNOWN AS THOMAS A. AQUINO,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered June 17, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

3

KA 08-00856

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MARLIN KEMP, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered March 28, 2008. The judgment convicted defendant, upon his plea of guilty, of arson in the second degree.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

4

KA 07-02240

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN BURNS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., 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 January 5, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), and in appeal No. 2 he appeals from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (§§ 110.00, 125.25 [1]). We agree with defendant that the judgments of conviction must be reversed and the pleas vacated because County Court failed to advise defendant prior to his entry of the pleas that his sentences would include periods of postrelease supervision (*see People v Catu*, 4 NY3d 242, 245). Even assuming, arguendo, that the waiver by defendant of his right to appeal is valid, we conclude that his challenge to the pleas survives that waiver. "Where, as here, a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion[,] . . . and that challenge survives defendant's waiver of the right to appeal" (*People v Dillon*, 67 AD3d 1382, 1383 [internal quotation marks omitted]). In view of our decision, we do not address defendant's remaining contention.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

5

KA 07-02241

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN BURNS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., 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 January 5, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Erie County Court for further proceedings on the indictment.

Same Memorandum as in *People v Burns* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

6

KA 09-01559

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JAMES WESOLOWSKI, DEFENDANT-APPELLANT.

LOTEMPPIO & BROWN, P.C., BUFFALO (FRANK L. LOTEMPPIO, JR., OF COUNSEL),
FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered September 16, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

7

KA 08-01039

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAZZMONE BROWN, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered April 24, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree (two counts), criminal possession of a weapon in the second degree (three counts) and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, one count of murder in the second degree (Penal Law § 125.25 [1]) and two counts of attempted murder in the second degree (§§ 110.00, 125.25 [1]). The conviction arises from an incident in which one individual was shot to death in front of his girlfriend, two other individuals were shot and injured while sitting in their car, and another individual was shot and injured as he ran from the scene. The police were unable to determine the identity of the shooter at the time of the incident. Four years later, however, two witnesses separately contacted the police and informed them that defendant was the shooter in exchange for receiving a possible benefit with respect to their own criminal charges. The police assembled a photo array containing defendant's photograph and showed it to the girlfriend of the murder victim and one of the attempted murder victims who had been seated in the car, both of whom tentatively identified defendant as the shooter and stated that they could not be certain of their identification without observing defendant in person. The People then applied for an order pursuant to *Matter of Abe A.* (56 NY2d 288) requiring defendant to appear in a lineup (see CPL 240.40 [2] [b] [i]).

We reject defendant's contention that County Court erred in

granting the People's application for that order. The police had probable cause to believe that defendant committed the crimes, as well as a clear indication that relevant material evidence would be obtained through the use of a lineup, and the record supports the conclusion that a lineup was a safe and reliable method by which to obtain such evidence (see *Abe A.*, 56 NY2d at 291). The mere fact that the witnesses viewing the lineup were aware that the suspect would be included did not render the lineup either unreliable or unduly suggestive (see *People v Cruz*, 55 AD3d 365, *lv denied* 11 NY3d 924; *People v Warren*, 50 AD3d 706, 707, *lv denied* 10 NY3d 965; *People v Rodriguez*, 17 AD3d 267, *lv denied* 5 NY3d 768).

The evidence, viewed in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (see generally *People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

We reject the further contention of defendant that he received ineffective assistance of counsel based on defense counsel's failure to object to various remarks by the prosecutor on summation. The majority of those remarks constituted fair comment on the evidence or were a fair response to defense counsel's challenges to the evidence and summation (see generally *People v Bowen*, 67 AD3d 1022; *People v Carey*, 67 AD3d 925; *People v Williams*, 43 AD3d 1336, 1337). Although defense counsel should have objected to the remarks that defendant now contends constituted an improper "safe streets" argument (see generally *People v Scott*, 60 AD3d 1483, *lv denied* 12 NY3d 859; *People v Tolliver*, 267 AD2d 1007, *lv denied* 94 NY2d 908), it cannot be said that, viewing counsel's representation in its totality, such error deprived defendant of meaningful representation (see generally *People v Turner*, 5 NY3d 476, 480; *People v Baldi*, 54 NY2d 137, 147).

By failing to challenge the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention that the ruling constituted an abuse of discretion (see *People v Walker*, 66 AD3d 1331, 1332; *People v Miller*, 59 AD3d 1124, 1125, *lv denied* 12 NY3d 819; *People v Brown*, 16 AD3d 1102, *lv denied* 5 NY3d 760). In any event, we conclude that the ruling, which allowed the People to cross-examine defendant concerning the fact that he had prior convictions but precluded them from cross-examining him concerning any underlying facts, was not an abuse of discretion (see *People v Parker*, 50 AD3d 585, *lv denied* 11 NY3d 740; *People v Alvarez*, 304 AD2d 313, *lv denied* 100 NY2d 578; *People v Young*, 298 AD2d 253, *lv denied* 99 NY2d 586).

Defendant also failed to preserve for our review his contention that the sentence imposed for his conviction of criminal possession of a weapon in the third degree must be vacated because the People failed to file a second felony offender statement pursuant to CPL 400.21 (2) with respect thereto (see *People v Mateo*, 53 AD3d 1111, 1112, *lv denied* 11 NY3d 791; *People v Dorrah*, 50 AD3d 1619, *lv denied* 11 NY3d

736). In any event, the People filed a second violent felony offender statement pursuant to CPL 400.15 (2), and thus they provided defendant with notice and an opportunity to challenge the predicate conviction. Inasmuch as the statutory purpose for the second felony offender statement was satisfied, "[t]he People's failure to file [that] statement [is] harmless, and [remitting] for filing and resentencing would be futile and pointless" (*People v Bouyea*, 64 NY2d 1140, 1142). Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

8

KA 09-00941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM COMERFORD, DEFENDANT-APPELLANT.

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered April 20, 2009. The judgment convicted defendant, upon a jury verdict, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the third degree (Penal Law § 130.25 [3]). Defendant failed to preserve for our review his contention that there was a *Rosario* violation because the People did not adequately identify or label a statement made by a prosecution witness (*see People v Bennett*, 52 AD3d 1185, 1186-1187, *lv denied* 11 NY3d 734; *People v Powell*, 234 AD2d 905, *lv denied* 89 NY2d 1098) and, in any event, that contention lacks merit. Defendant also failed to preserve for our review his contention that Supreme Court erred in allowing the People to present rebuttal testimony inasmuch as defendant failed to object to that proffered testimony at trial (*see People v Peterkin*, 12 AD3d 1026, 1028, *lv denied* 4 NY3d 766; *People v Jones*, 254 AD2d 780, *lv denied* 92 NY2d 1050). In any event, the rebuttal testimony was relevant to the issues of consent and defendant's consciousness of guilt, and thus it was not limited to " 'collateral matters inquired into solely to affect credibility' " (*People v Pavao*, 59 NY2d 282, 288).

We reject the contention of defendant that the court abused its discretion in refusing to permit him to re-call a witness after the close of proof. Defendant previously had been afforded a full and fair opportunity to cross-examine the witness concerning the victim's statements, emotional state and physical appearance after the rape but failed to avail himself of that opportunity (*see People v Adeyemi*, 32

AD3d 755, *lv denied* 7 NY3d 865; *People v Wegman*, 2 AD3d 1333, 1335, *lv denied* 2 NY3d 747; *People v Svanberg*, 293 AD2d 555, *lv denied* 98 NY2d 713).

Defendant further contends that the court erred in allowing the People to bolster the victim's testimony through the testimony of three other witnesses. Defendant failed to object to the testimony of two of those witnesses, and thus his contention with respect to those two witnesses is not preserved for our review (see *People v Burnett*, 306 AD2d 947, 948). With respect to the third witness in question, defendant's objection to his testimony on the grounds of hearsay and lack of foundation was insufficient to preserve his contention with respect to bolstering for our review (see *People v West*, 56 NY2d 662; *People v Smith*, 24 AD3d 1253, *lv denied* 6 NY3d 818; *People v Jacque*, 2 AD3d 1362, *lv denied* 2 NY3d 741). In any event, defendant's contention lacks merit. The testimony of one of the witnesses in question did not concern a prior statement of the victim, and the testimony of the other two witnesses fell within various exceptions to the hearsay rule and thus did not constitute improper bolstering (see generally *People v Buie*, 86 NY2d 501, 510; *People v Stevens*, 57 AD3d 1515, *lv denied* 12 NY3d 822). Finally, contrary to defendant's contention, we conclude that the court's evidentiary rulings were not inconsistent.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

9

KA 07-01573

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THERESA M. VARGAS, DEFENDANT-APPELLANT.

REDMOND & PARRINELLO, LLP, ROCHESTER (BRUCE F. FREEMAN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 28, 2006. The judgment convicted defendant, after a nonjury trial, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting her following a nonjury trial of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the evidence establishing that she acted in self-defense was uncontroverted and thus that reversal is required. We reject that contention. The written statement of defendant to the police contradicted her trial testimony with respect to the justification defense, and County Court was entitled to reject defendant's justification defense based on that written statement (see generally *People v Dlugash*, 41 NY2d 725, 736; *People v Kopp*, 33 AD3d 153, 158, lv denied 7 NY3d 849, cert denied 549 US 1227). Viewing the evidence in light of the elements of the crime in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). We have reviewed defendant's remaining contention and conclude that it is without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

10

CAF 08-01211

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

IN THE MATTER OF TIARA B.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TORRENCE B., RESPONDENT-APPELLANT.

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

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, LAW GUARDIAN, UTICA, FOR TIARA B.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered May 5, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights.

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 with respect to his daughter based on a finding of permanent neglect. Contrary to the contention of the father, petitioner established that he failed to develop a realistic plan for the child's future (see Social Services Law § 384-b [7] [c]; *Matter of Star Leslie W.*, 63 NY2d 136, 142-143). Although the record establishes that the father participated in several substance abuse treatment programs, it further establishes that he suffered frequent relapses and that his progress was insufficient to warrant the return of the child to his care (see *Matter of Regina M. C.*, 139 AD2d 929). In addition, the record supports Family Court's determination that a suspended judgment would not serve the best interests of the child (see *Matter of Emmeran M.*, 66 AD3d 1490). "The court's assessment that [the father] was not likely to change his behavior is entitled to great deference" (*Matter of Philip D.*, 266 AD2d 909), and the record supports the court's determination that any progress made by the father "was not sufficient to warrant any further prolongation of the child's unsettled familial status" (*Matter of Maryline A.*, 22 AD3d 227, 228).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

11

CAF 09-00584

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

IN THE MATTER OF CUNNTREL A., DAYJAH I M.A.,
DUVON J.A., AND TRYMEIR D.A.

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

CARRIE P., RESPONDENT,
AND JERMAINE D.A., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF
COUNSEL), FOR RESPONDENT-APPELLANT.

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

SUSAN B. MARRIS, LAW GUARDIAN, MANLIUS, FOR CUNNTREL A., DAYJAH I M.A.,
DUVON J.A., AND TRYMEIR D.A.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered March 10, 2009 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, adjudged that respondent Jermaine D.A. had neglected two of his children.

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

Memorandum: Respondent father appeals from an order adjudicating two of his children to be neglected based on his failure to supply them with adequate education (see Family Ct Act § 1012 [f] [i] [A]). Contrary to the father's contention, petitioner met its burden of establishing educational neglect by a preponderance of the evidence (see § 1046 [b] [i]; *Matter of Ember R.*, 285 AD2d 757, 758, lv denied 97 NY2d 604). Petitioner submitted evidence establishing that each child had "a significant, unexcused absentee rate that [had] a detrimental effect on [each] child's education" (*Ember R.*, 285 AD2d at 758; see *Matter of Matthew B.*, 24 AD3d 1183; *Matter of Dareth O.*, 304 AD2d 667). The father failed to present "evidence that the [children are] attending school and receiving the required instruction in another place" or to establish a reasonable justification for the children's absences and thus failed to rebut the prima facie evidence of educational neglect (*Matter of Christa H.*, 127 AD2d 997, 997; see *Matter of Brian H.*, 2 Misc 3d 1003[A], 2003 NY Slip Op 51715[U]; see

generally Matthew B., 24 AD3d 1183).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

12

CAF 09-00881

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

IN THE MATTER OF SEAN P.K.,
RESPONDENT-APPELLANT.

CHAUTAUQUA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

LYLE T. HAJDU, LAW GUARDIAN, LAKEWOOD, FOR RESPONDENT-APPELLANT.

STEPHEN M. ABDELLA, COUNTY ATTORNEY, MAYVILLE (SCOTT F. HARLEY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered December 8, 2008 in a proceeding pursuant to Family Court Act article 3. The amended order adjudicated respondent a juvenile delinquent, ordered respondent to pay restitution and ordered the Office of Probation to release respondent's name and address to the victim.

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

Memorandum: Respondent appeals from an amended order adjudicating him to be a juvenile delinquent based on the finding that he committed acts that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree. Respondent also was ordered to pay restitution in the sum of \$1,500 to the Office of Probation. Respondent contends that Family Court erred in ordering him to pay that amount of restitution because it was greater than the victim's out-of-pocket expenses, and that the amended order therefore improperly permitted the Office of Probation to apportion the restitution payment between the victim and the victim's insurer. We reject that contention. Pursuant to Family Court Act § 353.6 (1) (a), the court may order as a condition of probation that the respondent pay restitution "in an amount representing a fair and reasonable cost to replace the property [or] repair the damage caused by the respondent . . . not, however, to exceed [\$1,500]." Here, the victim received payment from its insurance company to repair the property. However, pursuant to the terms of the victim's subrogation agreement with the insurer, that payment was a "loan" made to enable the victim to repair its property, and the loan was to be repaid after the victim received restitution based on legal action taken against the individuals who caused the damage. Based on the terms of that agreement, the victim's use of the insurance company's loan to effect the necessary repairs constituted out-of-pocket expenses subject to

restitution. We conclude based on the record before us that the amount of restitution ordered by the court was justified by the amount of damage caused.

We note that the amended order cannot be construed as permitting the payment of restitution to the victim's insurance company. Although Penal Law § 60.27 (4) (b) authorizes restitution payments to the victim's representatives in criminal actions, that restitution provision does not apply to juvenile delinquency adjudications (see *Matter of Jared G.*, 39 AD3d 1248, 1249). Inasmuch as " 'Family Court possesses only the power which is explicitly conferred on it by statute' " (*Matter of Lamedh B.*, 299 AD2d 966), and there is no provision in the Family Court Act that is parallel to Penal Law § 60.27 (4) (b), the amended order must be read to reflect that the restitution payment in this case is to be made to the Office of Probation, which in turn will pass along the payment to the victim.

We agree with respondent that the court erred in ordering the Office of Probation, at the request of the presentment agency, to disclose his name and address to the victim to enable the victim to commence an action against his parents pursuant to General Obligations Law § 3-112 (1). The entity requesting such disclosure, i.e., the presentment agency, is not a proper party plaintiff in an action pursuant to General Obligations Law § 3-112. We therefore modify the amended order accordingly.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

13

TP 09-01878

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

IN THE MATTER OF MARCIA L. HEVERLY, PETITIONER,

V

ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY
SERVICES, RESPONDENT.

LAW OFFICE OF J. THOMAS FUOCO, P.C., ANGELICA (J. THOMAS FUOCO OF
COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI 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, Allegany County [Thomas P. Brown, A.J.], entered September 15, 2009) to review a determination of respondent. The determination denied, after a fair hearing, petitioner's request to amend to unfounded indicated reports of child maltreatment, maintained in the New York State Central Register of Child Abuse and Maltreatment, and to seal those amended reports.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

15

TP 09-01616

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

IN THE MATTER OF DANA RENE GIGNAC, R.P.H., DOING
BUSINESS AS SARATOGA PHARMACY, PETITIONER,

V

MEMORANDUM AND ORDER

DAVID A. PATERSON, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF STATE OF NEW YORK, RICHARD F.
DAINES, M.D., IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF NEW YORK STATE DEPARTMENT OF
HEALTH, AND JAMES G. SHEEHAN, IN HIS OFFICIAL
CAPACITY AS MEDICAID INSPECTOR GENERAL OF
OFFICE OF MEDICAID INSPECTOR GENERAL,
RESPONDENTS.

ALLEGAERT BERGER & VOGEL LLP, NEW YORK CITY (ROBERT F. FINKELSTEIN OF
COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU 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, Monroe County [Harold L. Galloway, J.], entered August 4, 2009) to annul a determination. The determination, inter alia, found that Saratoga Pharmacy had received overpayments from the Medicaid program and sanctioned petitioner and Saratoga Pharmacy for engaging in unacceptable practices under the Medicaid program.

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

Memorandum: Petitioner commenced this proceeding seeking to annul the determination of the Administrative Law Judge (ALJ) following a fair hearing insofar as it affirmed in part the determination of the Office of the Medicaid Inspector General (OMIG) after a final audit of Medicaid claims paid to petitioner in 2004 and 2005. Specifically, the ALJ affirmed the OMIG's determination to recover Medicaid program overpayments from Saratoga Pharmacy but reduced the total amount of the overpayment. The ALJ also affirmed the determination to sanction petitioner and Saratoga Pharmacy for engaging in unacceptable practices under the Medicaid program but reduced the sanction of exclusion from participation in the Medicaid program for a five-year period to a sanction of censure.

Contrary to petitioner's contention, the determination of the ALJ is not erroneous as a matter of law based on the OMIG's interpretation of the applicable regulations. "An agency's interpretation of its regulations must be upheld unless the determination is irrational and unreasonable" (*Matter of Marzec v DeBuono*, 95 NY2d 262, 266, *rearg denied* 96 NY2d 731 [internal quotation marks omitted]; see *Seittelman v Sabol*, 91 NY2d 618, 625). The OMIG interpreted the regulations applicable to the first category of disallowed claims to require petitioner to prepare and maintain contemporaneous records with respect to the delivery of prescription items (see 18 NYCRR 504.3 [a]; 18 NYCRR 517.3 [b] [1]; 18 NYCRR 540.7 [a] [8]), and that interpretation is not irrational or unreasonable (see generally *Matter of GMR Living Ctrs. v Novello*, 294 AD2d 851). In addition, the ALJ's determination that the OMIG properly disallowed certain claims in the first category based upon petitioner's failure to prepare and maintain such records is supported by substantial evidence (see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181).

The ALJ's determination that the OMIG properly disallowed certain claims in the second category based upon the inaccurate or incomplete designation of prescribers is also supported by substantial evidence (see generally *id.*). The OMIG presented documentary evidence demonstrating discrepancies between the prescribers listed on petitioner's claims and the underlying prescriptions, and the testimony of petitioner purporting to explain those discrepancies is insufficient to meet his "burden at the hearing to show that 'the determination of the [OMIG] was incorrect and that all . . . costs claimed were allowable' " (*GMR Living Ctrs.*, 294 AD2d at 852). In addition, the ALJ's determination that the OMIG properly disallowed the claim in the final category based on the failure of petitioner to provide a written order for the medical supply at issue is also supported by substantial evidence (see 18 NYCRR 505.5 [b] [1]; see generally *300 Gramatan Ave. Assoc.*, 45 NY2d at 180-181).

Contrary to the contention of petitioner, he "is liable for reimbursement of any overpayment[,] . . . and an overpayment 'includes any amount not authorized to be paid under the medical assistance program' . . . Medicaid payments are only authorized when providers and their services are in compliance with all applicable statutes, rules and regulations" (*Matter of A.R.E.B.A. Casriel v Novello*, 298 AD2d 134, 135, *lv denied* 100 NY2d 506, quoting 18 NYCRR 518.1 [c]). Finally, the penalty of censure is not so disproportionate to the violations at issue " 'as to be shocking to one's sense of fairness' " (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233; see *Matter of Bracken v Axelrod*, 93 AD2d 913, *lv denied* 59 NY2d 606). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

17

CA 09-01706

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

DONNA HEADLEY AND DONALD HEADLEY,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

M&J LIMITED PARTNERSHIP, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 6, 2009 in a personal injury action. The order, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: In this negligence action, defendant appeals from an order denying its motion for summary judgment dismissing the complaint. According to plaintiffs, who rented an apartment from defendant, Donna Headley (plaintiff) fell as a result of the dangerous condition of the back deck and steps of the apartment, i.e., the presence of a mildewy growth in the wood that, when wet, rendered the deck and steps unusually slippery. The complaint, as amplified by the bill of particulars, alleged that defendant created the allegedly dangerous condition by "allowing water, mold and mildew to form and remain on the steps of the premises," and that it had actual or constructive notice of the allegedly dangerous condition. Supreme Court properly denied the motion (*see Khamis v CG Foods, Inc.*, 49 AD3d 606, 607; *see generally Welch v De Cicco*, 9 AD3d 725; *Backer v Central Parking Sys.*, 292 AD2d 408, 409). We note in particular that, by its own submissions, which included the deposition testimony of both plaintiffs, defendant failed to establish that it did not have actual notice of the allegedly dangerous condition. Contrary to defendant's contention, the fact that plaintiff was aware of the condition did not relieve defendant of its duty to maintain the deck and steps in a reasonably safe condition. " 'The fact that a dangerous condition is open and obvious does not negate the duty to maintain premises in a reasonably safe condition but, rather, bears only on the injured person's comparative fault' " (*Rice v University of Rochester Med.*

Ctr., 55 AD3d 1325, 1327; see *Baines v G&D Ventures, Inc.*, 64 AD3d 528, 529; *Konopczynski v ADF Constr. Corp.*, 60 AD3d 1313, 1315).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

18

CA 09-01909

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

SCOTT VANBUSKIRK, CLAIMANT-APPELLANT,

V

ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 107578.)

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson,
J.), entered December 15, 2008. The order granted the motion of
defendant for summary judgment dismissing the claim.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

19

CA 09-00671

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

KENNETH BURNS AND JULIA BURNS,
PLAINTIFFS-APPELLANTS,

V

ORDER

CITY OF BATAVIA, CITY OF BATAVIA DEPARTMENT
OF PUBLIC WORKS, AND ERDMAN, ANTHONY AND
ASSOCIATES, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS CITY OF BATAVIA AND CITY OF BATAVIA DEPARTMENT
OF PUBLIC WORKS.

HARTER SECREST & EMERY LLP, ROCHESTER (CANDACE M. CURRAN OF COUNSEL),
FOR DEFENDANT-RESPONDENT ERDMAN, ANTHONY AND ASSOCIATES, INC.

Appeal from a judgment of the Supreme Court, Genesee County
(Robert C. Noonan, A.J.), entered November 10, 2008 in a personal
injury action. The judgment, upon the motion of defendant Erdman,
Anthony and Associates, Inc. for summary judgment, dismissed the
complaint against it.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

20

CA 09-00672

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

KENNETH BURNS AND JULIA BURNS,
PLAINTIFFS-APPELLANTS,

V

ORDER

CITY OF BATAVIA, CITY OF BATAVIA DEPARTMENT
OF PUBLIC WORKS, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

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

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

Appeal from an amended judgment of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered December 12, 2008 in a personal injury action. The amended judgment, upon the motion of defendants City of Batavia and City of Batavia Department of Public Works for summary judgment, dismissed the complaint and cross claims against them.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

22

CA 09-01598

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

LEONARD M. ENGLERT AND YVONNE ENGLERT,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

GERALD W. SCHAFFER, JR., ESQ., STEVEN
BARNES, ESQ., INDIVIDUALLY AND DOING BUSINESS
AS THE BARNES FIRM, AS SUCCESSORS IN INTEREST
TO CELLINO & BARNES, AND ROSS CELLINO,
INDIVIDUALLY AND AS A PARTNER IN THE LAW FIRM OF
CELLINO & BARNES, DEFENDANTS-APPELLANTS.

MARK R. UBA, WILLIAMSVILLE (CHRISTINE UBA OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

BURKE AND BURKE, ROCHESTER (PATRICK J. BURKE OF COUNSEL), AND S.
ROBERT WILLIAMS, PLLC, SYRACUSE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered January 9, 2009 in a legal malpractice action. The order, insofar as appealed from, denied the cross motion of defendants seeking to disqualify plaintiffs' attorneys from jointly representing plaintiffs.

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

Memorandum: Defendants appeal from that part of an order that denied their cross motion seeking to disqualify plaintiffs' attorneys from jointly representing plaintiffs. Even assuming, arguendo, that defendants have standing to bring the motion (*see Lake v Kaleida Health*, 60 AD3d 1469; *Maxon v Woods Oviatt Gilman LLP*, 45 AD3d 1376), we conclude that defendants are not aggrieved by Supreme Court's denial of their cross motion, and the appeal therefore must be dismissed (*see CPLR 5511*).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

23

KA 08-02466

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MICHAEL D. PIERCE, DEFENDANT-APPELLANT.

DENNIS A. GERMAIN, WATERTOWN, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Lewis County Court (Charles C. Merrell, J.), entered August 6, 2008. 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.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

24

KA 08-00890

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

APRIL LENO-MARCH, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, 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 January 15, 2008. The judgment convicted defendant, upon her plea of guilty, of burglary in the first degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of burglary in the first degree (Penal Law § 140.30 [1]) and assault in the first degree (§ 120.10 [1]). Contrary to the contention of defendant, the evidence establishes that she knowingly, intelligently and voluntarily waived her right to appeal (see *People v Lopez*, 6 NY3d 248, 256; *People v Seaberg*, 74 NY2d 1, 11). That valid waiver of the right to appeal encompasses defendant's challenges to County Court's suppression ruling (see *People v Kemp*, 94 NY2d 831, 833; *People v Garner*, 52 AD3d 1265, lv denied 11 NY3d 736), as well as defendant's challenge to the factual sufficiency of the plea allocution (see *People v Johnson*, 60 AD3d 1496, lv denied 12 NY3d 926; *People v Spikes*, 28 AD3d 1101, 1102, lv denied 7 NY3d 818; *People v Bland*, 27 AD3d 1052, lv denied 6 NY3d 892).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

25

KA 08-00483

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HECTOR R. ROSADO, DEFENDANT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, 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 May 16, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that his plea was not voluntarily entered because County Court erred in failing to conduct a sufficient inquiry during the plea colloquy with respect to whether defendant had consumed any drugs or medication on that day. Defendant failed to preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Garrett*, 60 AD3d 1389), and the narrow exception to the preservation doctrine does not apply with respect to defendant's contention (*see People v Lopez*, 71 NY2d 662, 666). Defendant denied having any physical or mental problems that would impair his ability to understand the plea proceedings, and "defendant's responses during the plea allocution established that defendant understood the terms and consequences of the plea" (*Garrett*, 60 AD3d at 1390).

