SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 12, 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

959

KA 09-01166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TROY L. KENNEDY, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

TROY L. KENNEDY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 7, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (four counts) and criminal possession of a controlled substance in the third degree (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the aggregation of the periods of postrelease supervision and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant was sentenced to a series of concurrent and consecutive determinate terms of incarceration, each of which included a period of postrelease supervision. At the conclusion of sentencing, County Court stated that the aggregate period of postrelease supervision would be 12 years.

Contrary to the contention of defendant, the court properly denied his challenge for cause with respect to a prospective juror inasmuch as his contention that the prospective juror was not truthful during voir dire is based on mere speculation (*see People v Toussaint*, 74 AD3d 846). Also contrary to the contention of defendant, the court did not err in refusing to permit him to ask additional questions of that prospective juror. The court was entitled to limit defendant's repetitive questioning of that prospective juror (*see* CPL 270.15 [1] [c]; *People v Harris*, 98 NY2d 452, 482 n 9; *People v Pepper*, 59 NY2d 353, 358-359), and defendant failed to identify any new questions that

he wished to ask her.

We reject defendant's contention that the verdict is against the weight of the evidence based on gaps in the chain of custody with respect to the drugs at issue. Contrary to defendant's implicit contention, the court properly admitted the drugs in evidence despite those alleged gaps. The police provided sufficient assurances of the identity and unchanged condition of the evidence (*see People v Julian*, 41 NY2d 340, 342-343), and thus any alleged gaps in the chain of custody went to the weight of the evidence, not its admissibility (*see People v Cleveland*, 273 AD2d 787, *lv denied* 95 NY2d 864). 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 People v Bleakley*, 69 NY2d 490, 495).

We reject the further contention of defendant that the court erred in denying his request for an adjournment to enable him to locate two witnesses to testify on his behalf. "[D]efendant's assertion that [the witnesses'] testimony would be material and favorable to the defense is supported by nothing more than the conclusory allegations of [defendant]" (*People v Vredenburg*, 200 AD2d 797, 799, *lv denied* 83 NY2d 859; *see People v Daniels*, 128 AD2d 632, 632-633, *lv denied* 70 NY2d 645). Nor did the court err in denying defendant's mid-trial request for the issuance of subpoenas to compel the appearance of those witnesses. As noted, defendant failed to establish that their testimony would be material and favorable to him and, in any event, he made "no showing of a diligent and good-faith attempt to insure the witness[es'] presence at trial" before seeking to subpoena those witnesses (*People v Perez*, 249 AD2d 492, 493, *lv denied* 92 NY2d 903).

Defendant failed to preserve for our review the contention in his pro se supplemental brief that his due process rights were denied by the alleged violation of his constitutional right to a speedy trial (*see People v Bradberry*, 68 AD3d 1688, 1690, *lv denied* 14 NY3d 838). In any event, upon our review of the factors set forth in *People v Taranovich* (37 NY2d 442, 445), we conclude that defendant's contention lacks merit (*see People v Doyle*, 50 AD3d 1546; *People v Jenkins*, 2 AD3d 1390).

Defendant's challenge to the hearsay evidence presented to the grand jury "is, in essence, a challenge to the sufficiency of the [g]rand [j]ury evidence" (*People v Cerda*, 236 AD2d 292), and that challenge is not reviewable on appeal from a judgment of conviction supported by legally sufficient evidence (*see* CPL 210.30 [6]). The further contention of defendant in his pro se supplemental brief that he received ineffective assistance of counsel is not properly before us to the extent that it is based on matters outside the record on appeal (*see People v Slater*, 61 AD3d 1328, 1329-1330, *lv denied* 13 NY3d 749), and we conclude that defendant's contention is otherwise without merit (*see generally People v Baldi*, 54 NY2d 137, 147). We have considered the remaining contentions of defendant in his pro se

supplemental brief and his pro se reply brief, and we conclude that they are without merit.

Finally, although not raised by defendant, we conclude that the court erred in aggregating the multiple periods of postrelease supervision that were imposed. Indeed, Penal Law § 70.45 (5) (c) mandates that the periods of postrelease supervision merge and are satisfied by the service of the longest unexpired term. Because we cannot allow an illegal sentence to stand (*see People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983), we modify the judgment accordingly.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

971

CA 10-00501

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

IN THE MATTER OF THE ESTATE OF OSCAR L. HEARD, DECEASED.

MARY BROWN, OBJECTANT-APPELLANT;

OPINION AND ORDER

MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT;

JEFFREY H. MARKS, GUARDIAN AD LITEM FOR DOYLE HEARD, RESPONDENT-RESPONDENT.

BOYLAN, BROWN, CODE, VIGDOR & WILSON, LLP, ROCHESTER (SANFORD R. SHAPIRO OF COUNSEL), FOR OBJECTANT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (RICHARD A. MARCHESE, JR., OF COUNSEL), FOR RESPONDENT.