In addition, defendant challenges the factual sufficiency of the plea allocution based on the court's failure to question him on the issue whether the shotgun used during the robbery was loaded. That challenge, however, is encompassed by defendant's valid waiver of the right to appeal (*see People v Daniels*, 59 AD3d 943, *lv denied* 12 NY3d 852). In any event, defendant also failed to preserve that challenge for our review, and the narrow exception to the preservation doctrine does not apply with respect thereto (*see Lopez*, 71 NY2d at 665-666). Although it is an affirmative defense to robbery in the first degree that the weapon in question was not loaded (*see* Penal Law § 160.15

[4]), "[n]othing in the plea allocution raised the possibility that the affirmative defense was applicable" (*People v Masterson*, 57 AD3d 1443).

Finally, the valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (see *People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

26

KA 08-02542

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BENITH WHITE, DEFENDANT-APPELLANT.

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. SILLEMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered October 30, 2008. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree, petit larceny, and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [7]), petit larceny (§ 155.25), and criminal possession of a weapon in the fourth degree (§ 265.01 [1]). We reject the contention of defendant that County Court erred in refusing to suppress evidence obtained as a result of the warrantless seizure of his vehicle. "[I]f the police possess probable cause to believe the vehicle is the instrumentality of a crime and exigent circumstances exist, they may seize the automobile without a warrant," and both of those factors exist here (*People v Buggenhagen*, 57 AD2d 466, 468-469; see *People v Swezey*, 215 AD2d 910, 914, *lv denied* 85 NY2d 980). The further contention of defendant that he was denied a fair trial based on prosecutorial misconduct on summation is preserved for our review only with respect to certain of the prosecutor's comments (see CPL 470.05 [2]). In any event, that contention is without merit inasmuch as the prosecutor's comments on summation were fair comment on defense counsel's summation (see *People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915; *People v Pepe*, 259 AD2d 949, 950, *lv denied* 93 NY2d 1024).

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (see generally *People v Bleakley*, 69 NY2d 490, 495). The testimony of defendant's accomplice was corroborated by other evidence at trial, including the testimony of a

police officer, the victim, and a neighbor of the victim implicating defendant in the crimes (see *People v Douglas*, 23 AD3d 1151, lv denied 6 NY3d 812; see generally *People v Johnson*, 1 AD3d 891, 892). Further, the evidence established that defendant possessed the handgun that was found in the bathroom of defendant's house, an area over which defendant exercised dominion and control (see Penal Law § 10.00 [8]; *People v Carter*, 60 AD3d 1103, 1106, lv denied 12 NY3d 924). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). The jury was entitled to credit the testimony of the People's witnesses over that of defendant's sole witness, who knew defendant personally and was in a romantic relationship with one of defendant's accomplices (see generally *id.*).

Defendant contends that he was denied effective assistance of counsel based on the cumulative effect of several alleged errors at trial, including defense counsel's failure to object to portions of the prosecutor's summation and to the jury charge. We reject that contention inasmuch as the record establishes that defendant received meaningful representation (see *People v Smith*, 32 AD3d 1291, 1292, lv denied 8 NY3d 849; see generally *People v Benevento*, 91 NY2d 708, 712; *People v Baldi*, 54 NY2d 137, 147). Defendant failed to preserve for our review his challenge to the amount of restitution imposed (see generally *People v Golgoski*, 40 AD3d 1138), and we decline to exercise our power to review that challenge 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.

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

27

KA 06-03477

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERIC BALENGER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered November 22, 2006. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of robbery in the first degree (Penal Law § 160.15 [1]) and two counts of assault in the second degree (§ 120.05 [2]). Defendant failed to preserve for our review his contention that he was denied a fair trial based on prosecutorial misconduct (*see People v Douglas*, 60 AD3d 1377, *lv denied* 12 NY3d 914), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). Contrary to defendant's further contention, neither defense counsel's failure to object to the alleged instances of prosecutorial misconduct nor any of defense counsel's other alleged shortcomings constituted ineffective assistance of counsel (*see generally People v Walker*, 50 AD3d 1452, 1453, *lv denied* 11 NY3d 795, 931). To the extent that defendant's contention is based on the alleged failure of defense counsel to advise defendant of his right to testify, that part of defendant's contention involves matters outside the record on appeal and is thus properly raised by way of a motion pursuant to CPL article 440 (*see People v Frazier*, 63 AD3d 1633, 1634, *lv denied* 12 NY3d 925). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and according great deference to the jury's resolution of credibility issues, we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490,

495). Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

28

KA 08-00881

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDRE M. MCMILLON, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., LIVINGSTON COUNTY
CONFLICT DEFENDERS, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from a judgment of Livingston County Court (Dennis S. Cohen, J.), rendered March 11, 2008. The judgment convicted defendant, upon his plea of guilty, of 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 his plea of guilty of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [ii]). We reject defendant's contention that County Court erred in imposing an enhanced sentence. The court conditioned the plea agreement on, inter alia, defendant's timely appearance at sentencing, and defendant arrived one hour and 20 minutes after the scheduled time for sentencing. Indeed, the record establishes that the court imposed the condition because defendant previously had arrived late for court appearances and that, on one of those occasions, the court was required to interrupt another proceeding in order to address defendant's case. We thus conclude that the court properly enhanced the sentence based upon defendant's failure to abide by a condition of the plea agreement (see *People v Figgins*, 87 NY2d 840, 841; *People v Marshall*, 231 AD2d 893, 894, lv denied 89 NY2d 866).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

29

KA 08-02247

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TARSHAWN THOMPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered April 16, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that his waiver of the right to appeal was invalid because Supreme Court failed to elicit from him, in his own words, his understanding of the waiver and its consequences. We reject that contention (*see People v Ludlow*, 42 AD3d 941; *People v Brown [Sean]*, 41 AD3d 1234, *lv denied* 9 NY3d 873). " '[T]here is no requirement that the . . . court engage in any particular litany' when accepting a defendant's waiver of the right to appeal" (*Ludlow*, 42 AD3d at 942, quoting *People v Callahan*, 80 NY2d 273, 283). The valid waiver by defendant of the right to appeal encompasses his challenge to the court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789; *People v Gilbert*, 17 AD3d 1164, *lv denied* 5 NY3d 762).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

30

KA 09-01550

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM ANDERSON, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered September 9, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating that part of the sentence ordering restitution and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665; *People v Dorrah*, 50 AD3d 1619, *lv denied* 11 NY3d 736). In any event, the record establishes that the factual allocution is sufficient inasmuch as defendant stated therein that he committed the essential elements of the crime (*see Dorrah*, 50 AD3d 1619). Contrary to defendant's further contention, the sentence is not unduly harsh or severe. We agree with defendant, however, that County Court erred in imposing restitution. Although defendant failed to preserve his contention with respect to restitution for our review (*see People v Peck*, 31 AD3d 1216, 1216-1217, *lv denied* 9 NY3d 992), we nevertheless exercise our power to address it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). A court may order a defendant to "make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby" (Penal Law § 60.27 [1]). The term offense includes "the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other

accusatory instrument disposed of by any plea of guilty by the defendant to an offense" (§ 60.27 [4] [a]). Here, the restitution ordered by the court was not for an offense within the meaning of section 60.27 (4) (a) (see *People v Diola*, 299 AD2d 962, lv denied 99 NY2d 581). We therefore modify the judgment by vacating that part of the sentence ordering defendant to pay restitution (see *People v Glasgow*, 12 AD3d 1172, 1172-1173, lv denied 4 NY3d 763).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

31

KAH 09-00304

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CLAUDE GIGUERE, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

WARREN BARKLEY, SUPERINTENDENT, CAPE VINCENT
CORRECTIONAL FACILITY, AND NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENTS-RESPONDENTS.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL),
FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered January 15, 2009. The judgment dismissed the petition for a writ of habeas corpus.

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

Memorandum: Supreme Court properly dismissed the petition for a writ of habeas corpus. The challenges by petitioner to the determination of the Administrative Law Judge following his final parole revocation hearing "could have been addressed in the course of [an] administrative appeal," and thus petitioner failed to exhaust his administrative remedies (*People ex rel. Davis v New York State Bd. of Parole*, 263 AD2d 706, 707, lv denied 93 NY2d 819; see *People ex rel. Faison v Travis*, 277 AD2d 916, lv denied 96 NY2d 705; *People ex rel. Campbell v Fillion*, 255 AD2d 915). The constitutional claims raised by petitioner are not of the type "that would justify departing from the general rule requiring exhaustion of administrative remedies" (*People ex rel. Gibbs v New York Bd. of Parole*, 251 AD2d 718, 718, lv denied 92 NY2d 814).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

32

CAF 08-00087

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

IN THE MATTER OF CORY S. AND JENNIFER D.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

FRANK S., RESPONDENT,
AND TERRY W., RESPONDENT-APPELLANT.

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

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

MARISA V. TEMPLE, LAW GUARDIAN, EAST SYRACUSE, FOR CORY S. AND
JENNIFER D.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered November 16, 2007 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, adjudged that respondent Terry W. abused her daughter and derivatively neglected her son.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent mother appeals from an order of fact-finding and disposition adjudging that she abused her daughter and derivatively neglected her son. We reject the mother's contention that Family Court erred in admitting in evidence the out-of-court statements of a child who was not a subject of this proceeding (see *Matter of Ian H.*, 42 AD3d 701, 702, *lv denied* 9 NY3d 814). The mother failed to object to the admission in evidence of the daughter's medical records on the grounds raised on appeal and thus failed to preserve her current contentions with respect to those records for our review (see *Matter of Pauline E. v Renelder P.*, 37 AD3d 1145, 1146; *Matter of James E.*, 17 AD3d 871, 873). Contrary to the mother's further contention, the findings of abuse and derivative neglect are supported by the requisite preponderance of the evidence (see § 1046 [b] [i]). Petitioner established that the mother "knew or should reasonably have known" that her daughter was in danger of being physically and sexually abused by her adult son (*Matter of Sara X.*, 122 AD2d 795, 796, *appeal dismissed* 69 NY2d 707; see *Matter of Lynelle W.*, 177 AD2d 1008), "and that 'a reasonably prudent parent would have

acted differently and, in so doing, prevented the injury' " (*Matter of Rhiannon B.*, 237 AD2d 935). The finding of derivative neglect with respect to the son who is the subject of this proceeding was proper because the mother, by allowing the daughter to be abused, thereby "demonstrated a fundamental defect in [her] understanding of the duties and obligations of parenthood and created an atmosphere detrimental to the physical, mental and emotional well-being of the son as well" (*Lynelle W.*, 177 AD2d at 1009; see *Matter of Derrick C.*, 52 AD3d 1325, 1326, lv denied 11 NY3d 705).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

33

CAF 09-00262

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

IN THE MATTER OF CHARLES N. VAUGHN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

EARNESTINE LAMBERT, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF
COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered November 17, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking visitation.

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, Onondaga County, for further proceedings on the petition.

Memorandum: Petitioner father appeals from an order dismissing his petition seeking visitation with his daughter. The father is incarcerated and was not present at the court appearance despite the issuance of an order by the Referee directing that he be transported for the appearance on his petition. The Referee summarily dismissed the petition when, upon asking the father's 15-year-old daughter whether she wanted to see or communicate with her father, the daughter responded in the negative. That was error inasmuch as the Referee did not have " 'sufficient information to make a comprehensive assessment of the best interests of the child[]' " (*Matter of Placidi v Sleiertin*, 61 AD3d 1340, 1341; see *Matter of Steven M. v Meghan M.*, 43 AD3d 1349, 1350). We therefore reverse the order, reinstate the petition and remit the matter to Family Court for further proceedings on the petition.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

34

CAF 08-01246

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

IN THE MATTER OF EDDIE COREY WALKER, JR.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TEESHA D. BOWMAN, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF
COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered May 19, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking visitation for lack of jurisdiction.

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, Onondaga County, for further proceedings on the petition.

Memorandum: Petitioner father appeals from an order in which Family Court sua sponte dismissed the petition for "lack of jurisdiction." We note at the outset that, because the order did not determine a motion made on notice, it is not appealable as of right (*see Sholes v Meagher*, 100 NY2d 333, 335; *Matter of Mary L.R. v Vernon B.*, 48 AD3d 1088, *lv denied* 10 NY3d 710). Although the father did not seek leave to appeal, under the circumstances of this case we treat the notice of appeal as an application for leave to appeal, and we grant the application in the interest of justice (*see Hurd v Hurd*, 66 AD3d 1492; *Milton v 305/72 Owners Corp.*, 19 AD3d 133, *lv denied* 7 NY3d 778; *see generally* CPLR 5701 [c]).

The evidence in the record establishes that the father did not sign the stipulation referring the matter to a referee to hear and determine the matter. "We agree with the father that, because he refused to consent to the authority of [a referee] to hear and determine the matter, the [Referee] lacked jurisdiction to dismiss the petition" (*Matter of David S.S. v Mia B.M.*, 48 AD3d 1246, 1246; *see Matter of Osmundson v Held-Cummings*, 306 AD2d 950, 950-951). We therefore reverse the order, reinstate the petition and remit the matter to Family Court for further proceedings on the petition.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

36

CA 09-00987

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF
THE ACCOUNT OF HSBC BANK U.S.A.,
RESPONDENT-RESPONDENT,
AS TRUSTEE UNDER AGREEMENT OF JESSE T.
LITTLETON, DATED 3/21/60 FOR JOSEPH COOK
LITTLETON, FOR THE PERIOD COVERING
OCTOBER 7, 1966 TO DECEMBER 16, 2002.

MEMORANDUM AND ORDER

BARBARA A. LITTLETON, NANCY JO DRUM,
WILLIAM JOHN LITTLETON AND MARGARET A. SPIES,
PETITIONERS-APPELLANTS;

CLOVER DRINKWATER AND SAYLES & EVANS,
RESPONDENTS-RESPONDENTS.

WILLIAMS & WILLIAMS, ROCHESTER (MITCHELL T. WILLIAMS OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (RICHARD E. ALEXANDER OF
COUNSEL), FOR RESPONDENT-RESPONDENT HSBC BANK U.S.A.

HISCOCK & BARCLAY, LLP, ROCHESTER (THOMAS B. CRONMILLER OF COUNSEL),
FOR RESPONDENTS-RESPONDENTS CLOVER DRINKWATER AND SAYLES & EVANS.

Appeal from a decree of the Surrogate's Court, Steuben County
(Marianne Furfure, S.), entered February 13, 2009. The decree granted
the motions of respondents and dismissed the petition seeking, inter
alia, to set aside releases executed by petitioners with respect to
the subject trust.

It is hereby ORDERED that the decree is unanimously affirmed
without costs.

Memorandum: Petitioners appeal from a decree that dismissed the
petition seeking, inter alia, "to vacate and set aside" all releases
executed by petitioners with respect to a trust created by Jesse T.
Littleton, who designated the predecessor of respondent HSBC Bank
U.S.A. (HSBC) as trustee. The trust provided income to Jesse
Littleton and his wife during their lifetimes and, thereafter, one
fourth of the assets in the trust continued for the benefit of their
son. Upon the death of their son, one half of the trust assets
continued for the benefit of his wife, petitioner Barbara A.
Littleton, and one half of the trust assets continued for the benefit
of his children, the remaining petitioners. The trust provided that

the trustee had "absolute discretion" to retain "any stocks, bonds or other securities . . .[,] including securities of Corning Glass Works [Corning] and any successor or affiliate thereof," and that the trustee "shall not be or be held responsible for any loss or depreciation that may occur in the value [of those securities]." Upon settlement of the trust, an informal accounting containing the trust's complete transaction history was sent to petitioners' attorney, respondent Clover Drinkwater, a partner in the law firm of respondent Sayles & Evans (collectively, respondent law firm), and Drinkwater sent petitioners a receipt and release agreement. The accounting revealed significant declines in the value of Corning stock, which constituted more than 80% of the trust corpus. Petitioners signed their respective releases, which provided that HSBC was forever absolved of all liability for the handling of trust assets.

More than three years later, petitioners commenced this proceeding seeking to set aside the releases, and Surrogate's Court granted the motions of HSBC and respondent law firm to dismiss the petition. We affirm.

According to petitioners, HSBC and respondent law firm committed fraud by failing to disclose the possible legal effect of the accounting and the execution of the releases. Contrary to petitioners' contention, however, the petition fails to state a cause of action for fraud or constructive fraud against either HSBC or respondent law firm because it fails to make a "factually supported allegation" of misrepresentation (*Pope v Saget*, 29 AD3d 437, 441, lv denied 8 NY3d 803; see *Simmons v Washing Equip. Tech.*, 51 AD3d 1390, 1391-1392). We further conclude that the Surrogate properly determined that the breach of fiduciary claim against respondent law firm was, in essence, a claim for legal malpractice and thus was barred by the three-year statute of limitations (see CPLR 214 [6]; *Harris v Kahn, Hoffman, Nonenmacher & Hochman, LLP*, 59 AD3d 390). Even assuming, arguendo, that the petition states a separate claim for breach of fiduciary duty against respondent law firm, we conclude that such claim arises from the same facts as those from which the legal malpractice claim arises, and thus the Surrogate properly dismissed that claim as duplicative of the legal malpractice claim (see *TVGA Eng'g, Surveying, P.C. v Gallick* [appeal No. 2], 45 AD3d 1252, 1256).

Finally, we conclude that the Surrogate properly dismissed the breach of fiduciary duty claim against HSBC. HSBC fulfilled its fiduciary duty by providing petitioners with a full accounting of the trust, and petitioners failed to object to the accounting and executed releases waiving their rights against HSBC (see *Matter of Hunter*, 4 NY3d 260, 270-271; *Matter of Schoenewerg*, 277 NY 424, 427-428).

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

37

CA 09-01720

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

MILFORD C. DRAKE, K. CHARLES POWELL AND
KEVIN POWELL, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

DALE F. FOX, FOX & FOX AND FAULT LINE OIL
CORPORATION, DEFENDANTS-RESPONDENTS.

BRAUTIGAM & BRAUTIGAM, L.L.P., FREDONIA (MICHAEL K. BOBSEINE OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF J. MICHAEL SHANE, ALLEGANY (J. MICHAEL SHANE OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Cattaraugus County
(Larry M. Himelein, A.J.), entered October 29, 2008. The judgment
dismissed the complaint after a nonjury trial.

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

Memorandum: Plaintiffs commenced this action seeking, inter
alia, damages for physical and environmental damage to their
properties allegedly resulting from defendants' oil and gas
exploration and production activities conducted pursuant to a series
of oil and gas leases. Supreme Court properly dismissed the complaint
following a nonjury trial. "[A] mineral estate in a tract of land
carries with it the right to such access over the surface that may be
reasonably necessary to carry on mining activities" (*Allen v*
Gouverneur Talc Co., 247 AD2d 691, 692; see *Frank v Fortuna Energy,*
Inc., 49 AD3d 1294). Here, plaintiffs failed to establish that
defendants acted unreasonably in their installation or use of access
roads to extract oil and gas or that plaintiffs are otherwise entitled
to recover damages pursuant to the terms of the leases for restoration
of their property prior to the completion of oil and gas production.
We have considered plaintiffs' remaining contentions and conclude that
they are lacking in merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

39

CA 09-01211

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

JOHN THOMAS LANDERS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CSX TRANSPORTATION, INC., DEFENDANT-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (J. CHRISTINE CHIRIBOGA OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (JOSEPH A. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 7, 2008 in an action pursuant to the Federal Employers' Liability Act. The order granted the motion of plaintiff for leave to amend the complaint.

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

Memorandum: Plaintiff commenced this action pursuant to the Federal Employers' Liability Act ([FELA] 45 USC § 51 *et seq.*), seeking damages for injuries that he allegedly sustained when he fell on stairs located at defendant's property. He subsequently moved for leave to amend the complaint by adding an additional defendant and a cause of action seeking damages for spinal injuries allegedly caused by long-term exposure to vibration. Contrary to defendant's contention, Supreme Court properly exercised its discretion in granting the motion.

It is well settled that "[l]eave [to amend a pleading] shall be freely given" (CPLR 3025 [b]), and "[t]he decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). A court " 'should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face' " (*Agway, Inc. v Williams*, 185 AD2d 636, 636; *see Lucido v Mancuso*, 49 AD3d 220, 229). We cannot conclude that the court abused its discretion in granting the motion in this case, particularly in light of the "more lenient standard for determining negligence and causation in a FELA action" (*McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1151 [internal quotation marks omitted]).

We have considered defendant's remaining contention and conclude

that it is without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

40

CA 09-00704

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ.

PAUL FERENCHAK, PLAINTIFF-APPELLANT,

V

ORDER

KATHRYN FERENCHAK, ALSO KNOWN AS KATHRYN FELL,
DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County
(Martha Walsh Hood, A.J.), entered November 21, 2008 in a divorce
action. The judgment, among other things, distributed the marital
assets.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

43

KA 08-02233

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARL J. RICHARDSON, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 15, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of robbery in the second degree (Penal Law § 160.10 [2] [b]). County Court properly refused to suppress the showup identification of defendant by several eyewitnesses. The information provided by the eyewitnesses and broadcast over the police radio established that two black males wearing white T-shirts had just robbed a drug store, and that information also included the make, model, color and approximate year of the vehicle in which they fled the scene. Shortly after the robbery, the police observed a stopped vehicle in which three black males, including defendant, were seated, and that vehicle matched the description provided by the eyewitnesses. Consequently, the police were justified in initially approaching the stopped vehicle (*see People v Sanders*, 224 AD2d 956, *lv denied* 88 NY2d 885; *see also People v Young*, 68 AD3d 1761; *People v Van Every*, 1 AD3d 977, 978-979, *lv denied* 1 NY3d 602). The police also had reasonable suspicion to detain defendant and the two passengers for the showup identification approximately 30 to 45 minutes after the robbery had occurred. As noted, the vehicle matched the description of the getaway vehicle and, in addition, it was located near the scene of the robbery and there were two white T-shirts on the seats of the vehicle (*see People v Cash J.Y.*, 60 AD3d 1487, 1489, *lv denied* 12 NY3d 913). We reject the contention of defendant that he was subjected to a de facto arrest at the time of the showup identification procedure (*see generally People v Smith*, 234 AD2d 946, *lv denied* 89 NY2d 1041). Contrary to defendant's further contention, the showup identification

procedure was not unduly suggestive. The People met their initial burden of establishing "the reasonableness of the police conduct and the lack of any undue suggestiveness," and defendant failed to meet his ultimate burden of establishing that the showup identification procedure was unduly suggestive (*People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). Indeed, we conclude that the procedure was "reasonable under the circumstances" (*People v Brisco*, 99 NY2d 596, 597).

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

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

44

KA 08-01040

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL SMALLS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JONATHAN D. LAMBERTI, VINCENT F. GUGINO, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered April 25, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, assault in the first degree (Penal Law § 120.10 [2]). We reject the contention of defendant that he was denied his right to effective assistance of counsel based on the failure of defense counsel to challenge the qualifications of the two medical witnesses. Defense counsel's primary strategy was to establish that defendant did not intend to disfigure the victim and that his conduct was justified, and defense counsel pursued that strategy through, inter alia, vigorous cross-examination of the victim. Defendant thus failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; see *People v Becoats*, 62 AD3d 1257, lv denied 12 NY3d 912). Moreover, defendant has failed to cite any authority to support his contention that only a plastic surgeon is qualified to testify concerning the seriousness and permanency of an allegedly disfiguring injury. Viewing the evidence, the law and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147).

We further conclude that County Court properly allowed the People to present evidence of defendant's prior assaults against the victim. "Unlike evidence of general criminal propensity, evidence that a

particular victim was the focus of a defendant's aggression may be highly relevant" (*People v Ebanks*, 60 AD3d 462, 462, lv denied 12 NY3d 924). Here, the prior incidents in which defendant bit the victim were relevant to establish the assaultive nature of their relationship and defendant's intent (see *People v Meseck*, 52 AD3d 948, 950; *People v Williams*, 29 AD3d 1217, 1219, lv denied 7 NY3d 797; *People v Jones*, 289 AD2d 1010, lv denied 97 NY2d 756). The court properly balanced the probative value of the evidence against its potential for prejudice (see *People v Mosley*, 55 AD3d 1371, lv denied 11 NY3d 856), and its instructions to the jury minimized any prejudicial effect.

Contrary to defendant's contention, we conclude that the court properly admitted in evidence photographs of the victim's injury. "[P]hotographs are admissible if they tend to prove or disprove a disputed or material issue . . . [and] should be excluded only if [their] sole purpose is to arouse the emotions of the jury and to prejudice the defendant" (*People v Wood*, 79 NY2d 958, 960 [internal quotation marks omitted]). Here, the photographs were relevant to an element of assault in the first degree, i.e., serious and permanent disfigurement (Penal Law § 120.10 [2]), and thus it cannot be said that their sole purpose was "to arouse the emotions of the jury and to prejudice the defendant" (*Wood*, 79 NY2d at 960 [internal quotation marks omitted]; see *People v Quijano*, 240 AD2d 186, lv denied 90 NY2d 942).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish permanent disfigurement inasmuch as he did not renew his motion for a trial order of dismissal after presenting evidence (see *People v Hines*, 97 NY2d 56, 61, rearg denied 97 NY2d 678). In any event, that contention lacks merit (see generally *People v Bleakley*, 69 NY2d 490, 495). Defendant also failed to preserve for our review his contention that the People failed to present legally sufficient evidence to disprove his justification defense because he did not move for a trial order of dismissal on that ground (see generally *People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crime of assault 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 the contention of defendant that the court abused its discretion in denying his motion pursuant to CPL 330.30 without conducting a hearing. Defendant's motion was based solely upon the allegation that the victim recanted her trial testimony and admitted that she bit defendant before he bit her. It is well established that "recantation evidence is inherently unreliable . . . and insufficient alone to warrant [setting aside the verdict]" (*People v Thibodeau*, 267 AD2d 952, 953, lv denied 95 NY2d 805; see *People v Jackson*, 238 AD2d 877, 879, lv denied 90 NY2d 859). In any event, the victim testified at trial that she was the initial aggressor, and it therefore "is not probable that defendant would receive a more favorable verdict at a retrial if [the victim] testified in accordance

with [her alleged statement to defense counsel recanting her trial testimony]" (*Jackson*, 238 AD2d at 878).

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

45

KA 05-01870

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LUIS A. MATEO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Dennis M. Kehoe, A.J.), rendered May 17, 2005. The judgment convicted defendant, upon a jury verdict, of assault in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the third degree (Penal Law § 120.00 [1]), defendant contends that the verdict is against the weight of the evidence because he was too intoxicated to have the requisite criminal intent to commit the assault. "Although there was evidence at trial that defendant consumed a significant quantity of alcohol on the night of the incident, '[a]n intoxicated person can form the requisite criminal intent to commit a crime, and it is for the trier of fact to decide if the extent of the intoxication acted to negate the element of intent' " (*People v Felice*, 45 AD3d 1442, 1443, *lv denied* 10 NY3d 764; *see People v Scott*, 47 AD3d 1016, 1018, *lv denied* 10 NY3d 870; *People v LaGuerre*, 29 AD3d 820, 822, *lv denied* 7 NY3d 814). Here, there is ample evidence in the record to support the verdict and, affording deference to the jury's credibility determinations, "we cannot say that the jury improperly weighed the evidence in deciding in the People's favor the extent of defendant's intoxication" (*Scott*, 47 AD3d at 1019; *see People v Massey*, 45 AD3d 1044, 1046, *lv denied* 9 NY3d 1036). Viewing the evidence in light of the elements of the crime of assault 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).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

46

KA 06-03045

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND GUZMAN, 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 (John R. Schwartz, A.J.), rendered August 7, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act 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 criminal sexual act in the first degree (Penal Law § 130.50 [1]), defendant contends that County Court erred in refusing to suppress the results of testing or analysis of his bodily fluids, obtained through an oral swab. Although the People are incorrect in asserting that defendant failed to preserve his contention for our review (see CPL 470.05 [2]; cf. *People v Rogers*, 277 AD2d 876, lv denied 96 NY2d 834; *People v Jamison*, 219 AD2d 853, lv denied 87 NY2d 974, 88 NY2d 966), we nevertheless conclude that defendant's contention lacks merit because defendant's consent to the oral swab was voluntarily given (see *People v Gonzalez*, 39 NY2d 122, 128; *People v Hall*, 35 AD3d 1171, lv denied 8 NY3d 923; *People v Caldwell*, 221 AD2d 972, lv denied 87 NY2d 920).

Defendant further contends that the court should have granted his motion to withdraw his plea based on his protestations of innocence and his assertion that the plea was not knowing, voluntary and intelligent. We reject that contention. The record establishes that defendant's plea was knowing, voluntary, and intelligent (see *People v Spikes*, 28 AD3d 1101, 1102, lv denied 7 NY3d 818; *People v Murray*, 207 AD2d 999, lv denied 84 NY2d 1014), and defendant did not submit any new evidence to substantiate his protestations of innocence (see *People v Baret*, 11 NY3d 31, 33-34; *People v Kimmons*, 39 AD3d 1180; *People v Klein*, 11 AD3d 959). Thus, contrary to defendant's

contention, the court did not err in summarily denying his motion, and the court had no duty to conduct an inquiry to determine whether the plea was knowingly, voluntarily and intelligently entered (*see People v Lopez*, 71 NY2d 662, 666).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

47

KA 08-01264

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PETE ROSADO, DEFENDANT-APPELLANT.

SCHLATHER, STUMBAR, PARKS & SALK, ITHACA (DAVID M. PARKS OF COUNSEL),
FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS
OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Craig J. Doran, J.), entered May 8, 2008 pursuant to the 2005 Drug Law Reform Act. The order, among other things, granted defendant's application for resentencing upon defendant's 2003 conviction of criminal possession of a controlled substance in the second degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Ontario County Court for further proceedings in accordance with the following Memorandum: We previously affirmed the judgment convicting defendant of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]; *People v Rosado*, 26 AD3d 891, lv denied 6 NY3d 838), and he now appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing. The order sets forth that defendant rejected the offer of a determinate sentence of imprisonment of 11½ years plus a five-year period of postrelease supervision on the condition that he waive his right to appeal, and County Court stated on the record that the previously imposed sentence of 8½ years to life "would continue."

Contrary to defendant's contention, we conclude that defendant was not denied an opportunity for a hearing pursuant to DLRA-2 on his resentencing application (see *People v Williams*, 45 AD3d 1377; cf. *People v Figueroa*, 21 AD3d 337, 339, lv denied 6 NY3d 753). We agree with defendant, however, that the court erred in failing to comply with DLRA-2 because it failed to set forth written findings of fact and the reasons for its determination that the new sentence was appropriate (see *Williams*, 45 AD3d 1377; see generally *People v James*, 67 AD3d 1357). We further conclude that the court erred in conditioning the resentencing offer on defendant's waiver of the right to appeal. "In order to safeguard a defendant's statutory right to

obtain appellate review of the proposed resentence *before* making the ultimate decision as to whether to accept it, the sentencing court must afford the defendant the opportunity to appeal from the initial DLRA[-2] order" (*People v Love*, 46 AD3d 919, 921, *lv denied* 10 NY3d 842 [emphasis added]; see *People v Graves*, 66 AD3d 1513, 1514-1515). Here, the court not only failed to afford defendant an opportunity to take an appeal from the specifying order, but it expressly conditioned the resentence offer on defendant's waiver of the right to appeal from the new sentence. We therefore reverse the order and remit the matter to County Court to determine defendant's application in compliance with DLRA-2.

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

50

CAF 08-01781

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF LAMONT HAYWOOD,
PETITIONER-APPELLANT,

V

ORDER

AUDREY HARRIS, RESPONDENT-RESPONDENT.

ROBERT TURNER, ROCHESTER, FOR PETITIONER-APPELLANT.

MATTHEW J. FERRO, LAW GUARDIAN, ROCHESTER, FOR ALAJZA H.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered July 21, 2008 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, dismissed in part the amended petition.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

51

CAF 09-01113

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF DAKOTA L.K.,
RESPONDENT-APPELLANT.

STEBEN COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

BONITA STUBBLEFIELD, LAW GUARDIAN, PIFFARD, FOR RESPONDENT-APPELLANT.

FREDERICK H. AHRENS, JR., COUNTY ATTORNEY, BATH (CRAIG A. PATRICK OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered April 28, 2009 in a proceeding pursuant to Family Court Act article 3. The order adjudicated respondent a juvenile delinquent and placed him in the custody of the Commissioner of Social Services of Steuben County for a period of one year.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the order entered April 10, 2009 is vacated, and the matter is remitted to Family Court, Steuben County, for further proceedings on the petition.

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, would constitute the crime of forcible touching (Penal Law § 130.52). We agree with respondent that his admission to the underlying act was defective based on Family Court's failure to comply with Family Court Act § 321.3. Indeed, the court failed to advise him of his right to present witnesses, to confront witnesses presented against him, and to have the presentment agency prove beyond a reasonable doubt that respondent committed the alleged act (*see Matter of David T.*, 59 AD3d 631; *Matter of Sean R.P.*, 24 AD3d 1200, 1201, *lv denied* 6 NY3d 711; *Matter of Jerry YY.*, 309 AD2d 1033). The court further failed to comply with the statute by failing to ascertain whether respondent and his parents were aware of the " 'possible specific dispositional orders' " (*Matter of Anthony S.*, 302 AD2d 531, 532; *see Sean R.P.*, 24 AD3d at 1201; *Matter of Warren R.*, 197 AD2d 920). We note that respondent was not required to preserve his contention for our review inasmuch as the requirements of Family Court Act § 321.3 " 'are mandatory and nonwaivable' " (*Matter of Tyler D.*, 64 AD3d 1243, 1244). Thus, the dispositional order is reversed and the fact-finding order is vacated (*see id.*). Because the period of respondent's placement has not expired, we do not dismiss the petition (*see id.*).

In view of our determination, we do not address respondent's remaining contention concerning the factual sufficiency of the admission.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

53

CAF 09-00477

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF TONETTE DENISE BUNCH,
PETITIONER-RESPONDENT,

V

ORDER

ZRINELL JOHN WEBSTER, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered February 18, 2009 in a proceeding pursuant to Family Court Act article 4. The order, insofar as appealed from, upon reconsideration suspended respondent's sentence of incarceration.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

54

CAF 08-02258

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF JAMES R. HOPKINS, JR.,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

GINA F. GELIA, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered October 17, 2008 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, found that respondent willfully violated a prior child support order.

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

Memorandum: Respondent mother appeals from an order finding that she willfully violated a prior child support order and imposing a 30-day suspended sentence on the condition that she pay all future child support. We note at the outset that the record does not support the contention of the mother that she paid the child support arrears during the parties' final appearance before the court and thus that Family Court should have dismissed the petition as moot. In any event, even had she done so, the fact remains that the mother failed to pay child support for several months, in violation of the prior order.

Contrary to the further contention of the mother, the court properly confirmed the Support Magistrate's determination that she was in willful violation of the prior child support order (see Family Ct Act § 439 [a]; *Matter of Hunt v Hunt*, 30 AD3d 1065). Petitioner father presented prima facie evidence of a willful violation by establishing that the mother repeatedly failed to pay child support as ordered, and the mother failed to meet her burden of establishing her inability to make the required payments (see *Matter of Powers v Powers*, 86 NY2d 63, 68-70; *Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452). We perceive no basis to disturb the determination of the Support Magistrate that the substance abuse issues of the mother did not render her unable to make those payments (see generally *Matter of Natali v Natali*, 30 AD3d 1010, 1011-1012), and the mother otherwise presented no evidence that she "was financially unable to satisfy [her] obligation during the time it accrued" (*Matter of Hold v Hold*, 8 AD3d 279, 280). Moreover, the mother "presented no evidence that

[she] made any efforts to obtain employment" to meet her child support obligation of \$25 per month (*Matter of Todd v Johnson*, 66 AD3d 1480, lv denied ___ NY3d ___ [Jan. 14, 2010]; see *Hunt*, 30 AD3d 1065).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

55

CAF 09-00701

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF CATHERINE CHOMIK,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JAROSLAW SYPNIAK, RESPONDENT-RESPONDENT.

SCHELL & SCHELL, P.C., FAIRPORT (GEORGE A. SCHELL OF COUNSEL), FOR
PETITIONER-APPELLANT.

GOULD, PECK, METZLER & COGNATA LLP, ROCHESTER (ERIC J. METZLER OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered March 11, 2009 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to the order of the Support Magistrate.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following Memorandum: Petitioner mother appeals from an order of Family Court denying her objections to the Support Magistrate's order, which in turn denied her motion to vacate the parties' prior consent order.

By order entered July 24, 2006, Family Court, upon the parties' consent, entered a judgment in favor of respondent father in the amount of \$14,000 in child support arrears. In May 2008, the mother commenced this proceeding seeking to vacate that order on the ground that, during the time period in which the arrears accrued, she was receiving public assistance and, thus, pursuant to Family Court Act § 413 (1) (g), arrears could not accrue in excess of \$500.

Although an order entered upon consent generally "is not subject to the review of either Family Court or this Court" (*Matter of Steuben County Support Collection Unit v Bartholomew*, 2 AD3d 1434, 1435, lv denied 2 NY3d 702, 703; see *Matter of Culton v Culton*, 2 AD3d 1446), it is well settled that "a court maintains inherent power to vacate a judgment [or order] in the interest of justice[, and that t]he enumerated grounds in CPLR 5015 are neither preemptive nor exhaustive and were not intended to limit that power" (*Ruben v American & Foreign Ins. Co.*, 185 AD2d 63, 67). Thus, an order entered on consent may indeed be subject to vacatur under CPLR 5015 (see *Matter of Croft v Gordon*, 297 AD2d 344; 390 W. End Assoc. v Baron, 274 AD2d 330, 332).

Here, we conclude that Family Court erred in failing to determine whether the mother's income was "less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services" when the \$14,000 in child support arrears accrued (Family Ct Act § 413 [1] [g]). We therefore hold the case, reserve decision, and remit the matter to Family Court to make that determination (see *Matter of Commissioner of Social Servs. of Rensselaer County v Faresta*, 11 AD3d 750). In the event that the mother's income was less than that amount, "unpaid child support arrears in excess of five hundred dollars shall not accrue" (§ 413 [1] [g]; see *Matter of Blake v Syck*, 230 AD2d 596, 599, lv denied 90 NY2d 811).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

56

CA 09-00187

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

CONWAY BEAM LEASING, INC., PLAINTIFF-RESPONDENT,

V

ORDER

SHERMAR, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

ANN W. MANION, UTICA, FOR DEFENDANT-APPELLANT.

KENNETH D. LICHT, ROCHESTER (KEITH E. O'TOOLE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered April 28, 2008. The order denied the motion of defendant Shermar, Inc. seeking leave to reargue its opposition to plaintiff's motion for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

57

CA 09-01040

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

KIMBERLY M. LARSEN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

NITIN S. BANWAR, M.D.,
AND INTERLAKES ORTHOPAEDIC SURGERY, P.C.,
DEFENDANTS-RESPONDENTS.

FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (STEVEN A. LUCIA OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 19, 2008 in a medical malpractice action. The order granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained as the result of defendants' medical malpractice. We agree with plaintiff that Supreme Court erred in granting defendants' motion seeking summary judgment dismissing the complaint. Where, as here, an expert's affidavit fails to address each of the specific factual claims of negligence raised in plaintiff's bill of particulars, that affidavit is insufficient to support a motion for summary judgment as a matter of law (*see Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874; *Larsen v Loychusuk*, 55 AD3d 560). Thus, defendants' motion should have been denied, regardless of the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Grant*, 55 AD3d at 875).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

58

CA 09-00786

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF RICHARD ROBLES,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

GEORGE B. ALEXANDER, CHAIRMAN, NEW
YORK STATE DIVISION OF PAROLE,
RESPONDENT-RESPONDENT.

RICHARD ROBLES, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David M. Barry, J.), entered January 16, 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.

Memorandum: Supreme Court properly dismissed the petition, pursuant to which petitioner challenged the denial by the New York State Division of Parole (Board) of his request for parole release. Because the Board properly considered the relevant statutory factors (see Executive Law § 259-i [2] [c] [A]) and there has been no "showing of irrationality bordering on impropriety" (*Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77), there is no basis for disturbing the determination of the Board (see *Matter of Pearl v New York State Div. of Parole*, 25 AD3d 1058; *Matter of Romer v Dennison*, 24 AD3d 866, 867-868, lv denied 6 NY3d 706). Contrary to the contention of petitioner, his challenges to the 1987 and 1994 determinations of the Board are time-barred inasmuch as the instant proceeding was not commenced within four months after those determinations became "final and binding upon the petitioner" (CPLR 217 [1]), i.e., when he became "aggrieved" by them (*Matter of Yarbough v Franco*, 95 NY2d 342, 346). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

62

CA 09-00905

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

SUSAN B. KITTS, PLAINTIFF-APPELLANT,

V

ORDER

BLOSSOM NORTH, LLC, DOING BUSINESS AS
BLOSSOM NORTH NURSING AND REHABILITATION
CENTER, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

DUTCHER & ZATKOWSKY, ROCHESTER (MILES P. ZATKOWSKY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, CANANDAIGUA (MARGARET E. SOMERSET OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered January 27, 2009. The order granted the motion of defendant to vacate two default judgments entered against it upon a certain condition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see *Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

63

CA 09-00906

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

SUSAN B. KITTS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BLOSSOM NORTH, LLC, DOING BUSINESS AS
BLOSSOM NORTH NURSING AND REHABILITATION
CENTER, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

DUTCHER & ZATKOWSKY, ROCHESTER (MILES P. ZATKOWSKY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, CANANDAIGUA (MARGARET E. SOMERSET OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered March 23, 2009. The order granted the motion of defendant and vacated two default judgments entered against it.

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

Memorandum: Plaintiff appeals from an order that granted the motion of defendant seeking to vacate two default judgments entered against it as a consequence of its failure to answer the complaint. Contrary to plaintiff's contentions, defendant "establish[ed] both a reasonable excuse for the default[s] and the existence of a meritorious defense" with respect to each default judgment (*Genesee Mgt. v Barrette*, 4 AD3d 874, 875; see *Bilodeau-Redeye v Preferred Mut. Ins. Co.*, 38 AD3d 1277; *Markson v Courtney*, 161 AD2d 1085, 1086). "Given the brief overall delay, the promptness with which defendant moved to vacate the judgment[s], the lack of any intention on defendant's part to abandon the action, plaintiff's failure to demonstrate any prejudice attributable to the delay, and the preference for resolving disputes on the merits," we conclude that Supreme Court properly granted defendant's motion (*Mayville v Wal-Mart Stores*, 273 AD2d 944, 945).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

64

KA 05-01909

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARL L. ROGERS, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered July 1, 2005. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and criminal sexual act 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 rape in the first degree (Penal Law § 130.35 [3]) and criminal sexual act in the first degree (§ 130.50 [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Issues of credibility . . ., including the weight to be given the backgrounds of the People's witnesses and inconsistencies in their testimony, were properly considered by the jury and there is no basis for disturbing its determinations" (*People v Garrick*, 11 AD3d 395, 396, *lv denied* 4 NY3d 744, 745, 798, 799).

Defendant failed to preserve for our review his contentions that Supreme Court erred in admitting the testimony of prosecution witnesses concerning conduct of defendant unrelated to the instant crimes solely to establish his propensity to commit the instant crimes (*see People v Lasage*, 221 AD2d 1006, 1006-1007, *lv denied* 88 NY2d 849), and in admitting evidence concerning a charge that was dismissed during trial (*see People v Larkin*, 281 AD2d 915, 916, *lv denied* 96 NY2d 864). Defendant also failed to preserve for our review his contention that the court erred in failing to give the jury curative instructions with respect to that evidence (*see People v Singletary*, 302 AD2d 952, *lv denied* 100 NY2d 542). We decline to exercise our power to review those contentions as a matter of discretion in the

interest of justice (see CPL 470.15 [6] [a]).

We reject the contention of defendant that he was denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147). " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712, quoting *People v Rivera*, 71 NY2d 705, 709) and, here, defendant failed to meet that burden. "The alleged instances of ineffective assistance concerning defense counsel's failure to make various objections[, to move to preclude certain evidence or to seek curative instructions] 'are based largely on [defendant's] hindsight disagreements with . . . trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies' " (*People v Douglas*, 60 AD3d 1377, 1377, lv denied 12 NY3d 914).

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

65

KA 08-02484

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MATTHEW STRAW, 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 (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 19, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree and burglary 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 burglary in the third degree (Penal Law § 140.20) and criminal possession of stolen property in the fourth degree (§ 165.45 [5]). We reject the contention of defendant that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). "No particular litany is required for an effective waiver of the right to appeal" (*People v McDonald*, 270 AD2d 955, *lv denied* 95 NY2d 800; *see People v Callahan*, 80 NY2d 273, 283), and the responses of defendant to Supreme Court's questions during the plea colloquy establish that he understood the proceedings and voluntarily waived the right to appeal (*see People v Tantaio*, 41 AD3d 1274, *lv denied* 9 NY3d 882). The valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737), but it does not encompass defendant's challenge to the amount of restitution ordered inasmuch as that amount was not included in the terms of the plea agreement (*see People v Lovett*, 8 AD3d 1007, *lv denied* 3 NY3d 673, 677; *cf. People v Gordon*, 43 AD3d 1330, *lv denied* 9 NY3d 1006). Contrary to defendant's contention, however, the People met their burden of establishing the victim's out-of-pocket loss by a preponderance of the evidence (*see CPL 400.30 [4]; People v*

Tzitzikalakis, 8 NY3d 217, 221).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

67

KA 07-00836

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LA'SHAWN D. BROWN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), 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 May 2, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts) and reckless endangerment 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, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and according great deference to the jury's resolution of credibility issues, we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The record does not support defendant's contention that evidentiary rulings by County Court during the cross-examination by defendant of certain prosecution witnesses impaired his ability to present a defense (*see People v Martin*, 33 AD3d 1024, *lv denied* 8 NY3d 882; *see also People v Macuil*, 67 AD3d 1025). Contrary to defendant's further contention, the prosecutor did not improperly vouch for the credibility of a witness during his summation but, rather, his statements were fair comment on the credibility of that witness, in response to the defense counsel's summation (*see People v Lazzaro*, 62 AD3d 1035; *People v Williams*, 52 AD3d 851, *lv denied* 11 NY3d 836).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

70

KA 08-02119

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ERNESTO TORRES-REYES, 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 Erie County Court (Michael F. Pietruszka, J.), rendered July 17, 2008. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

71

TP 09-01447

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF ROMARIS GLANTON, PETITIONER,

V

ORDER

S. KHAHAIFA, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, S. SQUIRES, STEWARD, AND
M. ALBER, TEACHER, RESPONDENTS.

ROMARIS GLANTON, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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, Orleans County [James P. Punch, A.J.], entered July 15, 2009) to review a determination of respondent S. Khahaifa, Superintendent, Orleans Correctional Facility. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

72

KA 04-01394

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

QUINN-TARIUS WHITE, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 10, 2004. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated 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 murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]), defendant contends that his guilty plea was not knowingly, voluntarily and intelligently entered. "[A]lthough defendant failed to preserve that contention for our review, we conclude that his statements during the plea colloquy cast significant doubt upon his guilt with respect to [that crime], and thus this case falls within the exception to the preservation requirement" (*People v Jones*, 64 AD3d 1158, 1159, lv denied 13 NY3d 860, citing *People v Lopez*, 71 NY2d 662, 666). Defendant stated during the plea colloquy that he and a codefendant were armed, respectively, with a rifle and a shotgun, and that they searched for the victim and, upon locating him, shot him at close range. Defendant also stated that he fired at the victim. Based upon his description of the two-on-one shooting, "defendant is 'guilty of an intentional shooting or no other' " (*People v Gonzalez*, 302 AD2d 870, 871-872, *affd* 1 NY3d 464, quoting *People v Wall*, 29 NY2d 863, 864; see *People v Payne*, 3 NY3d 266, 270, *rearg denied* 3 NY3d 767). Thus, the factual allocution failed to establish that defendant acted recklessly or with depraved indifference (see *Gonzalez*, 1 NY3d at 467-468). We therefore reverse the judgment of conviction, vacate the plea and remit the

matter to County Court for further proceedings on the indictment.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

74

KA 06-03433

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN HUNTER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 18, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Contrary to the contention of defendant, he failed to establish that he had standing to challenge the search of the apartment in which he was arrested, and thus Supreme Court properly refused to suppress the evidence seized therefrom. We note at the outset that, "[b]ecause defendant has the burden to allege facts sufficient to warrant suppression, the People are not precluded from raising the issue of standing for the first time on appeal" (*People v Hooper*, 245 AD2d 1020, 1021; see *People v McCall*, 51 AD3d 822, lv denied 11 NY3d 856; *People v Jones*, 182 AD2d 1066). "Here, defendant offered no evidence at the suppression hearing, and there was nothing in the People's evidence to support defendant's alleged expectation of privacy in the [apartment] that was searched. The allegations in defense counsel's supporting affirmation concerning defendant's expectation of privacy in the [apartment] served only to raise standing as an issue of fact and avoid summary judgment under CPL 710.60 (3)" (*People v Washington*, 39 AD3d 1228, 1229, lv denied 9 NY3d 870 [internal quotation marks omitted]; cf. *People v Telfer*, 175 AD2d 638, lv denied 78 NY2d 1130; see generally *People v Trotter*, 224 AD2d 1013). The only evidence presented at the suppression hearing on the issue of defendant's standing was the testimony of a police officer, who testified that

defendant's mother told him that defendant did not live at the apartment and stayed there "very rarely." There was no evidence that defendant had a key to the apartment or that he kept any clothing or other belongings there. Consequently, upon our review of the factors relevant to a determination of standing (see *People v Jose*, 252 AD2d 401, 403, *affd* 94 NY2d 844), we conclude that defendant was, at most, a casual visitor who lacked standing to challenge the search of the apartment (see *People v Rodriguez*, 69 NY2d 159, 163; *cf. Telfer*, 175 AD2d 638). In light of our determination, we need not consider defendant's remaining contentions.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

75

KAH 09-01349

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RAY WILLIAMS, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY ANNUCCI, DEPUTY COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL),
FOR RESPONDENT-APPELLANT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Romano, J.), entered October 20, 2008. The judgment, insofar as appealed from, granted the petition pursuant to CPLR article 78 and directed the New York State Department of Correctional Services to recalculate petitioner's prison term.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that the sentences he was serving should run concurrently because the sentencing court did not order them to run consecutively. In 1993 petitioner was convicted of two counts of burglary in the second degree and was sentenced to concurrent terms of imprisonment of 3 to 6 years on each count. In 1999 he again was convicted of two counts of burglary in the second degree and was sentenced to concurrent terms of imprisonment of 4 to 8 years on each count. Pursuant to Penal Law § 70.25 (2-b), the Department of Correctional Services (DOCS) calculated the sentences imposed for the 1999 conviction to run consecutively to the sentences imposed for the 1993 conviction. Supreme Court agreed with petitioner that the sentences he received for the 1999 conviction must run concurrently with the sentences he received for the 1993 conviction. Because petitioner was not entitled to immediate release, however, the court converted the proceeding to one pursuant to CPLR article 78 and directed DOCS to recalculate petitioner's prison term. Respondent appeals, contending that DOCS properly calculated the sentences imposed for petitioner's 1999 and 1993 convictions to run consecutively pursuant to Penal Law § 70.25 (2-b). We agree, and we therefore reverse the judgment insofar as appealed from and dismiss

the petition.

Section 70.25 (2-b) provides that, "[w]hen a person is convicted of a violent felony offense committed after arraignment and while released on recognizance or bail, but committed prior to the imposition of sentence on a pending felony charge, and if an indeterminate . . . sentence of imprisonment is imposed in each case, such sentences shall run consecutively." The statute further provides that a sentencing court may, in the interest of justice, order the sentences to run concurrently under certain circumstances, but it must "make a statement on the record of the facts and circumstances upon which such determination is based" (*id.*). It is undisputed that the sentencing court for the 1999 conviction did not address the issue whether the sentences imposed for that conviction were to run consecutively to or concurrently with the sentences imposed for the 1993 conviction.

In determining that the judgment insofar as appealed from must be reversed, we note the statement of the Court of Appeals that, "[i]n enacting the consecutive sentencing *mandate* of Penal Law § 70.25 (2-b), the Legislature plainly sought to combat violent criminal activity by requiring longer and stricter sentences for additional violent felonies committed while a felon was allowed to be free on recognizance or bail" (*People v Garcia*, 84 NY2d 336, 341 [emphasis added]). The Court of Appeals has thereafter stated that, "when a court is required by statute to impose a sentence that is consecutive to another, and the court does not say whether its sentence is consecutive or concurrent, it is deemed to have imposed the consecutive sentence the law requires" (*People ex rel. Gill v Greene*, 12 NY3d 1, 4, *cert denied* ___ US ___, 130 S Ct 86).