TRAYNOR, SKEHAN AND MARKS, ROCHESTER (JEFFREY H. MARKS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered November 30, 2009. The order, among other things, determined that the lien of respondent Monroe County Department of Social Services shall not be limited to the cost of decedent's medical care.

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

Opinion by SCONIERS, J.: This appeal concerns the issue whether respondent Monroe County Department of Social Services (DSS) is entitled to recover Medicaid payments from the estate of a decedent where the source of the estate funds is a tort settlement paid for injuries sustained by the decedent when he fell in the nursing home where he resided. The objectant herein, who is also the administrator and a distributee of the decedent's estate, appeals from an order directing that recovery by DSS against the estate for Medicaid payments made on behalf of decedent was not limited solely to the cost of his medical care resulting from the injuries sustained by him when he fell in the nursing home, allegedly as a result of the nursing home's negligence, for which he received the settlement proceeds (*Matter of Estate of Heard*, 25 Misc 3d 1233[A], 2009 NY Slip Op 52401[U]).

It is undisputed that Surrogate's Court had allocated the entire

amount of the settlement to decedent's pain and suffering, and that DSS asserted a claim against the proceeds of the settlement for the Medicaid payments it made on behalf of decedent from 1995 until his death in 2003. Relying on *Arkansas Dept. of Health & Human Servs. v Ahlborn* (547 US 268), the objectant contended that DSS could recoup only that part of the settlement that was paid for medical services provided to treat decedent for the injuries related to his fall in the nursing home. DSS responded that it was not asserting a lien akin to the one at issue in *Ahlborn.* Instead, DSS contended that its right to seek recoupment of Medicaid payments in addition to those made for the injuries sustained by decedent when he fell in the nursing home was based on section 369 (2) (b) (i) (B) of the Social Services Law, which allowed it to recoup costs expended for medical assistance of an individual who was at least 55 years old when he or she received such assistance. As previously noted, the Surrogate agreed with DSS and ordered the estate to pay DSS's claim (*Estate of Heard*, 2009 NY Slip Op 52401[U], *3). We conclude that the order should be affirmed.

In *Ahlborn*, a Medicaid recipient obtained a tort settlement after Medicaid had made payments on her behalf arising from injuries she sustained in a motor vehicle accident (*id.* at 272). The settlement did not specify any allocation for categories of damages, but petitioner Arkansas Department of Health and Human Services (state agency) nevertheless contended that it was entitled to a lien on the settlement in an amount equal to all of the Medicaid assistance it had provided to the recipient (*id*. at 274). The Medicaid recipient, on the other hand, contended that the state agency's lien "violated federal law insofar as its satisfaction would require depletion of compensation for her injuries other than past medical expenses" (*id*. at 269). In interpreting the anti-lien provisions, the United States Supreme Court noted that 42 § USC 1396p (a) (1) states in relevant part that "[n]o lien may be imposed against the property of any individual *prior to his [or her] death* on account of medical assistance paid . . . on his [or her] behalf" (*id*. at 283 [emphasis added]). The Court went on to state that 42 USC § 1396k (a) (1) (A) provided an exception to that anti-lien provision by requiring a Medicaid recipient, as a condition of eligibility, to assign to the state agency "any payments that may constitute reimbursement for medical costs" (*id*. at 284). Thus, by virtue of 42 USC § 1396k (a) (1) (A), the state agency was entitled to recover only that portion of the settlement that represented payments for past medical care for injuries causally related to the underlying accident (*id*. at 284-285), and the state agency stipulated that only a specified portion of the settlement proceeds were properly designated as payment for medical costs (*id.* at 288). Consequently, the state agency in *Ahlborn* had no lien on the portion of the settlement that represented pain and suffering or other damages unrelated to the medical care for injuries that were directly paid by Medicaid (*id*. at 284-285).

We conclude that the objectant's reliance on *Ahlborn* is misplaced. As noted, in *Ahlborn*, the state agency was seeking to recover a lien from a living person and thus its rights were governed by 42 USC § 1396p (a), which is codified in Social Services Law § 104-

b. Here, however, DSS is seeking to recover under Social Services Law § 369 (2) (b) (i) (B), not section 104-b, inasmuch as it seeks to recover from decedent's estate rather than from a living person. The federal counterpart to Social Services Law § 369 (2) (b) (i) (B) is 42 USC § 1396p (b) (1) (B), which likewise provides that, "[i]n the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of[, inter alia,] nursing facility services . . . ." Social Services Law § 369 (2) (b) (i) in turn provides that, "[n]otwithstanding any inconsistent provision of this chapter or other law, no adjustment or recovery may be made against the property of any individual on account of any medical assistance correctly paid to or on behalf of an individual under this title, except that recoveries must be pursued . . . (B) from the estate of an individual who was fifty-five years of age or older when he or she received such assistance." There is no limiting language with respect to estate funds that were not earmarked for medical expenses only. Moreover, in *Ahlborn*, the Court stated that it was not considering the anti-recovery provisions codified in 42 USC § 1396p (b), which as noted is the federal counterpart to the Social Services Law section at issue here, and thus *Ahlborn* is not controlling in this case.