The court here concluded that Penal Law § 70.25 (2-b) could not apply because that subdivision "was not exempted out of the requirements of section 70.25 (1)." Section 70.25 (1) provides that, as a general rule, sentences "shall run either concurrently or consecutively with respect to each other and the undischarged term or terms in such manner as the court directs at the time of sentence." If the court fails to specify the manner in which the sentence is to run, the default rule is that the sentence will run concurrently with all other terms (§ 70.25 [1] [a]). As the court correctly noted, subdivision (2-b) is not included in the opening clause of section 70.25 (1), which sets forth the exceptions to the applicability of section 70.25 (1). We conclude, however, that the omission of subdivision (2-b) in that opening clause was simply a legislative oversight. Although the Legislature amended the opening clause to include subdivision (2-a) when that subdivision was added in 1978 (see L 1978, ch 481, §§ 22-23) and to include subdivision (5) when that subdivision was added in 1981 (see L 1981, ch 372, §§ 1-2), it neglected to do so when it added subdivision (2-b) in 1982 (see L 1982, ch 559, § 1), and when it added subdivisions (2-c) through (2-g) in later years. It is apparent, however, that the legislative intent was to require consecutive sentences under subdivision (2-b) where the court failed to make an explicit determination with respect thereto

(see generally McKinney's Cons Laws of NY, Book 1, Statutes § 92; *People v Santi*, 3 NY3d 234, 243). The default rule pursuant to subdivision (1) (a) that sentences run concurrently where the court does not specify otherwise does not apply in this case because subdivision (2-b) mandates consecutive sentences, absent mitigating circumstances that the court did not find here (see generally *Gill*, 12 NY3d at 6).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

76

CA 09-01564

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

CHARLENE M. MURPHY, PLAINTIFF-RESPONDENT,

V

ORDER

THOMAS R. MURPHY, DEFENDANT-APPELLANT.

RIEHLMAN SHAFER & SHAFER, TULLY (ROBERT M. SHAFER OF COUNSEL), FOR
DEFENDANT-APPELLANT.

ALDERMAN AND ALDERMAN, SYRACUSE (EDWARD B. ALDERMAN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), dated March 4, 2009 in a divorce action. The order, among other things, denied defendant's cross motion seeking to terminate the spousal maintenance provisions contained in the judgment of divorce.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

77

CA 09-00961

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

CAROLE A. NORTHWAY, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

C. GREG NORTHWAY, SR., DEFENDANT-APPELLANT.

CAROL A. CONDON, BUFFALO, FOR DEFENDANT-APPELLANT.

SHARON ANSCOMBE OSGOOD, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 8, 2008 in a divorce action. The judgment, insofar as appealed from, directed defendant to pay plaintiff maintenance.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by providing that maintenance shall commence from the date of the judgment and as modified the judgment is affirmed without costs.

Memorandum: Defendant husband appeals from a judgment of divorce entered upon a referee's report. Contrary to defendant's contention, we conclude that Supreme Court adequately "set forth the factors it considered and the reasons for its decision" in awarding maintenance to plaintiff wife (Domestic Relations Law § 236 [B] [6] [b]; see *Fraley v Fraley*, 235 AD2d 997; see generally *Butler v Butler*, 256 AD2d 1041, 1042, lv denied 93 NY2d 805). The record establishes that the court properly evaluated plaintiff's reasonable needs and defendant's ability to provide for those needs in determining the amount of maintenance (see generally *Boughton v Boughton*, 239 AD2d 935) and that, in evaluating the ability of defendant to pay that amount, the court properly considered the increase in his income subsequent to the commencement of the action (see *Haines v Haines*, 44 AD3d 901, 902). With respect to the duration of maintenance, the court properly exercised its discretion in awarding maintenance until the earlier of the death of a party, plaintiff's remarriage or 2013, the year in which plaintiff becomes eligible for full Social Security benefits (see *Penna v Penna*, 29 AD3d 970, 971-972; *Taylor v Taylor*, 300 AD2d 298, 299). We agree with defendant, however, that the court abused its discretion in ordering that the award of maintenance was retroactive to the date of the commencement of the action. Plaintiff never requested pendente relief, and defendant adequately provided for her needs during the pendency of the action pursuant to an agreement between the parties. "Under these circumstances, it does not appear

that the parties contemplated a retroactive award of maintenance" (*Grumet v Grumet*, 37 AD3d 534, 536, lv denied 9 NY3d 818; see *Lobotsky v Lobotsky*, 122 AD2d 253, 255). We therefore modify the judgment accordingly.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

78

CA 09-01407

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF RANDY CLOE, TAMMY CLOE,
JONATHAN EYLES, JANELLE EYLES, KACI JOELS,
STEPHEN JOELS, VONNICE JOELS, JAMES
LAWRENCE, SR., JAMES LAWRENCE, JR., KENNETH
LAWRENCE, SR., KENNETH LAWRENCE, JR.,
WILLIAM MAIN, EDWARD MEREAND, DALE PETRIE,
DAVID PIETROSKI, FRANK ROACH, NICHOLAS
SURDO, JR., NICHOLAS SURDO, SR., BRIAN
WASHBURN AND THOMAS WHITMORE, COLLECTIVELY,
REPRESENTING AT LEAST TEN PERCENT OF THE
MEMBERSHIP OF THE SACKETS HARBOR FIRE
COMPANY, INC., PETITIONERS-APPELLANTS,
ET AL., PETITIONERS,

V

MEMORANDUM AND ORDER

THE ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
A PARTY REQUIRED TO BE NAMED PURSUANT TO
NOT-FOR-PROFIT CORPORATION LAW § 1102(b),
RESPONDENT-RESPONDENT.

SCICCHITANO & PINSKY, PLLC, SYRACUSE (DAVID B. GARWOOD OF COUNSEL),
FOR PETITIONERS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court,
Jefferson County (Hugh A. Gilbert, J.), entered August 28, 2008. The
judgment denied and dismissed the petition for judicial dissolution of
Sackets Harbor Fire Company, Inc.

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

Memorandum: Petitioners commenced this proceeding seeking
judicial dissolution of the Sackets Harbor Fire Company, Inc. (SHFC).
In opposing the petition, respondent contended, inter alia, that the
proceeding was defective because petitioners failed to name the
Village of Sackets Harbor (Village) as a necessary party. The Board
of Trustees of the Village (Board) thereafter moved to intervene
pursuant to CPLR 401.

Supreme Court "denied and dismissed" the petition on the merits

without a hearing (see generally CPLR 409 [b]; *Matter of Korotun v Laurel Place Homeowner's Assn.*, 6 AD3d 710, 711-712), and without determining whether the Village was a necessary party or deciding the Board's motion to intervene. We agree with respondent that the judgment must be affirmed, but our reasoning differs from that of the court. As respondent correctly contends as an alternative ground for affirmance (see generally *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), the court properly dismissed the petition based on petitioners' failure to name the Village as a necessary party. We conclude that respondent preserved its contention for our review inasmuch as it was raised by respondent in its opposing papers.

The SHFC is a fire corporation that was established by resolution of the Board in 1950, as required by N-PCL 404 (f) (see N-PCL 1402). Petitioners' attempt to distinguish the SHFC from the Village Fire Department is of no avail (see 1994 Ops St Comp No. 94-18), although we note that such distinctions may be important under different circumstances (see 1990 Ops St Comp No. 90-19). Despite the fact that the SHFC was separately incorporated under N-PCL 1402, the Village nevertheless retained control over the SHFC as it would over a fire department or fire company (see N-PCL 1402 [e] [1]; Village Law §§ 10-1000, 10-1008; 1990 Ops St Comp No. 90-19; 1989 Ops St Comp No. 89-15; 1979 Ops St Comp No. 79-568). Thus, the Village was a necessary party to the proceeding and the petition was properly dismissed on that ground alone.

Based on our determination, we see no need to address petitioners' remaining contentions.

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

80

CA 09-01338

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

LUKE MICHAEL, CLAIMANT-RESPONDENT,

V

ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 111667.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (PATRICK B. SARDINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (THOMAS C. CAMBIER OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered March 27, 2009 in a personal injury action. The order, insofar as appealed from, denied in part defendant's motion for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on December 8, 2009,

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

81

CA 09-01733

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

ERNESTINE WALKER AND RONNIE LEE WALKER,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NEIL H. GOLD AND SUSAN MATTICK-GOLD,
DEFENDANTS-APPELLANTS.

WILLIAMSON, CLUNE & STEVENS, ITHACA (ALLAN C. VANDEMARK OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered June 24, 2009 in a personal injury action. The order denied defendants' motion for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the amended complaint is dismissed.

Memorandum: Defendants appeal from an order denying their motion for summary judgment dismissing the amended complaint. Plaintiffs commenced this action seeking damages for injuries sustained by Ernestine Walker (plaintiff) when she was attacked by three dogs owned by defendants' tenants. When plaintiff was attacked, she was on the sidewalk across the street from defendants' property. Inasmuch as "the incident did not occur on defendant[s'] property and therefore defendant[s] owed no duty of care to [plaintiff], . . . Supreme Court erred in denying defendant[s'] motion" (*Ruffin v Dykes*, 37 AD3d 1191; see *Seiger v Dercole*, 50 AD3d 1524; *Weipert v Oldfield*, 298 AD2d 974). We therefore reverse the order, grant the motion and dismiss the amended complaint.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

84

KA 08-01560

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONAS DELPRINCE, DEFENDANT-APPELLANT.

MICHAEL B. JONES, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SUSAN H. SADINSKY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 2, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [9]) and endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, Supreme Court properly allowed the five-year-old victim to give unsworn testimony (*see People v Paul*, 48 AD3d 833, *lv denied* 10 NY3d 868; *People v Miller*, 295 AD2d 746, 747-748). Although the victim did not understand the nature of an oath and thus could not give sworn testimony, he possessed "sufficient intelligence and capacity" to give unsworn evidence (CPL 60.20 [2]; *see People v Raymond*, 60 AD3d 1388, *lv denied* 12 NY3d 919). Defendant failed to preserve for our review his further contention that the victim's unsworn testimony was not sufficiently corroborated (*see Raymond*, 60 AD3d 1388; *People v McLoud*, 291 AD2d 867, *lv denied* 98 NY2d 678) and, in any event, that contention is without merit (*see Raymond*, 60 AD3d 1388; *Paul*, 48 AD3d 833; *see generally* CPL 60.20 [3]; *People v Groff*, 71 NY2d 101, 103-104, 109-110). Defendant also failed to preserve for our review his contention that the evidence is legally insufficient to establish that the victim sustained a physical injury (*see People v Hawkes*, 39 AD3d 1209, 1210, *lv denied* 9 NY3d 844, 845; *People v Sommerville*, 30 AD3d 1093, 1095). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly

harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

85

KA 05-01424

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWNDELL J. DUVALL, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered June 3, 2005. The judgment convicted defendant, upon a jury verdict, 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: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). Contrary to the contention of defendant, Supreme Court properly admitted in evidence an application for cellular telephone service found in the pocket of a coat that was recovered from the scene of his arrest. The People did not offer the application as evidence that defendant was applying for such service or for the truth of the particular statements contained therein. Rather, the application was offered as circumstantial evidence of defendant's ownership or possession of the coat and thus was not hearsay (*see generally People v Voymas*, 39 AD3d 1182, 1184, *lv denied* 9 NY3d 852; *People v Howard*, 261 AD2d 841, *lv denied* 93 NY2d 1020). 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 defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). It cannot be said that the jury failed to give the evidence the weight it should be accorded (*see id.*).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

86

KA 08-01466

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN BOLDEN, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR
DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered June 9, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fifth degree and reckless driving.

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

Memorandum: Defendant was convicted following a jury trial of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [2]) and reckless driving (Vehicle and Traffic Law § 1212). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we reject the contention of defendant that the evidence is legally insufficient to establish that he knew that the pills he admittedly possessed contained a narcotic preparation (*see People v Davis*, 244 AD2d 1003). "Generally, possession suffices to permit the inference that [defendant knew] what he possess[e]d, especially, but not exclusively, if it . . . [was] on his person" (*People v Reisman*, 29 NY2d 278, 285, *cert denied* 405 US 1041; *see People v Walzer*, 227 AD2d 945, *lv denied* 88 NY2d 1072). Here, the pills were in a bottle located in the front pocket of the pants worn by defendant when he was arrested. Defendant's knowledge that the pills contained a narcotic preparation may also be inferred from defendant's flight from the police and the fact that the label on the bottle had someone else's name and address on it. Although an inference of knowledge may be negated and "the burden of going forward and [negating] the inference is a slight one" (*People v Kirkpatrick*, 32 NY2d 17, 23-24, *appeal dismissed* 414 US 948), defendant failed to negate the inference in this case (*cf. Walzer*, 227 AD2d at 946).

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 further conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Although the forensic chemist employed by the police tested only 4 of the 31 pills possessed by defendant, the chemist testified that she selected the 4 pills at random and found that all contained a narcotic preparation. Under the circumstances, " 'it was for the jury to decide whether the expert had adequately analyzed and weighed the contents and whether [her] opinion was entitled to be credited' " (*People v Hill*, 85 NY2d 256, 261, quoting *People v Argro*, 37 NY2d 929, 930).

Finally, we conclude that County Court properly refused to charge criminal possession of a controlled substance in the seventh degree as a lesser included offense of criminal possession of a controlled substance in the fifth degree. During the charge conference, defense counsel asserted that the lesser included offense should be charged because the jury might find that the chemist did not weigh all 31 pills, in which case the aggregate weight could be less than the amount required for a conviction of criminal possession of a controlled substance in the fifth degree. Based on our review of the record, including the chemist's testimony and the other evidence with respect to weight, we conclude that there is no reasonable view of the evidence that the chemist failed to weigh all of the pills possessed by defendant and thus that defendant committed the lesser offense and not the greater (see *People v Evans*, 37 AD3d 847, lv denied 9 NY3d 843; *People v Palmer*, 216 AD2d 883, lv denied 86 NY2d 799; see generally *People v Glover*, 57 NY2d 61, 63).

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

87

KA 09-00170

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JERMAINE L. MORRIS, DEFENDANT-APPELLANT.

CYNTHIA B. 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 6, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree and criminal impersonation in the second degree.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

89

KA 08-02122

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN MCPHERSON, DEFENDANT-APPELLANT.

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

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, J.), rendered August 6, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and grand larceny in the fourth degree (§ 155.30 [1]). Contrary to defendant's contention, County Court properly admitted in evidence an audiotape of a conversation between defendant and a prosecution witness. The People laid a proper foundation for the admission in evidence of the audiotape through the testimony of that witness (*see People v Morrice*, 61 AD3d 1390, 1390-1391; *see generally People v Ely*, 68 NY2d 520, 527). Contrary to defendant's further contention, the court properly determined as a matter of law that the same prosecution witness was not an accomplice and thus properly refused to submit to the jury the issue whether that witness was an accomplice. "An 'accomplice' means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in: (a) [t]he offense charged; or (b) [a]n offense based upon the same or some of the same facts or conduct which constitute the offense charged" (CPL 60.22 [2]; *see People v Berger*, 52 NY2d 214, 219). "If the undisputed evidence establishes that a witness is an accomplice, the jury must be so instructed but, if different inferences may reasonably be drawn from the proof regarding complicity, according to the statutory definition, the question should be left to the jury for its determination" (*People v Basch*, 36 NY2d 154, 157; *see People v Adams*, 307 AD2d 475, 475-476, lv denied 1 NY3d 566).

Here, the court properly concluded that the witness in question may not reasonably be considered to have participated in the offenses charged or offenses based upon the same or some of the same facts or conduct that constitute the offenses charged (see CPL 60.22 [2]). She thus "was not an accomplice as a matter of law and there was an insufficient basis upon which to submit her accomplice status to the jury" (*People v Freeman*, 305 AD2d 331, 331, *lv denied* 100 NY2d 594; see *People v Jones*, 73 NY2d 902, 903, *rearg denied* 74 NY2d 651; *People v Brazeau*, 162 AD2d 979, *lv denied* 76 NY2d 891). Because the witness was not an accomplice, the People were not required to corroborate her testimony (see generally CPL 60.22 [1]). We therefore conclude that defendant's contention that the evidence is legally insufficient to support the conviction because the testimony of that witness was not corroborated is without merit (see generally *People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). We have considered defendant's remaining contention and conclude that it is without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

90

KA 09-00164

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NICOLE J. RADUNS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 10, 2008. The judgment convicted defendant, upon her plea of guilty, of burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the order of protection in favor of C.S. and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of burglary in the third degree (Penal Law § 140.20). Contrary to the contention of defendant, her valid waiver of the right to appeal encompasses her challenge to the severity of the sentence inasmuch as County Court advised defendant of the maximum sentence it could impose before she waived her right to appeal (see *People v Lococo*, 92 NY2d 825). As defendant correctly contends, however, the court had no authority to issue an order of protection in favor of an individual who was neither a victim of the crime nor a witness to the crime to which defendant pleaded guilty (see CPL 530.13 [4] [a]). Although defendant failed to preserve that contention for our review by failing to object to the order of protection on that ground when it was issued (see *People v Shampine*, 31 AD3d 1163, 1164), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). The order of protection issued in favor of that individual thus is invalid (see *People v Creighton*, 298 AD2d 774, 776). We therefore modify the judgment by vacating that order of protection.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

91

KA 08-00397

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE A. FELIZ, DEFENDANT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, 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 May 15, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of robbery in the first degree (Penal Law § 160.15 [4]). The challenge by defendant to the factual sufficiency of the plea allocution does not survive his waiver of the right to appeal (*see People v Capocetta*, 67 AD3d 1395), the validity of which is not challenged by defendant. Additionally, by failing to move to withdraw his plea or to vacate the judgment of conviction, defendant failed to preserve that challenge for our review (*see People v Lopez*, 71 NY2d 662, 665; *People v Crandall*, 66 AD3d 1455). The waiver of the right to appeal also encompasses the challenge by defendant to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256).

Defendant further contends that County Court did not conduct a sufficient inquiry during the plea colloquy to determine whether he was under the influence of any drugs or medications. Although that contention concerns the voluntariness of the plea and thus survives defendant's valid waiver of the right to appeal, as noted defendant failed to move to withdraw the plea or to vacate the judgment of conviction and therefore failed to preserve his contention for our review (*see People v Zuliani*, 68 AD3d 1731). In any event, defendant's contention lacks merit, inasmuch as the record establishes that the court in fact conducted a sufficient inquiry by asking defendant, "Do you have any problems today, either physically or mentally, that in any way interfere with your understanding of what we're doing here" (*see Lopez*, 71 NY2d at 666; *People v Wilson*, 59 AD3d 975, *lv denied* 12 NY3d 861). Defendant did not indicate in response

thereto that he was unable to understand his rights or the terms of the plea agreement (see *People v Davis*, 37 AD3d 1179, lv denied 8 NY3d 983).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

92

KA 09-01845

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

H. WAYNE MORGAN, DEFENDANT-APPELLANT.

FERN S. ADELSTEIN, OLEAN, FOR DEFENDANT-APPELLANT.

Appeal from an order of the Allegany County Court (Thomas P. Brown, J.), entered April 7, 2009. The order denied the renewed application of defendant to remove a condition of his sentence of probation.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from an order denying his "renewed application" for permission to apply to the New York State Department of Motor Vehicles for reinstatement of his driving privileges. The restriction was imposed as a condition of his sentence of probation. Defendant may not take an appeal from the order either as of right (see CPL 450.10), or by permission (see CPL 450.15; see also *Matter of Pirro v Angiolillo*, 89 NY2d 351; *People v Cohen*, 222 AD2d 447, lv denied 88 NY2d 934). The appeal, therefore, must be dismissed (see e.g. *People v Ouni*, 67 AD3d 1029; *People v Santiago*, 63 AD3d 1656).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

93

KA 05-01323

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMAL D. MASON, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered April 29, 2005. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (four counts), criminal possession of a weapon in the third degree (10 counts), reckless endangerment in the first degree and unlawful wearing of a body vest.

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, four counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]). In previously affirming the judgments of conviction of four of the codefendants, we rejected their contentions that County Court erred in determining that the police had probable cause to search the van in which defendant and those codefendants were passengers (see *People v Young*, 57 AD3d 1431, lv denied 12 NY3d 789; *People v Majors*, 55 AD3d 1288, lv denied 11 NY3d 898; *People v Hunt*, 52 AD3d 1312, lv denied 11 NY3d 737; *People v Jackson*, 52 AD3d 1318, lv denied 11 NY3d 737). We likewise reject that same contention of defendant raised herein. We also rejected the contention of three of the codefendants that the police had probable cause to stop the van (see *Young*, 57 AD3d 1431; *Majors*, 55 AD3d 1288; *Hunt*, 52 AD3d 1312), and we similarly reject that contention of defendant raised herein. Contrary to defendant's further contention, the sentence is not unduly harsh or severe. We agree with defendant, however, that the certificate of conviction incorrectly reflects that defendant was sentenced as a second felony offender, and it must therefore be amended to reflect that he was sentenced as a violent felony offender

(see *People v Wynn*, 55 AD3d 1378, 1379, *lv denied* 11 NY3d 901).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

94

KAH 08-02009

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ANDREW MCDANIELS, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL CORCORAN, SUPERINTENDENT, CAYUGA
CORRECTIONAL FACILITY, BRIAN FISCHER,
COMMISSIONER, NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, JOSEPH FAZZARY,
SCHUYLER COUNTY DISTRICT ATTORNEY, AND
GEORGE B. ALEXANDER, CHAIRMAN, NEW YORK
STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

SHEILA E. SHEA, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, THIRD JUDICIAL
DEPARTMENT, ALBANY (SHANNON STOCKWELL OF COUNSEL), FOR
PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL),
FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court,
Cayuga County (Thomas G. Leone, A.J.), entered July 29, 2008 in a
habeas corpus proceeding. The judgment, inter alia, denied in part
the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ
of habeas corpus, alleging that he was being improperly detained on a
violation of postrelease supervision that, according to petitioner,
was erroneously imposed by the Department of Correctional Services
(DOCS). Petitioner further alleged that County Court had improperly
resentenced him to a period of postrelease supervision. Supreme Court
granted the petition to the extent of vacating the violation warrant,
but the court determined that petitioner had been validly resentenced
by County Court. The court directed that petitioner be released from
custody to postrelease supervision unless he was being held on an
order issued pursuant to Mental Hygiene Law article 10. In fact, an
order was in effect authorizing DOCS to retain custody of petitioner
pending a probable cause hearing in a civil commitment proceeding
pursuant to Mental Hygiene Law article 10, and petitioner did not move

to vacate that order. Habeas corpus relief was thus not available to petitioner. Even in the event that Supreme Court erred in determining that petitioner was properly resentenced to a period of postrelease supervision, he would not be entitled to the relief sought, i.e., immediate release from custody, in view of the order pursuant to Mental Hygiene Law article 10 (see *People ex rel. Hinton v Graham*, 66 AD3d 1402, *lv denied* ___ NY3d ___ [Jan. 19, 2010]; *People ex rel. Gloss v Costello*, 309 AD2d 1160, *lv denied* 1 NY3d 504). We therefore reverse the judgment and dismiss the petition.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

95

CAF 09-00005

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF NORMA WARRIOR,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ROBERT BEATMAN, SR., RESPONDENT-RESPONDENT.

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

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

STEVEN J. LORD, LAW GUARDIAN, ARCADE, FOR ROBERT B., JR.

Appeal from an order of the Family Court, Cattaraugus County (Paul B. Kelly, J.H.O.), entered November 19, 2008 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of the Law Guardian and dismissed the petition.

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

Memorandum: We reject the contention of petitioner mother that Family Court erred in granting the Law Guardian's motion to dismiss the petition seeking modification of an existing custody order without conducting a hearing. "A hearing is not automatically required whenever a parent seeks modification of a custody order" (*Matter of Wurmlinger v Freer*, 256 AD2d 1069) and, here, the mother failed to "make a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [internal quotation marks omitted]; see *Matter of Krest v Kawczynski*, 9 AD3d 907).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

97

CA 09-01896

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

PELUSIO FAMILY PARTNERSHIP, L.P.,
PLAINTIFF-RESPONDENT,

V

ORDER

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (PAUL F. KENEALLY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT S. ATTARDO OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered June 1, 2009 in a declaratory judgment action. The order denied defendant's motion for summary judgment.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

99

CA 09-00126

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

JAMES GALLAHER, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

REPUBLIC FRANKLIN INSURANCE COMPANY, AN
AFFILIATE OF UTICA MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

BROWN & KELLY, LLP, BUFFALO (JOSEPH M. SCHNITTER OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

FARACI LANGE, LLP, ROCHESTER (MATTHEW F. BELANGER OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered December 12, 2008. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and judgment is granted in favor of defendant as follows:

It is ADJUDGED and DECLARED that defendant is not obligated to provide supplementary uninsured motorist coverage to plaintiff.

Memorandum: Plaintiff, a volunteer firefighter, commenced this action seeking a declaration that defendant is obligated to provide him with supplementary uninsured motorist (SUM) coverage under a policy issued by defendant to the volunteer fire company. In relevant part, the SUM endorsement defined an insured as "[y]ou, as the named insured" and "[a]ny other person while occupying . . . [a] motor vehicle insured for SUM under this policy." The SUM endorsement also defined "occupying" as "in, upon, entering into, or exiting from a motor vehicle." Supreme Court denied defendant's motion for summary judgment. The court agreed with defendant that plaintiff was not a named insured under the policy, but nevertheless determined that there was an issue of fact whether plaintiff was covered under the policy as a person occupying the truck. Defendant now appeals, and plaintiff cross-appeals.

Addressing first plaintiff's cross appeal, we conclude that the court properly determined that plaintiff is not a named insured under the policy. The named insured was the fire company, and thus "[y]ou"

in the SUM endorsement referred only to the fire company and did not, as plaintiff contends, also refer to an employee of the company (see *Buckner v Motor Veh. Acc. Indem. Corp.*, 66 NY2d 211, 214; *Matter of Coregis Ins. Co. v Miceli*, 295 AD2d 511). Addressing next defendant's appeal, we agree with defendant that the court erred in determining that there is an issue of fact whether plaintiff was covered under the policy as a person occupying the truck. At the time of the accident, plaintiff had exited the fire company's truck and was directing traffic away from the scene of a motor vehicle accident. Plaintiff's conduct in directing traffic was "unrelated to the [truck]" and was not incidental to his exiting it (*Matter of Travelers Ins. Co. [Youdas]*, 13 AD3d 1044, 1045). Thus, under the facts of this case, plaintiff was not "occupying" the truck within the meaning of that term in the policy (see *Matter of Martinez*, 295 AD2d 277, 278; *Coregis Ins. Co.*, 295 AD2d at 511).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

100

CA 09-01546

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

DOROTHY L. SEXTON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

WILDA KIMBALL RESINGER, DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR
DEFENDANT-APPELLANT.

GOODELL & RANKIN, JAMESTOWN (R. THOMAS RANKIN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered April 29, 2009 in a personal injury action. The order denied defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on snow and ice in a parking area located in front of a post office. Defendant owned the property on which the post office and the parking area were located, and she had leased the property to the United States Postal Service (USPS) and its predecessor since 1971. We conclude that Supreme Court erred in denying the motion of defendant seeking summary judgment dismissing the complaint. Defendant met her initial burden by establishing that she was an out-of-possession landlord who had relinquished control of the premises to USPS (*see Lomedico v Cassillo*, 56 AD3d 1271, 1272). In support of the motion, defendant submitted evidence establishing that USPS created the parking area where plaintiff fell and had erected a sign restricting the parking area to post office patrons, without the knowledge or input of defendant. In doing so, USPS acted pursuant to a provision in the lease agreement that permitted it to make alterations and erect additions on the property and that further provided that such improvements "shall be and remain the property of [USPS]." There is no provision in the lease agreement that obligates defendant to maintain or repair the parking area (*see Sanchez v Barnes & Noble, Inc.*, 59 AD3d 698, 699; *Yadegar v International Food Mkt.*, 37 AD3d 595), nor is there any evidence that she assumed such a responsibility by her conduct (*see Gelardo v ASTHMA Realty Corp.*, 137 AD2d 787, 788).

Plaintiff failed to raise a triable issue of fact to defeat the motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). While we agree with plaintiff that the description of the leased property as including a "Parking and Maneuvering" area of 1,805 square feet is ambiguous, we nevertheless conclude that the terms of the lease as a whole unambiguously grant USPS possession and control of the building and all appurtenances comprising the post office, including the parking area at issue (see *Benderson v Wiper Check*, 266 AD2d 903, 904, lv denied 95 NY2d 819; *Reltron Corp. v Voxakis Enters.*, 57 AD2d 134, 139). Even assuming, arguendo, that the lease is ambiguous, we would nonetheless conclude that defendant is entitled to summary judgment because "all of the extrinsic evidence contained in the record weighs in favor of [defendant]'s interpretation of the lease" (*T.L.C. W., LLC v Fashion Outlets of Niagara, LLC*, 60 AD3d 1422, 1424). Although plaintiff contends that USPS "could reasonably disagree" with defendant's interpretation of the lease, plaintiff failed to submit any affidavits or other evidentiary proof in admissible form to support that contention, and plaintiff's " 'mere hope' " that such evidence exists is insufficient to raise a triable issue of fact (*J.K. Tobin Constr. Co., Inc. v David J. Hardy Constr. Co., Inc.*, 64 AD3d 1206, 1208).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

104

CA 09-01098

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

JASON L. SCHMIDT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GREGORY V. LORENZO AND LORENZO
INTERNATIONAL, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

JASON L. SCHMIDT, PLAINTIFF-APPELLANT PRO SE.

DAMON MOREY LLP, BUFFALO (GREGORY ZINI OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered September 18, 2008. The order denied plaintiff's motion for summary judgment on the cause of action for conversion and granted the cross motion of defendants for summary judgment dismissing that cause of action.

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

Memorandum: Plaintiff attorney commenced this action seeking damages arising from, inter alia, his alleged investment in a corporation. In appeal No. 1, plaintiff appeals from an order that denied his motion seeking summary judgment on his cause of action for conversion and granted defendants' cross motion for summary judgment dismissing that cause of action. We conclude that Supreme Court properly granted defendants' cross motion inasmuch as it is well established that a cause of action "to recover damages for conversion cannot be predicated on a mere breach of contract" (*Wolf v National Council of Young Israel*, 264 AD2d 416, 417; see *D'Ambrosio v Engel*, 292 AD2d 564, lv denied 99 NY2d 503; *Welch Foods v Wilson*, 277 AD2d 882, 885). Here, the parties agree that there was an oral agreement pursuant to which plaintiff would pay to defendant Gregory V. Lorenzo the sum of \$50,000, the only amount disputed on appeal, in exchange for shares of corporate stock. That agreement governs the parties' transaction and thus precludes recovery based on a cause of action for conversion (see *Welch Foods*, 277 AD2d at 885).

In appeal No. 3, plaintiff appeals from an order insofar as it denied his motion for summary judgment on the cause of action for unjust enrichment. Recovery on that cause of action, insofar as it is based on the same facts as those alleged in the cause of action for

conversion, is similarly precluded by the existence of the oral agreement (see *Morales v Grand Cru Assoc.*, 305 AD2d 647, lv denied 100 NY2d 510; *Welch Foods*, 277 AD2d at 885; see generally *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389). We note that, although the complaint alleges that defendants were additionally unjustly enriched by virtue of services rendered by plaintiff for which no compensation was received, plaintiff has abandoned any contention with respect to those services on appeal (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

105

CA 09-01099

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

JASON L. SCHMIDT, PLAINTIFF-APPELLANT,

V

ORDER

GREGORY V. LORENZO AND LORENZO
INTERNATIONAL, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

JASON L. SCHMIDT, PLAINTIFF-APPELLANT PRO SE.

DAMON MOREY LLP, BUFFALO (GREGORY ZINI OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from a decision (denominated decision and order) of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered May 4, 2009. The decision directed defendants to submit an order with respect to the denial of the motion of plaintiff for summary judgment on the cause of action for unjust enrichment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see *Pecora v Lawrence*, 28 AD3d 1136, 1137).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

106

CA 09-01100

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

JASON L. SCHMIDT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GREGORY V. LORENZO AND LORENZO
INTERNATIONAL, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

JASON L. SCHMIDT, PLAINTIFF-APPELLANT PRO SE.

DAMON MOREY LLP, BUFFALO (GREGORY ZINI OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered May 4, 2009. The order, insofar as appealed from, denied the motion of plaintiff for summary judgment on the cause of action for unjust enrichment.

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

Same Memorandum as in *Schmidt v Lorenzo* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

108

KA 08-02599

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

THOMAS DULAK, 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 (John L. Michalski, A.J.), rendered April 29, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (three counts).

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

109

KA 08-01976

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

RONDELLE K. MOORE, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (MICHAEL D. MCCARTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, J.), rendered April 14, 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.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

110

KA 07-00258

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JORGE L. COSME, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 25, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree (three counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and three counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]), defendant contends that County Court erred in refusing to suppress evidence seized as the result of the allegedly illegal stop of his vehicle. We reject that contention. "The officer[']s] observation that defendant was not wearing a seatbelt was a sufficient reason to stop the vehicle" driven by defendant (*People v Taylor*, 57 AD3d 1504, 1505, lv denied 12 NY3d 788). Once the vehicle was stopped, the officer detected the odor of marihuana and thus had probable cause to search the vehicle (see *People v Cirigliano*, 15 AD3d 672, lv denied 5 NY3d 760, 827).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

111

KA 08-02207

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES PACE, DEFENDANT-APPELLANT.

DENNIS CLAUS, LIVERPOOL, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered January 29, 2008. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree, attempted rape in the first degree and sexual abuse 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 following a jury trial of three felony offenses, including criminal sexual act in the first degree (Penal Law § 130.50 [1]). Defendant had been charged in Town Court with misdemeanor and felony offenses arising from a sexual assault he allegedly committed in the Town of West Winfield, Herkimer County. At arraignment defendant, acting pro se, pleaded guilty to the misdemeanors, and the remaining felony charges were referred to the grand jury. An indictment thereafter was issued, charging defendant with three felonies as well as the three misdemeanors to which he had already pleaded guilty. Defendant pleaded not guilty to the indictment, and the case proceeded to trial.

On the first day of jury selection in County Court, the prosecutor informed the court that he had learned only recently that defendant had pleaded guilty to the three misdemeanors, whereupon defendant moved to dismiss those counts of the indictment. The court granted defendant's motion, and defendant then moved to preclude the People from presenting at trial any evidence relating to the guilty plea. The court granted that motion only in part, ruling that, although the People could not present evidence of the plea on their direct case, they could use the plea for impeachment and rebuttal purposes should defendant testify and deny that he committed the underlying acts of the misdemeanors. Defendant contends that the court should have granted his motion in its entirety and that reversal

is required based on the court's failure to do so. We reject that contention.

"It is well settled that where a defendant's plea is withdrawn, it is out of the case for all purposes and the People may not use the plea or contents of the plea allocution on either their direct case or for purposes of impeachment" (*People v Alt*, 50 AD3d 1164, 1165; see *People v Curdgel*, 83 NY2d 862, 864). Here, defendant never moved to withdraw his guilty plea, and thus "the plea and the resulting conviction . . . are presumptively voluntary, valid and not otherwise subject to collateral attack" and may be used by the People as direct evidence of guilt (*People v Latham*, 90 NY2d 795, 799). We therefore conclude that the court's ruling on defendant's motion was proper.

There is no merit to the further contention of defendant that he was deprived of effective assistance of counsel based on defense counsel's failure to move to withdraw the plea or to request *Wade* and *Huntley* hearings. Although defendant was not represented by counsel when he entered the plea, it does not necessarily follow that the plea was involuntary and thus subject to vacatur. Indeed, such a determination cannot be made on this record, which does not include a transcript of the plea colloquy (see generally *People v Barnes*, 56 AD3d 1171). Defendant has thus failed to establish on the record before us that a motion to vacate the plea would have been meritorious and that defense counsel was therefore ineffective in failing to make such a motion (see *People v Spicola*, 61 AD3d 1434, 1435). In any event, as the People correctly note, defendant gave a full confession to the police after his arrest, and forensic tests established that the DNA in semen on the victim's shirt matched defendant's DNA. Thus, even if defense counsel had successfully moved to vacate the plea, there nevertheless was overwhelming proof that defendant had committed the misdemeanors to which he pleaded guilty, and it therefore cannot be said that a successful motion would have benefitted him.

In addition, defendant was not deprived of effective assistance of counsel based on defense counsel's failure to request a *Wade* hearing, inasmuch as there is no indication in the record that defendant was identified in a pretrial identification arranged by the police. With respect to defense counsel's failure to request a *Huntley* hearing concerning the statements made by defendant to the police, defendant has not shown that such a motion, if made, would have been successful (see *People v Borcyk*, 60 AD3d 1489, *lv denied* 12 NY3d 923). We note, however, that defendant has not contended that defense counsel was ineffective for failing to move for dismissal of the indictment on statutory double jeopardy grounds as a result of the guilty plea in Town Court (see CPL 40.20 [2]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

112

KA 09-01847

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GREGORY COLLINS, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR
DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 25, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree and reckless endangerment 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 after a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]) and reckless endangerment in the first degree (§ 120.25). By his general motion seeking a trial order of dismissal, defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). In any event, we conclude that defendant's contention is without merit. Two prosecution witnesses testified that they saw defendant carrying a handgun, and that they saw him fire shots toward the ground in the direction of one of the witnesses, who sustained a gunshot wound to the foot. Thus, we conclude that there is a valid line of reasoning and permissible inferences to enable Supreme Court to find that defendant possessed a loaded firearm with the intent to use it unlawfully against another person (*see People v Speights*, 56 AD3d 1232, 1233, *lv denied* 11 NY3d 930) and that, in doing so, he created a grave risk of death under circumstances evincing a depraved indifference to human life (*see People v Lobban*, 59 AD3d 566, *lv denied* 12 NY3d 818; *People v Yellen*, 30 AD3d 634, 635-636, *lv denied* 8 NY3d 951). We further conclude that the verdict is not against the weight of the evidence. Although a different result would not have been unreasonable, the court did not fail to give the evidence the weight it should be accorded, and we will not disturb the credibility determinations of the court, which had the opportunity to "view the

witnesses, hear the testimony and observe demeanor" (*People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

113

KA 09-01792

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WAYNE R. STEWART, DEFENDANT-APPELLANT.

ANTHONY J. LAFACHE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered August 30, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that the conviction is not supported by legally sufficient evidence because the People failed to establish that the victim sustained a serious physical injury within the meaning of Penal Law § 10.00 (10). Defendant did not move for a trial order of dismissal on that ground and thus failed to preserve his contention for our review (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that his contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented evidence establishing that the victim sustained four stab wounds, which resulted in permanent scars. In addition, the victim testified that he feels pain “[e]very day” as a result of his injuries. We thus conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that the victim sustained a serious physical injury (*see People v Alston*, 45 AD3d 398, 399, *lv denied* 10 NY3d 807; *People v McDuffie*, 293 AD2d 287, *lv denied* 98 NY2d 699; *People v Gagliardo*, 283 AD2d 964, *lv denied* 96 NY2d 901).

Defendant’s challenge to the jury panel was not in writing and thus is not preserved for our review (*see CPL 270.10 [2]; People v Prim*, 40 NY2d 946, 947; *People v Whitfield*, 152 AD2d 998, 999, *lv denied* 74 NY2d 900). In any event, the contention of defendant that he was denied the right to be tried by a jury of his peers is without merit, inasmuch as he failed to meet his initial burden of

establishing "a prima facie case of the systematic exclusion of blacks from the jury panel" (*Whitfield*, 152 AD2d at 999; see *People v Guzman*, 60 NY2d 403, 409, cert denied 466 US 951; *People v Jordan*, 261 AD2d 947, lv denied 93 NY2d 1003).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

114

KA 08-02140

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTONIO D. RUTLEDGE, DEFENDANT-APPELLANT.

PETER J. PULLANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered June 6, 2008. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). We reject defendant's contention that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant was charged as an accessory, and "[a]ccessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Chapman*, 30 AD3d 1000, 1001, *lv denied* 7 NY3d 811 [internal quotation marks omitted]). The People presented evidence establishing that defendant shared his codefendants' intent to cause serious physical injury to the victim and intentionally aided the codefendants by fighting with the victim while the victim was being stabbed and by kicking the victim after he fell to the ground. Thus, the People presented legally sufficient evidence establishing that the stabbing was the " 'culmination of a continuum of events in which [defendant] participated and continued to participate' " (*People v Little*, 186 AD2d 1072, *lv denied* 81 NY2d 1075). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to the further contention of defendant, Supreme Court's *Sandoval* ruling does not constitute an abuse of discretion. The court

properly determined that, in the event that defendant testified, the People would be entitled to cross-examine him with respect to his prior conviction of prostitution (see *People v Civitello*, 152 AD2d 812, 814, *lv denied* 74 NY2d 947; *People v Rhodes*, 96 AD2d 565, 567, *lv denied* 60 NY2d 970), and his history of arrests arising from bench warrants (see *People v Taylor*, 253 AD2d 471, *lv denied* 92 NY2d 952). Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

116

KA 08-01773

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JACKIE CROUCH, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 5, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress physical evidence, i.e., the handgun he allegedly possessed, and statements that he made to the police following his arrest. In his pretrial motion papers, defendant sought suppression of his statements only on the ground that they were involuntarily made, and he did not seek suppression of the gun. Following a *Huntley* hearing, defense counsel asserted for the first time, in a memorandum of law, that defendant was unlawfully stopped by the police. On appeal, he makes yet a third argument, conceding that the stop was lawful and instead contending that his initial detention by the police was actually an arrest unsupported by probable cause and thus that suppression of the handgun and statements is required. That contention therefore is not preserved for our review (see *People v Johnson*, 52 AD3d 1286, 1287, lv denied 11 NY3d 738; *People v Lugo*, 281 AD2d 957).

We reject the further contention of defendant that he was deprived of effective assistance of counsel based on defense counsel's failure to request a probable cause hearing (see generally *People v Baldi*, 54 NY2d 137, 147). 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 *People v Webster*, 56 AD3d 1242, lv denied 11 NY3d 931). In order to prevail on his contention that he was deprived of effective assistance of counsel, defendant was required to demonstrate "the absence of strategic or otherwise legitimate explanations" for defense counsel's failure to make the pretrial motion (*People v Garcia*, 75 NY2d 973, 974; see *People v Jacobs*, 52 AD3d 1182, lv denied 11 NY3d 926), and defendant failed to do so here. Even assuming, arguendo, that the police lacked probable cause to arrest defendant, we conclude that there would have been no basis for suppression of the gun inasmuch as the discovery of the gun by the police was not causally related to defendant's seizure (see *People v Cooley*, 48 AD3d 1091, lv denied 10 NY3d 861, citing *People v Arnau*, 58 NY2d 27, 32-34). Only the statements made by defendant in the police vehicle following his gunpoint detention were possibly subject to suppression as the product of an unlawful arrest, and those statements may be deemed to be exculpatory inasmuch as defendant denied possession of the gun and stated that it belonged to one of his codefendants.

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

117

KA 05-01420

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES C. HYMES, DEFENDANT-APPELLANT.

GIRUZZI LAW OFFICES, UTICA (F. CHRISTOPHER GIRUZZI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered June 1, 2005. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, criminal possession of a weapon in the second degree, and reckless endangerment 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 following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and reckless endangerment in the first degree (§ 120.25). Defendant made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19), and he failed to renew his motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). He therefore failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of criminal possession of a weapon in the second degree. In any event, that contention is without merit. The victim testified that, when defendant approached him from across the street while the victim was standing near his car, defendant displayed a silver gun with a brown handle and then fired the gun at him. A gun matching that description was subsequently recovered near the scene of the shooting. Although one of the codefendants testified for defendant that the gun in question was owned by the codefendant, the jury was entitled to reject that testimony and could have reasonably inferred that defendant either discarded the gun when he fled the scene or gave it to the codefendant, who in turn discarded it (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's further contention that the evidence is legally insufficient to establish that the weapon was

operable is also without merit (*see generally id.*).

We reject the contention of defendant that County Court erred in dismissing a juror over his objection. The record establishes that the juror admitted to the court that she had been sleeping during the testimony of the victim and that she had missed "a lot" of the testimony. It is well established that "[a] juror who has not heard all the evidence is grossly unqualified to render a verdict" (*People v Williams*, 202 AD2d 1004, 1004 [internal quotation marks omitted]). Defendant further contends that the court erred in denying his motion for a mistrial following an incident in which a Sheriff's Deputy dressed in civilian attire placed his hand on defendant and pulled defendant toward him while jurors were exiting the courtroom and passing between defendant, who was standing next to defense counsel, and the Sheriff's Deputy. We reject that contention inasmuch as the proximity of the jurors to defendant "warranted caution and [thus the actions of the Sheriff's deputy constituted] an appropriate security measure for the courtroom" (*People v Vargas*, 88 NY2d 363, 377; *see generally People v Riley*, 292 AD2d 822, 823-824, *lv denied* 98 NY2d 640).

Defendant contends that he was denied a fair trial as a result of prosecutorial misconduct on summation. Defendant preserved that contention for our review with respect to only two of the prosecutor's remarks (*see* CPL 470.05 [2]). We nevertheless conclude that all of the allegedly improper remarks constituted fair comment on the evidence or a fair response to defense counsel's summation (*see generally People v Halm*, 81 NY2d 819, 821), and that they "did not exceed the broad bounds of rhetorical comment permissible [on summation]" (*People v Galloway*, 54 NY2d 396, 399).

Finally, we conclude that the court properly refused to charge attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1], [2]) as a lesser included offense of attempted murder in the second degree. The record is unclear whether the court considered the request with respect to attempted assault in the second degree pursuant to subdivision (1) or (2) of section 120.05. Attempted assault in the second degree pursuant to section 110.00 and subdivision (2) of section 120.05 is not a lesser included offense of attempted murder in the second degree pursuant to sections 110.00 and 125.25 (1) inasmuch as subdivision (2) of section 120.05 requires an injury caused "by means of a deadly weapon or a dangerous instrument," which is not an element of attempted murder in the second degree. "It is thus possible to commit attempted murder in the [second] degree without concomitantly, by the same conduct, committing attempted assault in the second degree" pursuant to sections 110.00 and 120.05 (2) (*People v Carter*, 38 AD3d 1291, 1292; *see People v Smith*, 13 AD3d 1121, 1122, *lv denied* 4 NY3d 803). Although attempted assault in the second degree pursuant to section 110.00 and subdivision (1) of section 120.05 is a lesser included offense of attempted murder in the second degree pursuant to sections 110.00 and 125.25 (1) (*see Smith*, 13 AD3d at 1122), we conclude that the court properly determined that there was no "reasonable view of the evidence . . . that would support

a finding that [defendant] committed the lesser offense but not the greater" (*People v Glover*, 57 NY2d 61, 63). Indeed, the evidence established that the police recovered shell casings and spent bullets demonstrating that at least 26 shots were fired at the victim and his vehicle, in which his 10-year-old nephew was seated.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

118

CAF 09-00486

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

IN THE MATTER OF SHANE PATRICK GOLLOGLY,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HILARY L. THOMPSON, RESPONDENT-RESPONDENT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR PETITIONER-APPELLANT.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MARY P. DAVISON, LAW GUARDIAN, CANANDAIGUA, FOR NATALIE G.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered December 15, 2008 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.

Memorandum: Family Court properly dismissed the petition seeking to modify a prior order of custody without conducting a hearing. Petitioner father failed to establish that the child was affected by respondent mother's mental health issues (*cf. Matter of Leo v Leo*, 39 AD3d 899, 901-902; *Matter of Baker v Baker*, 283 AD2d 730, 730-731, *lv denied* 96 NY2d 720), and he otherwise failed to make a sufficient evidentiary showing to warrant a hearing (*see Matter of Wurmlinger v Freer*, 256 AD2d 1069; *Matter of Lynette L. v Richard K.A.*, 210 AD2d 1005).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

119

CAF 08-01219, CAF 08-00964

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

IN THE MATTER OF RACHAEL N.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTINE N. AND DOUGLAS M.,
RESPONDENTS-APPELLANTS.

TYSON BLUE, CANANDAIGUA, FOR RESPONDENT-APPELLANT CHRISTINE N.

VICTORIA L. KING, CANANDAIGUA, FOR RESPONDENT-APPELLANT DOUGLAS M.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF
COUNSEL), FOR PETITIONER-RESPONDENT.

MICHAEL BALLMAN, LAW GUARDIAN, CANANDAIGUA, FOR RACHAEL N.

Appeals from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered April 22, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents.

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

Memorandum: Respondent parents appeal from an order terminating their parental rights pursuant to Social Services Law § 384-b on the ground of permanent neglect. We affirm. Petitioner met its initial burden of establishing by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the parents' relationship with the child (*see* § 384-b [7] [a]; *Matter of Geoffrey N.*, 16 AD3d 1167; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142). The parents thereafter failed to establish that they had "a meaningful plan for the child['s] future, including that [they have] addressed the problems that caused the removal" of the child (*Matter of Kaitlyn R.*, 279 AD2d 912, 914).

Contrary to the contention of respondent mother, the evidence at the hearing establishes that she was unable to plan for the future of the child inasmuch as she failed to correct the conditions that led to removal of the child. Further, although respondent father had made some progress with his mental health, anger and substance abuse issues after the filing of the petition, the record of the dispositional hearing establishes that he was still abusing drugs, drinking alcohol,

had anger issues, and refused to visit with the child because he objected to the visitation procedures. "While continually finding fault with or no need for various programs and personnel, [the parents] 'gained no insight into their own behavior which had been so physically and emotionally damaging to the child[] and had required [her] removal' " (*Matter of Nathaniel T.*, 67 NY2d 838, 842).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

120

CA 09-01911

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

NANCY SZYMKOWIAK, PLAINTIFF,

V

ORDER

DORITEX CORP., DEFENDANT.

DORITEX CORP., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

AMERICAN HOMEPATIENT, THIRD-PARTY
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (DENNIS P. GLASCOTT OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (JERRY MARTI OF COUNSEL), FOR
THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 30, 2009 in a personal injury action. The order, among other things, denied third-party defendant's motion for summary judgment.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

121

CA 09-01724

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

N&W CONSTRUCTION COMPANY, INC., PLAINTIFF,
AND BRAWDY CONSTRUCTION, INC.,
PLAINTIFF-APPELLANT,

V

ORDER

ROOSA FAMILY ASSOCIATES, LIMITED PARTNERSHIP,
JOSEPH B. ROOSA, INDIVIDUALLY, NORTHWEST
SAVINGS BANK, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

JOHN J. LAVIN, P.C., BUFFALO (JOHN J. LAVIN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered April 3, 2009 in an action for, inter alia, foreclosure of a mechanic's lien. The order, insofar as appealed from, denied the motion of plaintiff Brawdy Construction, Inc. for an extension of the notice of pendency and granted the cross motion of defendants Roosa Family Associates, Limited Partnership, Joseph B. Roosa, individually, and Northwest Savings Bank to vacate the mechanic's lien of that plaintiff.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

124

CA 09-01883

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

LELAND J. FAERY, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CITY OF LOCKPORT, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JEFFREY FREEDMAN ATTORNEYS AT LAW, BUFFALO (EDWARD J. MURPHY, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered July 6, 2009 in a personal injury action. The order, insofar as appealed from, denied in part defendant's motion for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained at a wastewater treatment plant when, during the course of his work as a laborer, he placed his arm and hand into the engine compartment of a skid steer. Defendant was the owner of the treatment plant and, at the time of the accident, plaintiff was employed by a construction company with whom defendant had contracted to remove a portion of the roof at the plant. We conclude that Supreme Court erred in denying that part of defendant's motion for summary judgment dismissing the common-law negligence claim, and thus should have granted the motion in its entirety, thereby dismissing the complaint. "A finding of negligence may be based only upon the breach of a duty. If, in connection with the acts complained of, the defendant owes no duty to the plaintiff, the action must fail" (*Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347) and, here, defendant established as a matter of law that it owed no duty to plaintiff (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiff's contention, there is " 'no duty to warn against a condition that can be readily observed by a reasonable use of one's senses' " (*Bombard v Central Hudson Gas & Elec. Co.*, 205 AD2d 1018, 1020, *lv dismissed* 84 NY2d 923; *see Breem v Long Is. Light. Co.*, 256 AD2d 294, *lv denied* 93 NY2d 802). In any event, plaintiff, " 'based on his training [and] prior practice, . . . knew or should have known' " of the harm that

could be caused by placing his arm and hand into the engine compartment of a skid steer (*Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1053).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

125

CA 09-01331

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

JOHN K. MARTINEZ, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TAMBE ELECTRIC, INC., DEFENDANT-APPELLANT,
ROCHESTER INSTITUTE OF TECHNOLOGY AND
THE PIKE COMPANY, INC., DEFENDANTS-RESPONDENTS.

ROCHESTER INSTITUTE OF TECHNOLOGY, ET AL.,
THIRD-PARTY PLAINTIFFS,

V

BETLEM SERVICE CORPORATION, THIRD-PARTY
DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR
DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (JAMES E. MASLYN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

LAW OFFICES OF DOUGLAS COPPOLA, BUFFALO (WILLIAM K. KENNEDY OF
COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 15, 2009 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Tambe Electric, Inc. for summary judgment and granted that part of the cross motion of third-party defendant for leave to amend its answer.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained when he received an electrical shock and fell from a ladder at a construction site owned by defendant-third-party plaintiff Rochester Institute of Technology. Defendant Tambe Electric, Inc. (Tambe), the electrical subcontractor at the site, contends that Supreme Court erred in denying its motion for summary judgment dismissing the complaint against it and in granting that part of the cross motion of third-party defendant, plaintiff's employer, for leave to amend its

answer to the third-party complaint to assert a cross claim for indemnification and/or contribution against Tambe. We affirm.

Contrary to the contention of Tambe, the court properly denied those parts of its motion with respect to the Labor Law § 240 (1) and § 241 (6) causes of action against it. Tambe failed to establish as a matter of law that it was not an agent of the general contractor with respect to the work that resulted in plaintiff's injuries. "A subcontractor such as [Tambe] will be liable as an agent of the general contractor for injuries sustained in those areas and activities within the scope of the work delegated to it . . . Plaintiff['s] theory of liability in this case is based on a defective condition of the premises rather than the manner of the work . . .[, and Tambe] failed to meet its initial burden of establishing that it did not have supervision or control of the safety of the area involved in the incident . . . Pursuant to its [sub]contract with [the general contractor, Tambe] was responsible for the [temporary wiring] and for the safety of its work and the work area" (*Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 12 AD3d 1059, 1060-1061; see *Musillo v Marist Coll.*, 306 AD2d 782, 783-784; cf. *Rice v City of Cortland*, 262 AD2d 770, 771-772).

Contrary to the further contention of Tambe, the court properly denied those parts of its motion with respect to the common-law negligence and Labor Law § 200 causes of action against it. "In determining [the] potential liability [of an owner or its agent] under the common law or the statute, we must recognize the distinction between those cases in which the injury was caused by the defective condition of the premises and those in which the injury was the result of a defect not in the land itself but in the equipment or its operation . . . In the latter case, defendant is not liable because [it] exercised no supervisory control over the injury-producing work" (*Farrell v Okeic*, 266 AD2d 892, 893 [internal quotation marks omitted]). As previously noted, however, plaintiff alleges that his injury was caused by the defective condition of the premises, and Tambe "failed to meet [its] burden of establishing that [it] did not breach [its] duty 'to take reasonable care and prudence in securing the safety of the work area' " (*id.*). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317). Here, the subcontract agreement between Tambe and the general contractor, submitted by Tambe in support of its motion, establishes that it contractually assumed responsibility for the safety of the temporary wiring.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

129

KA 08-01895

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

PHILIP M. FARREN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered July 28, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

130

KA 08-01896

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

PHILIP M. FARREN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered July 28, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted grand larceny in the third degree.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

131

KA 08-02641

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

NICOLE K. MAXFIELD, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (RAY A. KYLES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered July 3, 2008. The judgment convicted defendant, upon her 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

134

KA 08-01764

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RANDY W. BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHRISTOPHER S. BRADSTREET, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered April 14, 2008. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: On appeal from two judgments each convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that County Court erred in delegating its authority to determine the amount of restitution to be imposed to the Probation Department. Although that contention is not encompassed by defendant's valid waiver of the right to appeal (*see e.g. People v Dort*, 277 AD2d 487; *People v Denué*, 275 AD2d 863), we nevertheless conclude that it lacks merit. It is well settled that the court "may call on [the Probation Department] to act as a preliminary fact finder and submit its recommendations in a written report" (*People v Fuller*, 57 NY2d 152, 158). Here, the court rather than the Probation Department fixed the amount of restitution and imposed that amount at the time of sentencing, and we thus conclude that there was no improper delegation of authority (*cf. People v Beaudoin*, 195 AD2d 996, *lv denied* 82 NY2d 891; *People v Bentivegna*, 145 AD2d 899).

Although "[t]he challenge by defendant to the amount of restitution is not foreclosed by his [valid] waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement" (*People v Sweeney*, 4 AD3d 769, 770, *lv denied* 2 NY3d 807), we conclude that defendant waived that contention inasmuch as he expressly consented to the amount of restitution recommended by the Probation Department in the presentence report (*see generally People v Huffman*, 288 AD2d 907, *lv denied* 97 NY2d 755; *People v*

Chambers, 242 AD2d 860).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

135

KA 08-01765

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RANDY W. BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHRISTOPHER S. BRADSTREET, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered April 14, 2008. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Same Memorandum as in *People v Brown* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

138

KA 08-01770

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARL D. ERB, JR., DEFENDANT-APPELLANT.

ALAN P. REED, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 25, 2008. The judgment convicted defendant, upon a jury verdict, of criminally negligent homicide.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed, and the matter is remitted to Ontario County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminally negligent homicide (Penal Law § 125.10), defendant contends that the evidence is legally insufficient to support the conviction. We agree. The evidence establishes that defendant and the victim, whom he first met on the day she died, used cocaine throughout that day. While defendant was driving the victim to her mother's home in a trailer park, he observed her inject herself with heroin, which she had obtained without his assistance. Upon arriving at the trailer park, defendant was unable to wake the victim in order to ascertain her mother's address within the trailer park, at which time he removed her from his vehicle and left her on a lawn inside the trailer park. Although the victim was breathing and making noises at the time defendant left her there, she was found unconscious several hours later and died within a short time after being hospitalized.

Defendant was acquitted of manslaughter in the second degree (Penal Law § 125.15 [1]) but convicted of the lesser included offense of criminally negligent homicide. "The question on this appeal is therefore whether, when viewed in the light most favorable to the People, the evidence adduced at trial showed that [defendant's] conduct constituted 'not only a failure to perceive a risk of death, but also some serious blameworthiness in the conduct that caused it' . . . Measured by this standard, the evidence falls short" (*People v Cabrera*, 10 NY3d 370, 378, quoting *People v Boutin*, 75 NY2d 692, 696).

We agree with defendant that the evidence failed to establish that his acts in any way caused the death of the victim. Defendant did not procure or inject the drugs that caused the death of the victim, nor did he place her in a location that made her less likely to obtain medical assistance. There is no evidence that removing the victim from the vehicle or leaving her outside contributed to her death. Consequently, "defendant's actions were not a 'sufficiently direct cause' of [the victim's] death to warrant the imposition of criminal liability" (*People v Bianco*, 67 AD3d 1417, 1419, quoting *People v Kibbe*, 35 NY2d 407, 413).

Further, although "[t]he Penal Law provides that criminal liability may be based on an omission . . . , which is defined as the failure to perform a legally imposed duty" (*People v Steinberg*, 79 NY2d 673, 680; see § 15.00 [3]; § 15.05), no such omission occurred here. "Criminal liability cannot be premised on a failure to act . . . , unless the party so charged has a legal duty to act" (*People v Myers*, 201 AD2d 855, 856; see *People v Carroll*, 244 AD2d 104, 106, *affd* 93 NY2d 564). Inasmuch as the People do not contend that defendant had any duty to provide care for the victim and, indeed, they presented no evidence of such a duty (see *Myers*, 201 AD2d 855, 856-857; *cf. People v Manon*, 226 AD2d 774, 776, *lv denied* 88 NY2d 1022), there is no basis upon which to find defendant liable for a failure to act. We therefore reverse the judgment of conviction, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

We need not review defendant's remaining contentions in light of our determination.

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

141

KAH 08-01977

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
FRANK GRAHAM, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, AND
MALCOLM CULLY, SUPERINTENDENT, LIVINGSTON
CORRECTIONAL FACILITY, RESPONDENTS-RESPONDENTS.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF
COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered July 16, 2008 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: This appeal by petitioner from the judgment dismissing his petition for a writ of habeas corpus has been rendered moot by his release to parole supervision (see *People ex rel. Mitchell v Unger*, 63 AD3d 1591; *People ex rel. Cooper v New York State Div. of Parole*, 286 AD2d 792), and the exception to the mootness doctrine does not apply herein (see *People ex rel. Hampton v Dennison*, 59 AD3d 951, lv denied 12 NY3d 711).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

142

CAF 09-00636

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

IN THE MATTER OF PATRICK J. HUTSON,
PETITIONER-APPELLANT,

V

ORDER

STACY M. HUTSON, RESPONDENT-RESPONDENT.

SUSAN GRAY JONES, CANANDAIGUA, FOR PETITIONER-APPELLANT.

MUEHE AND NEWTON, LLP, CANANDAIGUA (GEORGE F. NEWTON OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

MARYBETH D. BARNET, LAW GUARDIAN, CANANDAIGUA, FOR GRACIE R.H. AND
ALYSSA M.H.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered February 11, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by petitioner on January 13, 2010, the attorneys for the parties on January 21 and 22, 2010, and the Law Guardian on January 22, 2010,

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

147

CA 09-01643

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

IN THE MATTER OF THE ESTATE OF EUGENE JASON,
DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

LISA HERDMAN, NOW KNOWN AS LISA KRUE,
DEFENDANT-RESPONDENT.

FEUERSTEIN & SMITH, LLP, BUFFALO (MARK E. GUGLIELMI OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered December 30, 2008 in a declaratory judgment action. The order denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this declaratory judgment action by filing a summons and complaint. Simultaneously, plaintiff filed an order to show cause seeking the same declaratory relief. We deem the order to show cause as constituting a motion for summary judgment, and we conclude that Supreme Court properly denied the motion. " 'A motion for summary judgment may not be made before issue is joined . . . [,] and [the courts have] strictly adhered to [that requirement]' " (Ward v Guardian Indus. Corp., 17 AD3d 1100, 1101, quoting City of Rochester v Chiarella, 65 NY2d 92, 101; see CPLR 3212 [a]; Coolidge Equities Ltd. v Falls Ct. Props. Co., 45 AD3d 1289).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

149

CA 09-01910

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

KELLY DELUCAS, AS PARENT AND NATURAL GUARDIAN
OF ZACHARY FLORES, PLAINTIFF-RESPONDENT,

V

ORDER

CITY OF LOCKPORT SCHOOL DISTRICT AND LOCKPORT
SENIOR HIGH SCHOOL, DEFENDANTS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JEFFREY F.
BAASE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JEFFREY E. MARION, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 30, 2009 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 for reasons stated in the decision at Supreme Court.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

150

CA 09-01001

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

KENNETH DAVIS AND JANICE DAVIS,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

WIND-SUN CONSTRUCTION, INC.,
DEFENDANT-RESPONDENT.

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

GOLDBERG SEGALLA LLP, BUFFALO (PAUL MCCORMICK OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered May 6, 2009 in a personal injury action. The order, among other things, granted defendant's cross motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Kenneth Davis (plaintiff) while he was attempting to move the fabricated steel components of a pedestrian bridge into his employer's facility on Akron Road in Lockport. Defendant was the general contractor on the project to construct the pedestrian bridge at Lyndon Road in Fairport, and entered into a subcontract with plaintiff's employer to fabricate the steel bridge components.

Supreme Court properly granted that part of defendant's cross motion for summary judgment dismissing the Labor Law § 241 (6) cause of action. That statute applies to "construction, excavation and demolition work," and plaintiff was not engaged in such work when he was injured (*id.*). Indeed, plaintiff's accident did not occur at the construction site but, rather, it occurred while he was engaged in the fabrication of steel bridge components at his employer's facility. Thus, he was not engaged in an activity protected under Labor Law § 241 (6) (*see Solly v Tam Ceramics*, 258 AD2d 914; *Safe v Bethlehem Steel Corp.*, 258 AD2d 933, *lv denied* 93 NY2d 818). Furthermore, plaintiff was not engaged in a protected activity under Labor Law § 240 (1) at the time of the accident, and thus the court properly denied plaintiffs' motion for leave to amend the complaint to include

a cause of action for the violation of that statute (see generally *Solly*, 258 AD2d 914).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

152

CA 09-01426

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

KRISTINE E. SHORT, PLAINTIFF-APPELLANT,

V

ORDER

GERALD DALOIA AND BETTE DALOIA,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered October 10, 2008 in a personal injury action. The order denied the motion of plaintiff for judgment notwithstanding the verdict or, in the alternative, a new trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see *Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; see also CPLR 5501 [a] [1], [2]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

153

CA 09-01427

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

KRISTINE E. SHORT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GERALD DALOIA AND BETTE DALOIA,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County
(Evelyn Frazee, J.), entered November 3, 2008 in a personal injury
action. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for
injuries she sustained when the vehicle in which she was a passenger
was allegedly struck by a vehicle owned by defendant Gerald Daloia and
operated by defendant Bette Daloia. Plaintiff appeals from a judgment
entered upon a jury verdict finding that Bette Daloia was not
negligent. We reject the contention of plaintiff that Supreme Court
erred in denying her post-trial motion for "[j]udgment notwithstanding
the verdict[] or in the alternative a new trial" pursuant to CPLR
4404. In light of the paucity of direct evidence concerning the
circumstances of the accident and the contradictory nature of the
circumstantial evidence presented, we conclude that "the preponderance
of the evidence in favor of plaintiff [was] not so great that the
verdict could not have been reached upon any fair interpretation of
the evidence, nor is the verdict palpably wrong or irrational"
(*Kettles v City of Rochester*, 21 AD3d 1424, 1425; see generally *Lolik
v Big V Supermarkets*, 86 NY2d 744, 746). Plaintiff failed to preserve
for our review her further contention that the court erred in failing
to include in its readback of the definition of negligence to the jury
that portion of the jury charge pertaining to a statutory violation
(see generally *Garris v K-Mart, Inc.*, 37 AD3d 1065). In any event,
that contention is without merit inasmuch as the court's readback was
appropriately responsive to the jury's request for the definition of
negligence (see *Kettles*, 21 AD3d 1424, 1425-1426; *Gutierrez v City of*

New York, 288 AD2d 86).

Finally, plaintiff contends that she is entitled to a new trial based on the alleged misconduct of defendants' attorney during summation. Plaintiff failed to object to the majority of the comments at issue and thus she failed to preserve for our review her contention with respect to those comments (see *Dailey v Keith*, 306 AD2d 815, 816, *affd* 1 NY3d 586; *Wiepert v Manchester*, 298 AD2d 947). With respect to the comments to which plaintiff objected, we conclude that they neither " 'divert[ed] the attention of the jurors from the issues at hand' " (*Kmiotek v Chaba*, 60 AD3d 1295, 1296), nor had any likely effect on the jury's verdict (see *Wilson v City of New York*, 65 AD3d 906, 908).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

154

KA 09-01873

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DALE L. JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Seneca County Court (Dennis F. Bender, J.), dated June 8, 2009. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 et seq.), defendant contends that County Court erred in assessing 20 points against him under risk factor six, based on the victim's mental disability, and 20 points against him under risk factor seven, for establishing a relationship with the individual in question for the purpose of victimizing him. We reject that contention, and we conclude that the court properly determined that defendant was presumptively a level two risk. The People presented clear and convincing evidence establishing that the mental condition of the victim was such that he was incapable of appraising the nature of his own conduct, particularly with respect to the foreplay activities in which he participated (Penal Law § 130.00 [5]), and that the victim did not understand the social and moral implications of such sexual activity (*see generally People v Cratsley*, 86 NY2d 81, 87-88; *People v Easley*, 42 NY2d 50, 55-57). The People further established by clear and convincing evidence that defendant entered into his relationship with the victim for the primary purpose of victimizing him.

Contrary to defendant's further contention, the court did not abuse its discretion in refusing to grant defendant a downward departure from his presumptive risk level based on his age and the fact that he had been released from prison in Iowa without further required sex offender treatment. Age alone does not warrant a downward departure (*see People v Stewart*, 63 AD3d 1588, lv denied 13 NY3d 704). In addition, defendant's release from prison without the

requirement that defendant obtain further sex offender treatment was based on the results of a polygraph examination administered to defendant just prior to his release in which he portrayed himself to be innocent, but the results of a polygraph examination are inadmissible in New York based on their unreliability (see *People v Shedrick*, 66 NY2d 1015, 1018, rearg denied 67 NY2d 758; *People v DeLorenzo*, 45 AD3d 1402, lv denied 10 NY3d 763; *People v Weber*, 40 AD3d 1267, lv denied 9 NY3d 927). Furthermore, the claims of innocence by defendant at the polygraph examination were directly contrary to his admissions of guilt at the Iowa trial.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

155

KA 08-01271

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

FELIX VELLON, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered August 8, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, robbery in the second degree and burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted (*see People v Cruz*, 45 AD3d 1462).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

156

KA 07-00950

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE ALPHONSO VALLE, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 11, 2006. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]). Defendant contends that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights because of his language deficits and subnormal intellect. We reject that contention. The record establishes that defendant was given the *Miranda* warnings in Spanish because, although defendant understood and spoke both English and Spanish, the officers believed that he would better understand the warnings in Spanish (see generally *People v Valverde*, 13 AD3d 658, 659, lv denied 4 NY3d 836; *People v Garrido-Valdez*, 299 AD2d 858, lv denied 99 NY2d 614; *People v Mendez*, 283 AD2d 522, 523, lv denied 97 NY2d 642). The record of the *Huntley* hearing further establishes that defendant responded to questioning in an appropriate manner without exhibiting any comprehension difficulty. With respect to the contention of defendant concerning his subnormal intellect, we note that "[t]he intelligence of a defendant is only one factor to consider in determining whether his or her waiver of *Miranda* rights was voluntary and, here, the record supports [Supreme Court's] determination that defendant understood the meaning of the *Miranda* warnings prior to waiving his rights" (*People v Green*, 60 AD3d 1320, 1322, lv denied 12 NY3d 915; see *People v Williams*, 62 NY2d 285, 287). Defendant failed to preserve for our review his further contention that the court improperly questioned a defense witness during the *Huntley* hearing

(see *People v Charleston*, 56 NY2d 886, 887; *People v Smalls*, 293 AD2d 500, lv denied 98 NY2d 681). In any event, that contention is without merit inasmuch as the court was merely clarifying the testimony of that witness, and it did so as well with the People's witnesses (see generally *People v Nurse*, 8 AD3d 301, lv denied 3 NY3d 679). We have considered defendant's remaining contention and conclude that it is without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

160

KA 05-00437

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY C. DARRISAW, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI 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 January 31, 2005. The judgment convicted defendant, upon a nonjury verdict, of unauthorized use of a vehicle in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a bench trial of unauthorized use of a vehicle in the third degree (Penal Law § 165.05 [1]), defendant contends that the conviction is not supported by legally sufficient evidence. We reject that contention. The People presented evidence establishing that defendant rode in the stolen vehicle without the consent of the owner, thereby establishing the elements of the crime of which he was convicted (see *People v Rivera*, 185 AD2d 751, 752, *affd* 82 NY2d 695). Thus, viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), we conclude that there is a " 'valid line of reasoning and permissible inferences from which a rational [factfinder] could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

161

KA 06-03780

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAMON HUNTER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered November 3, 2006. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and burglary 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 robbery in the first degree (Penal Law § 160.15 [3]) and burglary in the first degree (§ 140.30 [3]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction because his intoxication precluded him from forming the requisite intent to commit the crimes (*see People v Lamica*, 53 AD3d 1109, *lv denied* 11 NY3d 833; *see generally People v Gray*, 86 NY2d 10, 19). In any event, his contention is without merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that a rational trier of fact could infer that defendant had the requisite intent to commit the crimes of which he was convicted (*see People v Pross*, 302 AD2d 895, 897-898, *lv denied* 99 NY2d 657; *see generally People v Tedesco*, 30 AD3d 1075, 1076, *lv denied* 7 NY3d 818; *People v Mahoney*, 6 AD3d 1104, *lv denied* 3 NY3d 660). We further note the well-settled principle that "[a]n intoxicated person can form the requisite criminal intent to commit a crime, and it is for the trier of fact to decide if the extent of the intoxication acted to negate the element of intent" (*People v Felice*, 45 AD3d 1442, 1443, *lv denied* 10 NY3d 764). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject the further contention of defendant that the verdict is against the weight of the evidence (*see People v Johnson*, 43 AD3d 1422, *lv denied* 9 NY3d 1035; *see generally People v Bleakley*,

69 NY2d 490, 495).

Also contrary to the contention of defendant, he received effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147). Defense counsel's failure to make a motion for a trial order of dismissal on the ground raised on appeal does not constitute ineffective assistance of counsel because that motion would have had no chance of success (see *People v Stultz*, 2 NY3d 277, 287, rearg denied 3 NY3d 702; *People v Lewis*, 67 AD3d 1396). Defense counsel also was not ineffective for failing to retain an expert on the issue of defendant's intoxication. " 'Defendant has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence' " (*People v Jurgensen*, 288 AD2d 937, 938, lv denied 97 NY2d 684).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

163

KA 07-01882

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER T. HAWKINS, DEFENDANT-APPELLANT.

FRANCIS C. AMENDOLA, BUFFALO, FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered April 19, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree and attempted promoting prison contraband 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 criminal sale of a controlled substance in the fourth degree (Penal Law § 220.34 [1]) and attempted promoting prison contraband in the first degree (§§ 110.00, 205.25 [2]), defendant contends that County Court erred in denying his motion seeking to withdraw his plea on the ground that he was unable to comprehend the plea proceedings and requesting a competency examination pursuant to CPL article 730. Although the contentions of defendant implicate the voluntariness of his plea and thus survive his waiver of the right to appeal (*see People v Stoddard*, 67 AD3d 1055; *People v Bennefield*, 306 AD2d 911), we nevertheless conclude that they are without merit.

"[A] defendant is presumed to be competent" (*People v Tortorici*, 92 NY2d 757, 765, cert denied 528 US 834; *see People v Wilcox*, 45 AD3d 1320, lv denied 10 NY3d 772), and "the court is under no obligation to issue an order of examination . . . unless it has [a] 'reasonable ground . . . to believe that the defendant [is] an incapacitated person' " (*People v Morgan*, 87 NY2d 878, 880; *see People v Williams*, 35 AD3d 1273, 1274, lv denied 8 NY3d 928). "The determination of whether to order a competency hearing lies within the sound discretion of the . . . court" (*Tortorici*, 92 NY2d at 766; *see Morgan*, 87 NY2d at 879-880; *Williams*, 35 AD3d at 1274).

Here, the record supports the court's conclusion that defendant's

complaints of mental illness were invented by defendant in order to avoid the consequences of the plea (see *People v Powell*, 293 AD2d 423, *lv denied* 98 NY2d 700; *People v Wiggins*, 191 AD2d 364, 365, *lv denied* 81 NY2d 1021; *People v Clickner*, 128 AD2d 917, 918-919, *lv denied* 70 NY2d 644). Indeed, the People presented uncontradicted evidence that defendant feigned mental illness in an attempt to manipulate the criminal justice system (see generally *Powell*, 293 AD2d 423; *People v Farrell*, 184 AD2d 396, *lv denied* 80 NY2d 974, 975).

Finally, we note that, although the sentence and commitment contains the correct Penal Law citation for criminal sale of a controlled substance in the fourth degree, it incorrectly describes the Penal Law citation as both "CSCS 4th" and "CPCS 4th." The sentence and commitment must therefore be amended to correct the clerical error and to reflect that defendant was convicted of criminal sale of a controlled substance in the fourth degree (see generally *People v Saxton*, 32 AD3d 1286).

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

166

CAF 08-01528

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

IN THE MATTER OF RICHARD F. PLUMMER,
PETITIONER-APPELLANT,

ORDER

V

JENNIFER M. PLUMMER, RESPONDENT-RESPONDENT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK OF
COUNSEL), FOR PETITIONER-APPELLANT.

KIMBERLY WHITE WEISBECK, LAW GUARDIAN, ROCHESTER, FOR ANTONIO P.

Appeal from an order of the Family Court, Monroe County (Thomas
W. Polito, R.), entered June 4, 2008 in a proceeding pursuant to
Family Court Act article 6. The order dismissed the petition.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

168

CA 09-01007

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

ANTHONY M. CONIGLIO AND PAMELA CONIGLIO,
PLAINTIFFS-APPELLANTS,

V

ORDER

THE ANDERSONS, INC., ET AL., DEFENDANTS,
AND TRANSCO RAILWAY PRODUCTS, INC.,
DEFENDANT-RESPONDENT.

THE CAREY FIRM, LLC, BUFFALO (SHAWN W. CAREY OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

SLIWA & LANE, BUFFALO (STANLEY J. SLIWA OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered March 6, 2009 in a personal injury action. The order granted the motion of defendant Transco Railway Products, Inc. for summary judgment dismissing the amended complaint against it.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

170

CA 09-01702

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

MARY LOU ANDREOZZI, PLAINTIFF,

V

ORDER

TOPS MARKETS, LLC, BENDERSON DEVELOPMENT
COMPANY, INC., DEFENDANTS-APPELLANTS,
AND CHURCHILL CONTRACTING, INC.,
DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE, JR., OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered August 27, 2008 in a personal injury action. The order granted the motion of defendant Churchill Contracting, Inc. for summary judgment and denied the cross motion of defendants Tops Markets, LLC and Benderson Development Company, Inc. for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties to the appeal on January 5 and 11, 2010,

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

172

CA 09-01918

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

IN THE MATTER OF ALLSTATE INSURANCE COMPANY,
PETITIONER-RESPONDENT,

V

ORDER

THOMAS LASKER, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered December 17, 2008 in a proceeding pursuant to CPLR article 75. The order granted the petition for a permanent stay of arbitration.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on January 27, 2010,

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

174

KA 07-01036

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FREDDY H. FULLER, DEFENDANT-APPELLANT.

DAVID M. GIGLIO, 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 December 12, 2006. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [3]) and attempted robbery in the first degree (§ 160.15 [2]). Although the challenge by defendant to County Court's suppression ruling survives his guilty plea (see CPL 710.70 [2]), that challenge is without merit. The court in fact suppressed all statements made after defendant invoked his right to counsel, with the exception of a spontaneous statement made by defendant concerning the arresting officer's plan to obtain a search warrant. Contrary to defendant's contention, the spontaneous statement did not result from " 'words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response' " (*Rhode Island v Innis*, 446 US 291, 302; see *People v Ferro*, 63 NY2d 316, 322-323, cert denied 472 US 1007).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

177

KA 08-02219

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALJUAN GREEN, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered September 9, 2008. 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.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in refusing to suppress the identification testimony of the victim. We reject that contention. At the hearing conducted pursuant to *People v Rodriguez* (79 NY2d 445), the People established that the victim had sufficient familiarity with defendant that his identification of defendant from a single photograph was merely confirmatory (see *People v Jacobs*, 65 AD3d 594, 595, *lv denied* 13 NY3d 836; *People v Lathrop*, 242 AD2d 876, *lv denied* 91 NY2d 894). Defendant failed to preserve for our review his further contention that the court erred in accepting his plea after he expressed dissatisfaction with defense counsel and misgivings with respect to the plea, and "this case does not qualify for the narrow, rare exception to the requirement that the claim of an invalid guilty plea must be appropriately preserved" (*People v Clarke*, 93 NY2d 904, 906).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

178

TP 09-01717

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

IN THE MATTER OF PHILIP EGBERT, PETITIONER,

V

ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (SUSAN K. JONES OF
COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF
COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered August 18, 2009) to review a determination of respondent. 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.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

179

KA 08-00349

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

YESHUA CAMACHO, ALSO KNOWN AS YESHUA MANUEL
CAMACHO FIGUEROA, ALSO KNOWN AS YESHUA MANUEL
FIGUERO CAMACHO, ALSO KNOWN AS MANUEL CAMACHO,
DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (MARK C. CURLEY OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 20, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), robbery in the first degree, and conspiracy in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [3]), defendant contends that the verdict is inconsistent insofar as the jury convicted him of murder in the second degree under subdivision (3) of Penal Law § 125.25 but acquitted him of the counts of intentional murder in the second degree (§ 125.25 [1]) and conspiracy in the second degree (§ 105.15). Defendant failed to raise that contention prior to the discharge of the jury and thus failed to preserve it for our review (see *People v Alfaro*, 66 NY2d 985; *People v Satloff*, 56 NY2d 745, rearg denied 57 NY2d 674). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Contrary to the further contention of defendant, the conviction is supported by legally sufficient evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

We reject the contention of defendant that his written and oral statements to the police were involuntary and that County Court therefore erred in refusing to suppress them. "The voluntariness of a confession is to be determined by examining the totality of the circumstances surrounding the confession" (*People v Coggins*, 234 AD2d 469, 470; see *People v Scott*, 212 AD2d 1047, *affd* 86 NY2d 864). Here, defendant's statement was not rendered involuntary by reason of any alleged deception by the police. In general, mere deception by the police will not require suppression of a statement obtained therefrom unless "the deception was so fundamentally unfair as to deny due process" (*People v Tarsia*, 50 NY2d 1, 11), or if the police made a " 'promise or threat . . . that could induce a false confession' " (*People v Tankleff*, 84 NY2d 992, 994). "Even assuming, arguendo, that the police misled defendant, we conclude that such deception did not create a substantial risk that the defendant might falsely incriminate himself" (*People v Alexander*, 51 AD3d 1380, 1382, *lv denied* 11 NY3d 733 [internal quotation marks omitted]; see *People v Sanchez*, 286 AD2d 650, *lv denied* 97 NY2d 760; *People v Jackson*, 143 AD2d 471, 473).

We also reject defendant's contention that the court abused its discretion by admitting in evidence certain photographs of the murder victim (see generally *People v Poblner*, 32 NY2d 356, 369-370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905). Here, the photographs were relevant to show an intent to kill, to corroborate the Medical Examiner's testimony concerning the cause of death, and to corroborate the statements that defendant made to several witnesses concerning the commission of the crime (see *People v Jones*, 43 AD3d 1296, 1297-1298, *lv denied* 9 NY3d 991, 10 NY3d 812; *People v Law*, 273 AD2d 897, 898, *lv denied* 95 NY2d 965). Finally, the sentence is not unduly harsh or severe.

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

180

KA 08-02509

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISAAC LEARY, 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 (Joseph E. Fahey, J.), rendered October 23, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). He contends that County Court erred in denying from the bench his request for a *Franks* hearing (see *Franks v Delaware*, 438 US 154), which was contained in that part of his omnibus motion seeking suppression of contraband seized by the police pursuant to a search warrant. We reject that contention. "A guilty plea generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings" (*People v Fernandez*, 67 NY2d 686, 688; see *People v Black*, 185 AD2d 609), and the exception set forth in CPL 710.70 (2) allowing appellate review with respect to orders that "finally den[y] a motion to suppress evidence" is not applicable because defendant pleaded guilty before the court issued such an order.

We conclude, in any event, that the court properly denied defendant's request for a *Franks* hearing. Although defendant challenged the veracity of statements made by a police officer in support of the search warrant application, we conclude that the remaining information in the warrant application, apart from those statements, provided probable cause to support the issuance of the search warrant (see *People v Plevy*, 52 NY2d 58, 66; *People v Ippolito*, 226 AD2d 285, lv denied 88 NY2d 966; see generally *People v Tambe*, 71 NY2d 492, 505). Probable cause to search the residence in question arose from, inter alia, the admission by defendant to the police

following his arrest that there was approximately a kilogram of cocaine in a safe located inside the residence that the police had observed him leaving minutes before his arrest.

Defendant further contends that the court erred in refusing to conduct a probable cause hearing. There is no indication in the record, however, that defendant specifically requested such a hearing. In any event, defendant forfeited that contention by pleading guilty before a suppression hearing was held or an order was entered denying any alleged request for a hearing (see CPL 710.70 [2]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

181

KA 08-02133

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID BRUSIE, ALSO KNOWN AS DAVID B. BRUSIE,
ALSO KNOWN AS DAVID J. BRUSIE, ALSO KNOWN AS
DAVID B. BRUSIE, JR., ALSO KNOWN AS DAVID
BRUCE BRUSIE, DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered October 8, 2008. The order directed defendant to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the order is affirmed, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: Defendant was convicted upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]). County Court sentenced defendant to a term of incarceration and scheduled a hearing to determine the amount of restitution to be imposed. Defendant did not appeal from the original judgment of conviction and now appeals from the order of restitution entered following a hearing. As a general rule, a defendant may not appeal as of right from a restitution order in a criminal case (see CPL 450.10; *People v Fricchione*, 43 AD3d 410). Here, however, the court bifurcated the sentencing proceeding by severing the issue of restitution for a separate hearing, and thus "defendant may properly appeal as of right from both the judgment of conviction . . . and the sentence as amended . . ., directing payment of restitution . . ., [with] no need to seek leave to appeal from [the] order of restitution" (*People v Swiatowy*, 280 AD2d 71, 73, lv denied 96 NY2d 868; see CPL 450.10 [2]; *People v Russo*, 68 AD3d 1437 n 2).

With respect to the merits, we agree with defendant that the court erred in delegating its responsibility to conduct a restitution hearing to its court attorney for the same reason as that set forth in our decision in *People v Bunnell* (59 AD3d 942, amended on rearg 63 AD3d 1671, amended 63 AD3d 1727). Although defendant failed to preserve his contention for our review, "preservation is not required inasmuch as the essential nature of the right to be sentenced as

provided by law is implicated" (*People v Weber* [appeal No. 2], 64 AD3d 1185, 1186 [internal quotation marks omitted]; see *Bunnell*, 59 AD3d 942). We therefore modify the order by vacating the amount of restitution ordered, and we remit the matter to County Court for a new hearing to determine the amount of restitution in compliance with Penal Law § 60.27.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

182

KA 09-00575

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAMON CRUMPLER, DEFENDANT-APPELLANT.

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

LAMON CRUMPLER, DEFENDANT-APPELLANT PRO SE.

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, J.), rendered January 16, 2009. 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). Defendant failed to preserve for our review his contention that his plea was not voluntarily, knowingly and intelligently entered on the ground that he was unaware at the time of the plea that he was thereby forfeiting his right to challenge the sufficiency of the evidence before the grand jury (*see People v Kalteux*, 2 AD3d 967; *see generally People v Hansen*, 95 NY2d 227, 233). Indeed, by pleading guilty, defendant also forfeited his contention that County Court erred in refusing to dismiss the indictment based upon the prosecutor's alleged failure to introduce exculpatory evidence before the grand jury (*see People v Simmons*, 27 AD3d 786, *lv denied* 7 NY3d 763; *People v Rogers*, 1 AD3d 112, *lv denied* 1 NY3d 568, 579).

Defendant further contends that the integrity of the grand jury proceeding was impaired when he appeared before the grand jury in jail clothing, and thus that the court also erred in refusing to dismiss the indictment on that ground. Although that contention survives the guilty plea (*see People v Gilmore*, 12 AD3d 1155), we conclude that it lacks merit. "[T]he prosecutor's cautionary instructions to the grand jurors dispelled any possible prejudice to defendant" (*People v Pennick*, 2 AD3d 1427, 1428, *lv denied* 1 NY3d 632; *see Gilmore*, 12 AD3d

at 1155). We note in any event that, after objecting to his appearance before the grand jury in jail clothing, defendant was afforded the opportunity to testify before the grand jury in street clothing but chose not to do so. Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

183

CAF 09-01558

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

IN THE MATTER OF DYLAN G.,
RESPONDENT-APPELLANT.

CHAUTAUQUA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

ORDER

RONALD A. SZOT, LAW GUARDIAN, DUNKIRK, FOR RESPONDENT-APPELLANT.

STEPHEN M. ABDELLA, COUNTY ATTORNEY, MAYVILLE (SCOTT F. HARLEY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Chautauqua
County (Judith S. Claire, J.), entered December 8, 2008 in a
proceeding pursuant to Family Court Act article 3. The amended order,
insofar as appealed from, ordered respondent to pay \$1,500 in
restitution.

It is hereby ORDERED that the amended order so appealed from is
unanimously affirmed without costs (*see generally Matter of Sean P.K.,*
___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

184

CAF 09-00656

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

IN THE MATTER OF TRAYVAUGHN F.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

WILLIAM F., RESPONDENT-RESPONDENT.

WILLIAM L. KOSLOSKY, ESQ., LAW GUARDIAN,
APPELLANT.

ORDER

WILLIAM KOSLOSKY, LAW GUARDIAN, UTICA, APPELLANT PRO SE.

EDWARD G. KAMINSKI, UTICA, FOR RESPONDENT-RESPONDENT.

CHESTER W. JASKOLKA, UTICA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered March 26, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order dismissed the petition to terminate the parental rights of respondent.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

186

CAF 08-01533

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

IN THE MATTER OF CYNTHIA JOY ALEXANDER,
PETITIONER-APPELLANT,

V

ORDER

JOSEPH J. PALAKA, III, RESPONDENT-RESPONDENT.

PAUL A. NORTON, CLINTON, FOR PETITIONER-APPELLANT.

ABBIE GOLDBAS, UTICA, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered June 13, 2008 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent physical custody of the parties' child.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

187

CA 09-01620

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

SHARON H. LEARNED AND JAMES D. LEARNED,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

FAXTON-ST. LUKE'S HEALTHCARE,
FAXTON-SUNSET-ST. LUKE'S HEALTHCARE
CENTER, INC., FAXTON-ST. LUKE'S HEALTHCARE
ST. LUKE'S DIVISION, AND MOHAWK VALLEY
NETWORK, INC., DEFENDANTS-APPELLANTS.

NAPIERSKI, VANDENBURGH & NAPIERSKI, L.L.P., ALBANY (CHRISTINA D.
PORTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MCLANE, SMITH AND LASCURETTES, L.L.P., UTICA (STEVEN A. SMITH OF
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered November 25, 2008 in a medical malpractice action. The order, insofar as appealed from, granted in part plaintiffs' motion to compel the production of certain documents and denied defendants' cross motion for a protective order.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Sharon H. Learned as the result of postoperative infections allegedly caused by defendants' negligence in failing, inter alia, to ensure that the operating room and surgical equipment were properly sterilized. Plaintiffs moved to compel defendants to provide specified documents, and defendants cross-moved for a protective order with respect thereto. Contrary to defendants' contention, Supreme Court properly granted plaintiffs' motion and denied defendants' cross motion "insofar as defendants are directed to produce" certain of the documents sought by plaintiffs, thereby granting plaintiffs' motion only in part. "Supreme Court is invested with broad discretion to supervise discovery and to determine what is material and necessary as that phrase is used in CPLR 3101 (a) . . . , and only a clear abuse of discretion will prompt appellate action" (*Community Dev. Assn. v Warren-Hoffman & Assoc.*, 4 AD3d 755 [internal quotation marks omitted]). We perceive no such clear abuse of discretion here. We note in particular that, with respect to the minutes of the Infectious Control Committee meetings for calendar year

2002, we conclude that defendants did not establish that those minutes were "generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3) or a malpractice prevention program pursuant to Public Health Law § 2805-j" (*Maisch v Millard Fillmore Hosps.*, 262 AD2d 1017, 1017). Thus, defendants failed to meet their burden of establishing that those minutes are shielded from disclosure (see *Kivlehan v Waltner*, 36 AD3d 597, 598; *Little v Highland Hosp. of Rochester*, 280 AD2d 908). In any event, in its bench decision the court directed defendants to produce the minutes "subject, however, to any objection that may be applicable pursuant to New York Education Law § 6527 (3) (b)," thus implicitly determining that the minutes would be subject to an in camera inspection to enable the court to determine whether those minutes are entitled to statutory privileges (see generally *Klingner v Mashioff*, 50 AD3d 746, 747; *Ross v Northern Westchester Hosp. Assn.*, 43 AD3d 1135, 1136).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

188

CA 09-01850

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

DIANE S. HARTMAN-JWEID, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MATTHEW K. OVERBAUGH, DEFENDANT-RESPONDENT.

JAMES G. DISTEFANO, SYRACUSE, FOR PLAINTIFF-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (RYAN T. EMERY OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered December 3, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed 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 her vehicle collided with a vehicle driven by defendant. We conclude that Supreme Court properly granted defendant's motion seeking summary judgment dismissing the complaint, which sought damages for both serious injury (see Insurance Law § 5102 [d]), and loss of earnings relating to injuries that did not constitute serious injuries. Defendant met his burden of establishing that plaintiff did not sustain a serious injury under the three categories alleged by plaintiff in the complaint, as amplified by the bill of particulars, i.e., permanent consequential limitation of use, significant limitation of use and 90/180-day categories, and plaintiff failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

In support of his motion, defendant submitted the affirmation and report of an orthopedic surgeon who examined plaintiff at his request. Defendant's expert concluded, based on his examination of plaintiff and his review of her medical records, that the only objective medical findings with respect to any alleged injury related to a preexisting degenerative condition of the spine. "[W]ith persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation" and, here, plaintiff failed to meet that burden (*Carrasco v Mendez*, 4 NY3d 566, 580; see *Lux v Jakson*, 52 AD3d 1253). Although plaintiff submitted the

affidavits of a chiropractor and her treating physician in opposition to the motion, neither affidavit addressed the conclusion of defendant's expert that the changes in plaintiff's spine were degenerative in nature (see *Marsh v City of New York*, 61 AD3d 552; *Valentin v Pomilla*, 59 AD3d 184, 186; *Lux*, 52 AD3d 1253).

Defendant further established that the additional non-permanent injuries alleged in the complaint, as amplified by the bill of particulars, were not causally related to the accident and thus were insufficient to establish that plaintiff sustained a serious injury in the accident under the 90/180-day category. Indeed, the affirmed report of defendant's expert indicates that those injuries lacked a physiological base and that any limitation in plaintiff's activities was self-imposed (see *Marsh*, 61 AD3d 552). The expert affidavits submitted by plaintiff in opposition to the motion address only her alleged spinal injuries, which as noted were related to a preexisting degenerative condition, and thus plaintiff failed to raise a triable issue of fact with respect to the 90/180-day category.

Finally, we reject the contention of plaintiff that the court erred in granting that part of defendant's motion concerning her claim for loss of earnings that continue beyond the three-year statutory period (see generally Insurance Law § 5102 [a] [2]). Although a plaintiff need not sustain a serious injury to support such a claim (see *Colvin v Slawoniewski*, 15 AD3d 900; *Tortorello v Landi*, 136 AD2d 545), defendant met his initial burden by establishing that plaintiff did not sustain any injury that was causally related to the accident and that any limitation on plaintiff's activities was self-imposed, and plaintiff failed to raise a triable issue of fact with respect to that claim.

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

191

CA 09-00412

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

LIZA A. TURNER, AS ADMINISTRATRIX OF THE
ESTATE OF BRIAN K. TURNER, DECEASED, AND
LIZA A. TURNER, INDIVIDUALLY AND AS SURVIVING
SPOUSE AND AS PARENT AND NATURAL GUARDIAN OF
COURTNEY TURNER, JONATHAN TURNER, TYLER
TURNER AND ANDREW TURNER, INFANTS UNDER 14
YEARS OF AGE, PLAINTIFF-RESPONDENT,

ORDER

V

STEVE M. VULCAN, ET AL., DEFENDANTS,
AND BALDWINVILLE LODGE NO. 644, LOYAL ORDER
OF MOOSE, DEFENDANT-APPELLANT.

LEWIS BRISBOIS BISGAARD & SMITH LLP, NEW YORK CITY (GEORGE CATLETT OF
COUNSEL), FOR DEFENDANT-APPELLANT.

GERMAIN & GERMAIN, LLP, SYRACUSE (PAUL A. GERMAIN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered December 1, 2008 in an action for, inter alia, wrongful death. The order, insofar as appealed from, denied in part the motion of defendant Baldwinsville Lodge No. 644, Loyal Order of Moose, for summary judgment.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties to the appeal on December 1, 2009,

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

193

CA 09-01885

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

ELLIS CLARK WELLMAN, JR., PLAINTIFF-RESPONDENT,

V

ORDER

RONALD V. AJELLO, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

CALLI, CALLI & CULLY, UTICA (HERBERT J. CULLY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MCLANE, SMITH AND LASCURETTES, L.L.P., UTICA (STEVEN A. SMITH OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (John W. Grow, J.), entered January 7, 2009 in an action pursuant to RPAPL article 15. The order, among other things, denied the motion of defendant Ronald V. Ajello for a directed verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see *Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; see also CPLR 5501 [a] [1]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

194

CA 09-01888

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

ELLIS CLARK WELLMAN, JR., PLAINTIFF-RESPONDENT,

V

ORDER

RONALD V. AJELLO, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

CALLI, CALLI & CULLY, UTICA (HERBERT J. CULLY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MCLANE, SMITH AND LASCURETTES, L.L.P., UTICA (STEVEN A. SMITH OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (John W. Grow, J.), entered January 23, 2009 in an action pursuant to RPAPL article 15. The judgment declared that plaintiff is the owner of certain real property by adverse possession and directed defendant Ronald V. Ajello to remove and relocate his stockade fence.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

195

TP 09-01734

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

IN THE MATTER OF ANTONIO VELEZ, PETITIONER,

V

ORDER

JAMES A. MANCE, SUPERINTENDENT, MARCY
CORRECTIONAL FACILITY, NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES, RESPONDENT.

ANTONIO VELEZ, PETITIONER PRO SE.

ANDREW M. CUOMO, 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, Oneida County [Anthony F. Shaheen, J.], entered August 14, 2009) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

196

KA 08-02215

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TALMADGE STREETER, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered September 26, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

199

KA 06-03648

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEGLOYDE POLES, DEFENDANT-APPELLANT.

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

DEGLOYDE POLES, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Raymond E. Cornelius, J.), rendered May 5, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second 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.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). Defendant contends that the CPL 710.30 notice was insufficient because it did not include the names of the witnesses who identified defendant from photo arrays prior to trial. We reject that contention. Even assuming, arguendo, that the People were required to serve a CPL 710.30 notice for those pretrial identifications of defendant (see *People v Grajales*, 8 NY3d 861, 862), we conclude that the notice was sufficient because it set forth "the date of the identification proceeding, the location where it occurred and the manner of identification" (*People v Sumter*, 68 AD3d 1701, 1701; see *People v Lopez*, 84 NY2d 425, 428).

Defendant failed to preserve for our review his contention that Supreme Court's initial aggressor charge was improper (see CPL 470.05 [2]), 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 further conclude that defense counsel was not ineffective in requesting the charge, which comports with that set

forth in the Pattern Criminal Jury Instructions (see CJI2d[NY] Defense, Justification: Use of Deadly Physical Force in Defense of a Person; see also *People v McWilliams*, 48 AD3d 1266, 1267, lv denied 10 NY3d 961). Contrary to the contention of defendant in his main and pro se supplemental briefs, defense counsel's representation, viewed in its entirety, was meaningful (see generally *People v Baldi*, 54 NY2d 137, 147).

We have considered the remaining contentions of defendant in his pro se supplemental brief and conclude that none requires reversal.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

200

KA 08-02386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JERMAINE L. WILLIAMS, DEFENDANT-APPELLANT.

CYNTHIA B. 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 June 26, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

201

KA 08-01270

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES POLLARD, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 9, 2008. The judgment convicted defendant, after a nonjury trial, of rape in the first degree and rape 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 following a nonjury trial of rape in the first degree (Penal Law § 130.35 [1]) and rape in the second degree (§ 130.30 [1]). Contrary to the contention of defendant, Supreme Court properly refused to suppress the statements that he made to the police after he had waived his *Miranda* rights and voluntarily submitted to a computer voice stress analysis (CVSA) test. "Here, no impression that the [CVSA] test was omniscient was foisted upon defendant" (*People v Tarsia*, 50 NY2d 1, 11), and the use of the CVSA test as an interview tool did not provoke an involuntary confession. Indeed, although defendant made statements that may be construed as inculpatory, he consistently denied the charges. Defendant consented to the court's determination that the police would be permitted to testify at trial with respect to those statements without reference to the CVSA test, and we thus conclude that he waived his contention on appeal that such testimony should have been suppressed because it violated the "rule of completeness" (see generally *People v Backus*, 67 AD3d 1428, 1429). In any event, that contention is without merit. The use of the CVSA test as an interview tool did not constitute exculpatory evidence and was not necessary to provide a complete narration of defendant's inculpatory statements (see generally *People v Harris*, 249 AD2d 775, 777).

Defendant made only a general motion for a trial order of dismissal at the close of the People's case (see *People v Gray*, 86

NY2d 10, 19), and he failed to renew his motion after presenting evidence (see *People v Hines*, 97 NY2d 56, 61, rearg denied 97 NY2d 678). He thus failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction. In any event, that contention is without merit. The victim testified in detail concerning the crimes, and other testimony, including that of defendant, corroborated her testimony, thereby satisfying "the proof and burden requirements for every element of the crime[s] charged" (*People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different result would not have been unreasonable, we conclude that the court did not fail to give the evidence the weight it should be accorded, and there is no basis upon which to disturb the court's credibility determinations (see generally *id.*).

Defendant failed to object to the court's questioning of both defendant and defense counsel, and he therefore failed to preserve for our review his contention that the court assumed the role or appearance of the prosecutor (see CPL 470.05 [2]). In any event, we reject that contention. It is well established that a court may intervene "in order to clarify a confusing issue" (*People v Arnold*, 98 NY2d 63, 67), and the court's questions to defendant with respect to communications between the victim and defendant through MySpace and AOL instant messaging did not constitute an abuse of discretion. The comments of the court concerning its discussion in chambers with defense counsel with respect to its understanding of that testimony and whether the People would call a rebuttal witness likewise did not constitute an abuse of discretion (*cf. id.* at 68). We have reviewed defendant's remaining contentions with respect to whether the court impermissibly assumed the role or appearance of a prosecutor and conclude that they are without merit.

We reject the further contention of defendant that he was denied effective assistance of counsel. Defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712), and we conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147; see *Benevento*, 91 NY2d at 712). Finally, the sentence is not unduly harsh or severe.

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

202

KA 08-02000

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL J. HEVERLY, DEFENDANT-APPELLANT.

CHRISTOPHER S. BRADSTREET, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, J.), rendered January 14, 2008. The judgment convicted defendant, upon his plea of guilty, of felony driving while intoxicated (two counts), aggravated unlicensed operation of a motor vehicle in the first degree, offering a false instrument for filing in the first degree and obstructing governmental administration in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2]; § 1193 [1] [c] [former ii]). We note that defendant pleaded guilty following voir dire and the People's disclosure of *Rosario* material. Defendant contends that he was denied effective assistance of counsel because defense counsel failed to request an appropriate sanction for an alleged *Rosario* violation and failed to conduct a complete investigation of the case before proceeding to trial. To the extent that the contention of defendant survives the plea thereafter entered by him and his waiver of the right to appeal (see *People v Santos*, 37 AD3d 1141, lv denied 8 NY3d 950), it is lacking in merit.

Contrary to defendant's contention, defense counsel objected to the *Rosario* material at issue, i.e., three letters written by defendant to the District Attorney, and requested additional time to review that material with defendant. County Court granted that request and, based on the record before us, it cannot be said that an application for a sanction, such as preclusion, would have been granted inasmuch as defendant was not prejudiced by the alleged delay in disclosure of the letters (see generally *People v Alves*, 1 AD3d 938). Furthermore, we note that one of the letters was the basis for the charge of offering a false instrument for filing in the first

degree (Penal Law § 175.35), and thus it must be presumed that defendant was aware of the contents of that letter. In any event, we conclude that defendant received meaningful representation. There is no support in the record for defendant's contention that defense counsel failed to conduct a complete investigation. Indeed, the record establishes that defendant "receive[d] an advantageous plea[,] and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel" (*People v Ford*, 86 NY2d 397, 404). Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

205

KAH 08-01031

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
FRANK HARRIS, PETITIONER-APPELLANT,

V

ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENT-RESPONDENT.

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

FRANK HARRIS, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 31, 2009 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.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

206

KAH 09-00858

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES COSTANZO, PETITIONER-APPELLANT,

V

ORDER

JAMES MORRISSEY, SUPERINTENDENT, BUTLER
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

ROBERT A. DINIERI, CLYDE, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wayne County (John
B. Nesbitt, A.J.), entered March 5, 2009 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.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

209

CA 09-01784

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

KRYSTALO HETEEKIDES, INDIVIDUALLY AND AS THE
EXECUTRIX OF THE ESTATE OF DEMETRIOS HETEEKIDES,
ALSO KNOWN AS JIMMY HETEEKIDES, DECEASED,
PLAINTIFF-RESPONDENT,

V

ORDER

COUNTY OF ONTARIO AND GARY G. BAXTER, AS
TREASURER OF COUNTY OF ONTARIO,
DEFENDANTS-APPELLANTS.

JASON S. DIPONZIO, P.C., ROCHESTER (JASON S. DIPONZIO OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (MARY JO S. KORONA OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (John
J. Ark, J.), entered November 18, 2008. The order, among other
things, denied defendants' motion to dismiss the complaint.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

210

CA 09-01826

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

LISA M. GROCHOWSKI, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JASON P. FUDELLA, DEFENDANT-APPELLANT.

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

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Nelson H. Cosgrove, J.H.O.), entered May 1, 2009 in a personal injury action. The order granted plaintiff's motion to set aside the verdict and for a new trial.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her vehicle was rear-ended by a vehicle driven by defendant. Following a summary jury trial conducted pursuant to the parties' stipulation in accordance with "the Summary Jury Trial Rules of the Eighth Judicial District," the jury found in favor of defendant. Defendant appeals from an order granting plaintiff's motion to set aside the verdict as against the weight of the evidence and for a new trial. We reject defendant's contention that Supreme Court violated the terms of the stipulation in determining the motion. "A stipulation between parties is an independent contract subject to the principles of contract interpretation" (*Matter of Black v New York State & Local Employees' Retirement Sys.*, 30 AD3d 920, 920). Here, the parties stipulated that the issue of negligence would be submitted to the jury and that neither party would request the court to direct a verdict pursuant to CPLR 4401 on that issue. The stipulation is silent, however, with respect to motions to set aside the verdict as against the weight of the evidence pursuant to CPLR 4404, and thus the court properly concluded that the terms of the stipulation do not evince the intent of plaintiff to forego her right to move to set aside the verdict (see generally *White v Winter*, 28 AD3d 1148).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

211

CA 09-01836

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

PAMELA MITCHELL, AS EXECUTRIX OF THE ESTATE OF
SARAH FINCHER, DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, LANCASTER (DAVID W. OLSON OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (RUTHANNE WANNOP OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered November 19, 2008 in a wrongful death action. The order granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiff appeals from an order in which Supreme Court granted the motion of defendant seeking to dismiss the complaint pursuant to CPLR 3012 (b) based on plaintiff's failure to serve the complaint in a timely manner in response to its notice of appearance and demand for complaint. In order to defeat the motion, plaintiff was required to "demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action . . . It is generally within the sound discretion of the court to determine what constitutes a reasonable excuse for the delay in serving the complaint . . . , and the court has the discretion to excuse delay based on law office failure" (*Kordasiewicz v BCC Prods., Inc.*, 26 AD3d 853, 854 [internal quotation marks omitted]). We conclude that the court improvidently exercised its discretion in granting the motion and dismissing the complaint where, as here, the 12-day delay in serving the complaint was the result of law office failure (*see Nolan v Lechner*, 60 AD3d 473), and plaintiff's notice of claim established that plaintiff has a meritorious cause of action (*cf. Kordasiewicz*, 26 AD3d at 855; *see generally Guzetti v City of New York*, 32 AD3d 234).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

213

CA 09-01722

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

JONATHAN C. REYNHOUT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DEBORAH HUESTON, FORMERLY KNOWN AS DEBORAH
REYNHOUT, DEFENDANT-RESPONDENT.

DAVID C. LAUB, BUFFALO, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 30, 2009. The order, insofar as appealed from, denied the motion of plaintiff seeking, inter alia, to modify the judgment of divorce.

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

Memorandum: Supreme Court properly denied the motion of plaintiff husband seeking, inter alia, to modify the judgment of divorce, which incorporated but did not merge the terms of the parties' separation agreement, by reducing the amount of maintenance paid by him. In support of that part of his motion, plaintiff was required in accordance with the case law in effect at the time of entry of the judgment to "present evidence that there has been a substantial change in financial circumstances between the time of entry of the judgment of divorce and the time of the [motion] for modification" (*McCarthy v McCarthy*, 214 AD2d 1000, 1000; see *Matter of Downer v Downer*, 199 AD2d 1092; *Kurtz v Kurtz*, 58 AD2d 1006, lv denied 43 NY2d 641). Plaintiff submitted no evidence of his financial situation at those relevant times and thus failed to meet his burden with respect to that part of the motion (see *McCarthy*, 214 AD2d 1000; *Klapper v Klapper*, 204 AD2d 518, 519). The contention of defendant wife that the court erred in denying her application for attorney's fees is not properly before us inasmuch as she failed to take a cross appeal from the order (see generally CPLR 5515; *Andritz v Andritz*, 131 AD2d 529).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

215

CA 09-00842

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

STEPHEN J. CORGAN, PLAINTIFF-RESPONDENT,

V

ORDER

THE DIMARCO GROUP, LLC AND 4110 WEST
RIDGE, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 5, 2008 in a breach of contract action. The order, inter alia, determined that plaintiff is entitled to damages upon the lease of certain real property following a nonjury trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see CPLR 5501 [a] [1]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

216

CA 09-00962

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

STEPHEN J. CORGAN, PLAINTIFF-RESPONDENT,

V

ORDER

THE DIMARCO GROUP, LLC AND 4110 WEST
RIDGE, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 11, 2008 in a breach of contract action. The order, inter alia, determined that plaintiff is entitled to damages upon the supplemental lease agreement with respect to certain real property following a nonjury trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see CPLR 5501 [a] [1]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

217

CA 09-00963

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

STEPHEN J. CORGAN, PLAINTIFF-RESPONDENT,

V

ORDER

THE DIMARCO GROUP, LLC AND 4110 WEST
RIDGE, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(Kenneth R. Fisher, J.), entered April 22, 2009 in a breach of
contract action. The judgment awarded damages to plaintiff against
defendants following a nonjury trial.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

218

CA 09-00964

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

STEPHEN J. CORGAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THE DIMARCO GROUP, LLC AND 4110 WEST
RIDGE, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 4.)

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(Kenneth R. Fisher, J.), entered April 27, 2009 in a breach of
contract action. The judgment awarded damages to plaintiff against
defendant The DiMarco Group, LLC following a nonjury trial.

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

Memorandum: Defendants appeal from a judgment rendered following
a nonjury trial that awarded damages to plaintiff, a licensed real
estate broker, for the breach of the "Professional Services and Fee
Agreement" (Agreement) between plaintiff and defendant The DiMarco
Group, LLC (DiMarco Group). Plaintiff established that he was
entitled to a commission pursuant to the Agreement because he was the
procuring cause of the lease and the supplemental lease agreement
between defendant 4110 West Ridge, LLC (4110) and the United States
General Services Administration (GSA) (*see Williams Real Estate Co. v
Solow Dev. Corp.*, 38 NY2d 978, *rearg denied* 39 NY2d 832; *Getreu v
Plaxall Inc.*, 261 AD2d 574). Defendants contend for the first time on
appeal that, because 4110 is the owner and lessor of the leased
property, DiMarco Group is not liable for plaintiff's commissions
under the agreement. Defendants further contend, also for the first
time on appeal, that the interpretation of the Agreement by Supreme
Court leads to commercially unreasonable results. "It is well settled
that '[a]n appellate court should not, and will not, consider
different theories or new questions, if proof might have been offered
to refute or overcome them had those theories or questions been
presented in the court of first instance' " (*Ciesinski v Town of
Aurora*, 202 AD2d 984, 985). Here, plaintiff might have presented
evidence to refute or overcome both contentions, and we thus do not

consider those contentions on appeal (see *Oram v Capone*, 206 AD2d 839, 840).

The court properly concluded, contrary to defendants' position at trial, that nothing in the Agreement provided for its expiration upon plaintiff's employment with DiMarco Group or upon the withdrawal by GSA of its initial Solicitation For Offers. Although the testimony of the owner of DiMarco Group with respect to his interpretation of the Agreement was to the contrary, "the 'unilateral expression of one party's postcontractual subjective understanding of the terms of [an] agreement . . . [is] not probative as an aid to the interpretation of the [agreement]' " (*Di Giulio v City of Buffalo*, 237 AD2d 938, 939).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

219

KA 08-00853

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALLAN QUIGLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., 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 Erie County Court (Thomas P. Amodio, J.), rendered January 8, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal mischief in the third degree and possession of burglar's tools.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is modified on the law by reducing the conviction of criminal mischief in the third degree (Penal Law § 145.05 [2]) to criminal mischief in the fourth degree (§ 145.00 [1]) and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for sentencing on the conviction of criminal mischief in the fourth degree.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a nonjury trial of criminal mischief in the third degree (Penal Law § 145.05 [2]) and possession of burglar's tools (§ 140.35) and, in appeal No. 2, he appeals from a resentence pursuant to which he was resentenced as a second felony offender.

With respect to the judgment in appeal No. 1, we agree with defendant that the conviction of criminal mischief in the third degree is not supported by legally sufficient evidence inasmuch as the People did not establish the value of the damage to the church property (see generally *People v Bleakley*, 69 NY2d 490, 495). A conviction of that crime requires proof beyond a reasonable doubt that the damage to the property exceeds \$250 (Penal Law § 145.05 [2]; see *People v Pluff*, 217 AD2d 744). The People presented evidence establishing that the police found defendant on a ladder against the church in question at night, and that they also found a copper gutter that was bent and folded next to the ladder. The People, however, offered only hearsay testimony to establish the cost of the damage to the property, which is legally

insufficient to support the conviction of criminal mischief (see *People v Jeffries*, 151 AD2d 964, lv denied 74 NY2d 848). Nevertheless, the evidence is legally sufficient to establish that defendant intentionally damaged property (see *People v Civitello*, 287 AD2d 784, 786-787, lv denied 97 NY2d 703; *People v Duran*, 238 AD2d 351, 352; *People v Brantley*, 186 AD2d 1036, 1037, lv denied 81 NY2d 785). We therefore modify the judgment in appeal No. 1 by reducing the conviction of criminal mischief in the third degree to criminal mischief in the fourth degree (§ 145.00 [1]), "which requires no proof of value" (*Duran*, 238 AD2d at 352; see CPL 470.15 [2] [a]), and we modify the resentence in appeal No. 2 by vacating the sentence imposed on count one of the indictment (see CPL 470.15 [2] [a]). We remit the matter to County Court for sentencing on the conviction of criminal mischief in the fourth degree (see CPL 470.20 [4]). We have examined defendant's remaining contentions and conclude that they are without merit.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

220

KA 08-00855

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALLAN QUIGLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., 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 Erie County Court (Thomas P. Amodeo, J.), rendered February 5, 2008. Defendant was resented as a second felony offender upon his conviction of criminal mischief in the third degree and possession of burglar's tools.

It is hereby ORDERED that the resentence so appealed from is unanimously modified on the law by vacating the sentence imposed on count one of the indictment and as modified the resentence is affirmed.

Same Memorandum as in *People v Quigley* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

221

KA 08-02647

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TREVOR DOBSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (MICHAEL D. MCCARTNEY OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, J.), rendered October 20, 2008. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class D felony, 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: In appeal No. 1, defendant appeals from a judgment convicting him of driving while intoxicated as a class D felony (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (ii)]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [2] [a] [i]) and, in appeal No. 2, defendant appeals from a judgment convicting him of the same crimes. County Court did not err in denying defendant's motion to vacate the plea in each appeal. Although defendant contends that he believed that he was pleading guilty only to one class D and one class E felony, the record establishes that the fact that he was pleading guilty to two class D felonies was repeatedly explained to him and thus that his plea in each appeal was knowing, voluntary, and intelligent (*see People v Smith*, 37 AD3d 1141, *lv denied* 9 NY3d 851, 926; *People v Price*, 309 AD2d 1259, *lv denied* 1 NY3d 578). Finally, we reject defendant's challenge to the severity of the sentence in each appeal.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

222

KA 08-02648

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TREVOR DOBSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (MICHAEL D. MCCARTNEY OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, J.), rendered October 20, 2008. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class D felony, 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.

Same Memorandum as in *People v Dobson* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2010]).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

223

KA 08-01502

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH MCMASTER, DEFENDANT-APPELLANT.

DENNIS CLAUS, LIVERPOOL, FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered June 5, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, promoting prison contraband in the first degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant failed to preserve for our review his contention that County Court failed to conduct an adequate inquiry into his allegation that the jury had engaged in premature deliberations (*see* CPL 470.05 [2]; *People v Smith*, 49 AD3d 904, 905, *lv denied* 10 NY3d 870; *People v Paccione*, 295 AD2d 450, 450-451, *lv denied* 98 NY2d 731), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The sentence is not unduly harsh or severe.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

229

TP 09-01846

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

IN THE MATTER OF YU ZHANG, PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
CHRISTOPHER C. DAHL, PRESIDENT, STATE
UNIVERSITY OF NEW YORK AT GENESEO, AND
STATE UNIVERSITY OF NEW YORK AT GENESEO,
RESPONDENTS.

YU ZHANG, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF
COUNSEL), FOR RESPONDENTS CHRISTOPHER C. DAHL, PRESIDENT, STATE
UNIVERSITY OF NEW YORK AT GENESEO, AND STATE UNIVERSITY OF NEW YORK AT
GENESEO.

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, Monroe County [William P. Polito, J.], entered August 18, 2009) to annul a determination of respondent New York State Division of Human Rights. The determination dismissed petitioner's complaints alleging of unlawful discrimination and retaliation by respondents Christopher C. Dahl, President, State University of New York at Geneseo, and State University of New York at Geneseo.

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, inter alia, to annul the determination of respondent New York State Division of Human Rights (hereafter, SDHR) dismissing his complaints alleging unlawful discrimination and retaliation. We conclude that the determination is supported by substantial evidence and thus must be confirmed (*see generally Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331; *Matter of Mohawk Val. Orthopedics, LLP v Carcone*, 66 AD3d 1350, 1351). Although petitioner established a prima facie case of discrimination, we conclude that respondents State University of New York at Geneseo (SUNY Geneseo) and Christopher C. Dahl, the president of SUNY Geneseo, rebutted the presumption of discrimination by presenting nondiscriminatory reasons to support their decision not to grant tenure to petitioner (*see generally Ferrante v American Lung*

Assn., 90 NY2d 623, 629). Petitioner failed to establish that those reasons were merely a pretext for discrimination (see generally *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305; *Ferrante*, 90 NY2d at 629-630). In addition, petitioner failed to establish that SUNY Geneseo and Dahl engaged in retaliation after petitioner filed his complaint for unlawful discrimination (see Executive Law § 296 [7]).

Petitioner contends that SDHR failed to comply with various time limits set forth in Executive Law § 297. Those time limits, however, are directory rather than mandatory, and in any event petitioner has not demonstrated substantial prejudice as a result of the minimal delays (see *Union Free School Dist. No. 6 of Towns of Islip & Smithtown v New York State Human Rights Appeal Bd.*, 35 NY2d 371, 380-381, rearg denied 36 NY2d 807; *Matter of 121-129 Broadway Realty v New York State Div. of Human Rights*, 43 AD2d 754). We have considered petitioner's remaining contentions and conclude that they are without merit.

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

230

KAH 08-02545

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RICHARD PERALES, PETITIONER-APPELLANT,

V

ORDER

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

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

Appeal from a judgment of the Supreme Court, Seneca County
(Dennis F. Bender, A.J.), entered October 10, 2008 in a habeas corpus
proceeding. The judgment dismissed the petition.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

234

CA 09-01912

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

IN THE MATTER OF CARMEN LARATONDA,
CLAIMANT-APPELLANT,

V

ORDER

LEWISTON-PORTER CENTRAL SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR
CLAIMANT-APPELLANT.

PETRONE & PETRONE, P.C., BUFFALO (JAMES H. COSGRIFF, III, OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County
(Richard C. Kloch, Sr., A.J.), entered December 12, 2008. The order
denied 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 affirmed without costs.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

235

CA 09-00535

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

KADIJA MOALIM, PLAINTIFF-APPELLANT,

V

ORDER

ELIZABETH C. HENEHAN, DEFENDANT-RESPONDENT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (J. MICHAEL CHAMBLEE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF LAURIE G. OGDEN, ROCHESTER (DAVID F. BOWEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered November 6, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

236

CA 09-01928

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

KOREY P. KUSTES, PLAINTIFF-RESPONDENT,

V

ORDER

NICOLE S. CUMMINGS, ET AL., DEFENDANTS,
AND JOSEPH SHEEHAN, JR., DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF
COUNSEL), FOR DEFENDANT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (RAFAEL O. GOMEZ OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered June 3, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant Joseph Sheehan, Jr. for summary judgment.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties to the appeal on December 28, 2009,

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

239

CA 09-02472

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

IN THE MATTER OF MERCO, INC.,
PETITIONER-APPELLANT,

V

ORDER

NIAGARA FALLS WATER BOARD,
RESPONDENT-RESPONDENT.

YARUSSI CONSTRUCTION, INC., RESPONDENT.

KING & KING, LLP, LONG ISLAND CITY (PETER M. KUTIL OF COUNSEL), AND
ERNSTROM & DRESTE, LLP, ROCHESTER, FOR PETITIONER-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (KIMBERLY A. COLAIACOVO OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (DAMON A. DECASTRO OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court,
Niagara County (Ralph A. Boniello, III, J.), entered November 30, 2009
in a proceeding pursuant to CPLR article 78. The judgment dismissed
the petition and vacated a temporary restraining order.

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

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

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

240

OP 09-02584

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

IN THE MATTER OF LAWRENCE CARTER, PETITIONER,

V

MEMORANDUM AND ORDER

JOHN T. WARD, JR., CHAUTAUQUA COUNTY COURT
JUDGE, RESPONDENT.

DAVID W. FOLEY, CHAUTAUQUA COUNTY DISTRICT
ATTORNEY, INTERVENOR-RESPONDENT.

WILLIAM F. COUGHLIN, PUBLIC DEFENDER, MAYVILLE, FOR PETITIONER.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE, INTERVENOR-RESPONDENT PRO
SE.

Proceeding pursuant to CPLR article 78 (instituted in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit respondent from enforcing the order that disqualified petitioner's appointed counsel.

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

Memorandum: Petitioner was initially indicted by a Chautauqua County grand jury in January 2009 on charges of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and murder in the second degree (§ 125.25 [1], [3]). Approximately one week prior to trial, the People moved to disqualify petitioner's appointed counsel, the Chautauqua County Public Defender. The People asserted that there was an actual conflict of interest because a codefendant who had pleaded guilty and agreed to testify against petitioner in exchange for a lesser sentence was represented by a former assistant public defender who was a partner in a private law practice with an attorney presently serving as a part-time assistant public defender. Petitioner in fact was represented by two assistant public defenders who did not share a practice or office space with either the codefendant's counsel or his partner. Although petitioner waived the conflict on the record, County Court granted the People's motion to disqualify petitioner's appointed counsel on the ground that petitioner's right to effective assistance of counsel would be violated in the event that petitioner was represented by his appointed counsel. Petitioner commenced the instant CPLR article 78 proceeding in this Court, seeking to prohibit respondent from enforcing the order that disqualified petitioner's appointed counsel.

We dismiss the petition, although we note that we have not addressed the merits thereof. "Even if an error of allegedly constitutional dimension is involved here, 'prohibition does not lie because the removal of counsel would be reviewable upon direct appeal' " (*Matter of Barrett v Vogt*, 170 AD2d 860, 861, quoting *Matter of Lipari v Owens*, 70 NY2d 731, 733; see *Matter of Patel v Breslin*, 45 AD3d 1240, 1241, lv denied 10 NY3d 704).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court

MOTION NO. (1471/91) KA 10-00077. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOMINIC BRETTI, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., LINDLEY, GREEN, AND PINE, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (686/94) KA 09-02420. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HECTOR RIVERA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, in failing to argue that Supreme Court erred in responding to notes from the jury during its deliberations. Upon our review of the trial court proceedings, we conclude that the issue may have merit. Therefore, the order of July 15, 1994 is vacated and this Court will consider the appeal de novo (see *People v LeFrois*, 151 AD2d 1046). Defendant is directed to perfect his appeal on or before May 17, 2010. PRESENT: PERADOTTO, J.P., FAHEY, GREEN, AND PINE, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (681/95) KA 06-02255. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EUGENE TURNER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CARNI, GREEN, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1521/00) KA 98-05049. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V GREAT GOD WHITE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, GREEN, AND PINE, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (737/05) KA 05-00449. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY VASQUEZ, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, AND PINE, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1150/05) KA 03-00443. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL WILSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CARNI, GREEN, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (445/06) KA 05-00193. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT. -- Motion for reargument and renewal denied. PRESENT: SMITH, J.P., CARNI, GREEN, AND PINE, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (445/06) KA 05-00193. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., GREEN, PINE, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (240/07) KA 06-03188. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V JAMES H. GILKESON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, GREEN, PINE, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

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, in the alternative, leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, GREEN, AND PINE, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (753/08) KA 06-01225. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAMAR GRIMES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PINE, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1048/08) KA 02-02682. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AARON MCKNIGHT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., GREEN, PINE, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1040/09) CA 09-00219. -- IN THE MATTER OF ST. ANN'S HOME FOR THE AGED, ET AL., PETITIONERS-RESPONDENTS-APPELLANTS, V RICHARD F. DAINES, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK, RESPONDENT-APPELLANT-RESPONDENT. -- Motion to correct memorandum and for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND GREEN, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1127/09) CA 09-00421. -- HUEN NEW YORK, INC.,
PLAINTIFF-APPELLANT, V BOARD OF EDUCATION CLINTON CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the
Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, GREEN, AND
PINE, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1153/09) CA 09-00652. -- IN THE MATTER OF THE RIDGE ROAD FIRE
DISTRICT, PETITIONER-RESPONDENT, V MICHAEL P. SCHIANO, AS HEARING OFFICER
DESIGNATED PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT BETWEEN RIDGE
ROAD FIRE DISTRICT AND RIDGE ROAD PROFESSIONAL FIREFIGHTERS ASSOCIATION
IAFF, LOCAL 3794, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO,
RESPONDENT, KEVIN NOWAK, AND RIDGE ROAD PROFESSIONAL FIREFIGHTERS
ASSOCIATION IAFF, LOCAL 3794, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,
AFL-CIO, RESPONDENTS-APPELLANTS. -- Motion for reargument or leave to
appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH,
CARNI, PINE, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1156/09) CA 09-00354. -- ONEIDA INDIAN NATION, A SOVEREIGN
NATION, PLAINTIFF-APPELLANT, V HUNT CONSTRUCTION GROUP, INC.,
DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the
Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND
GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1177/09) CA 08-01871. -- KATHLEEN DOODY, PLAINTIFF-RESPONDENT,
V KENNETH L. GOTTSBALL AND DIANE A. GOTTSBALL, DEFENDANTS-APPELLANTS.

(APPEAL NO. 1.) -- Motion for clarification or reargument denied. PRESENT:
CENTRA, J.P., FAHEY, PERADOTTO, AND GREEN, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1178/09) CA 08-01872. -- KATHLEEN DOODY, PLAINTIFF-RESPONDENT,
V KENNETH L. GOTTSBALL AND DIANE A. GOTTSBALL, DEFENDANTS-APPELLANTS.

(APPEAL NO. 2.) -- Motion for clarification or reargument denied. PRESENT:
CENTRA, J.P., FAHEY, PERADOTTO, AND GREEN, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1293/09) CA 09-01063. -- DONALD GIMENO,
PLAINTIFF-APPELLANT-RESPONDENT, V AMERICAN SIGNATURE, INC., DOING BUSINESS
AS VALUE-CITY FURNITURE, CONSTRUCTION ONE, DEFENDANTS-RESPONDENTS, MELCO
CONSTRUCTION SERVICES, INC., MIDWEST INTERIORS,

DEFENDANTS-RESPONDENTS-APPELLANTS, ET AL., DEFENDANT. -- Motion for
reargument denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND GREEN, JJ.
(Filed Feb. 11, 2010.)

MOTION NO. (1298/09) KA 08-02280. -- THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT, V MURTADA S. EBRAHIM, DEFENDANT-APPELLANT. -- Motion for
reargument denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND GORSKI,
JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1309/09) CA 09-00953. -- IN THE MATTER OF PASTOR KEITH H.

SCOTT, SR., ET AL., PETITIONERS, DORA RICHARDSON, JOSEPHINE RUSH, JOHN MCKENDRY, AND SHELLEY MCKENDRY, PETITIONERS-APPELLANTS, V CITY OF BUFFALO, COMMON COUNCIL OF CITY OF BUFFALO, BYRON BROWN, IN HIS OFFICIAL CAPACITY AS MAYOR OF CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF PUBLIC WORKS, DEPARTMENT OF ECONOMIC DEVELOPMENT PERMITS AND INSPECTION, BUFFALO SEWER AUTHORITY AND BUFFALO MUNICIPAL WATER FINANCE AUTHORITY,

RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, PINE, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1311/09) CA 09-00707. -- JASON ANDREWS, PLAINTIFF-RESPONDENT, V NORTHWEST AUTO MALL AND FRANK SANTONASTASO, DEFENDANTS-APPELLANTS. --

Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1354/09) CA 09-00229. -- MICHAEL PASSUCCI, PLAINTIFF-RESPONDENT, V THE HOME DEPOT, INC., THE HOME DEPOT SPECIAL SERVICES, INC., MICHAEL BLAIR AND MICHAEL KEITH NAZAR,

DEFENDANTS-APPELLANTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, AND PINE, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1367/09) CA 09-00332. -- JAMES O'DONNELL, PLAINTIFF-APPELLANT, V BUFFALO-DS ASSOCIATES, LLC, DELTA SONIC CARWASH SYSTEMS, INC., AND

BENDERSON DEVELOPMENT COMPANY, DEFENDANTS-RESPONDENTS. -- Motion for reargument and renewal denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND PERADOTTO, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1401/09) KA 07-02521. -- **THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES L. RIVERS, DEFENDANT-APPELLANT.** -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

MOTION NO. (1422/09) KA 08-01681. -- **THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EMMETT BAKER, DEFENDANT-APPELLANT.** -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, PINE, AND GORSKI, JJ. (Filed Feb. 11, 2010.)

KAH 09-00118. -- **THE PEOPLE OF THE STATE OF NEW YORK EX REL. JOSE CRUZ, PETITIONER-APPELLANT, V DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT.** -- Judgment unanimously affirmed without costs. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Wyoming County, Mark H. Dadd, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ. (Filed Feb. 11, 2010.)

KAH 09-00112. -- **THE PEOPLE OF THE STATE OF NEW YORK EX REL. DONELL GRANT, PETITIONER-APPELLANT, V DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT.** -- Judgment unanimously affirmed without costs.

Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Wyoming County, Mark H. Dadd, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ. (Filed Feb. 11, 2010.)

KA 08-01143. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TAMMY S. HUTCHINSON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed.

Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, Frederick G. Reed, J. - Possession of a Forged Instrument, 2nd Degree). PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ. (Filed Feb. 11, 2010.)

KAH 09-00751. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. RONALD JACKSON, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed without costs. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Wyoming County, Mark H. Dadd, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ. (Filed Feb. 11, 2010.)

KA 08-00537. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLIFTON MOODY, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, William F.

Kocher, J. - Criminal Sale of a Controlled Substance, 3rd Degree).

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ. (Filed Feb. 11, 2010.)

KA 07-01115. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN BANCHS RIVERA, DEFENDANT-APPELLANT. -- Order unanimously affirmed.

Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Monroe County Court, John J. Connell, J. - 2005 Drug Law Reform Act). PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ. (Filed Feb. 11, 2010.)

KA 08-02678. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DARIEN WALKER, 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 Erie County Court, Thomas P. Franczyk, J. - Criminal Possession of a Controlled Substance, 7th Degree). PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ. (Filed Feb. 11, 2010.)

KA 08-01210. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EUGENE WALKER, JR., DEFENDANT-APPELLANT. -- Judgment unanimously affirmed.

Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, Frederick G. Reed, J. - Criminal Possession of a Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND

LINDLEY, JJ. (Filed Feb. 11, 2010.)