In sum, decedent was at least 55 years old when he received assistance from DSS, and we conclude that both the relevant federal and state statutes mandate that DSS be permitted to recover from the estate of decedent the expenses it paid for his nursing home care. Those expenses include benefits unrelated to the injuries that were the subject of the settlement received based on his fall in the nursing home, inasmuch as the expenses undisputedly paid for decedent's nursing home care. Accordingly, we conclude that the order should be affirmed.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

977

KA 06-00672

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH LASTER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY 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 (Patricia D. Marks, J.), rendered December 21, 2005. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (four counts), sexual abuse in the first degree (two counts) and sodomy in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed on counts four and five of the indictment shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from two judgments convicting him following a jury trial of, inter alia, five counts of rape in the first degree (Penal Law § 130.35 [1]) and three counts of sexual abuse in the first degree (§ 130.65 [1]). We reject the contention of defendant in appeal No. 1 that the "John Doe" indictment that identified him using only his DNA profile was jurisdictionally defective and violated his "right to be fairly notified that he was the person accused in the indictment." "Absent a constitutional or statutory prohibition, a DNA indictment is an appropriate method to prosecute perpetrators of some of the most heinous criminal acts. Indeed, the prevalence of DNA databanks today as a criminal justice tool supports the conclusion that a defendant can be properly identified by a DNA profile, especially in light of the accuracy of this identification. The chance that a positive DNA match does not belong to the same person may be less than one in 500 million" (*People v Martinez*, 52 AD3d 68, 73, *lv denied* 11 NY3d 791).

Here, as in *Martinez*, "[d]efendant's right to notice of the charges attached at his arraignment . . ., at which time the

indictment was unsealed . . . At the arraignment, defendant was informed of the charges against him and given a copy of the indictment. Defendant was thus necessarily placed on notice that he was the individual charged in the indictment. Nothing in CPL 200.50 requires that an individual charged in an indictment be referred to in any particular manner, and we conclude that a 'John Doe' indictment accompanied by a specific DNA profile is sufficient to give a defendant notice of the charges against him" (*id*. at 72). Defendant's "constitutionally grounded right to fair notice of the crime of which [defendant] is accused is not dependent on [his] subjective capacity . . . to understand it. Just as defendant is not required to be literate for a written indictment to be valid, he is not required to be a geneticist to be subject to indictment by DNA profile" (*id*. at 73). We note that several courts outside of New York have upheld the use of accusatory instruments that identify the defendant only by his or her DNA profile (*see generally People v Robinson*, 47 Cal4th 1104, 1132-1134, 224 P3d 55, 73-74, *cert denied* ___ US ___ [Oct. 4, 2010]). Further, we note that identifying a defendant by DNA profile is more precise than identifying a defendant by name, photograph or any other description (*see generally id.*).

We agree with defendant in appeal No. 1, however, that County Court erred in imposing consecutive sentences for counts four and five of the indictment, charging defendant with separate acts of rape against the same victim, only moments apart. "We conclude that the briefly interrupted act of sexual intercourse . . . was 'part and parcel of the continuous conduct' that constituted one act of rape" (*People v Watkins*, 300 AD2d 1070, 1071, *lv denied* 99 NY2d 659). We therefore modify the order accordingly. We have considered defendant's remaining contentions in each appeal and conclude that they are without merit.

Entered: November 12, 2010 Patricia L. Morgan
Clerk of the Court

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

978

KA 06-00673

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH LASTER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY 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 (Patricia D. Marks, J.), rendered December 21, 2005. The judgment convicted defendant, upon a jury verdict, of 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.

Same Memorandum as in *People v Laster* ([appeal No. 1] ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

982

KA 09-00284

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYRUS Y. REED, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Matthew J. Murphy, III, J.), rendered January 20, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). The conviction arises out of an incident in which defendant stabbed the victim while the two men were walking home from a bar in the early morning hours. We reject the contention of defendant that County Court erred in refusing to suppress incriminating statements that he made to the police following his apprehension. Those statements, in which defendant admitted that he stabbed the victim in retaliation for his role in assisting defendant's brother to commit suicide, were spontaneous and not "the product of 'express questioning or its functional equivalent' " (*People v Bryant*, 59 NY2d 786, 788, *rearg dismissed* 65 NY2d 638, quoting *Rhode Island v Innis*, 446 US 291, 300-301; *see People v Cooper*, 59 AD3d 1052, 1053-1054, *lv denied* 12 NY3d 852). Although the police questioned defendant about the location of the knife while he was in custody and prior to administering *Miranda* warnings, defendant's responses were admissible under the public safety exception to the *Miranda* rule (*see People v Allah*, 54 AD3d 632, *lv denied* 12 NY3d 755; *People v Taylor*, 302 AD2d 868, *lv denied* 99 NY2d 658). In any event, we note that defendant did not move to suppress the knife, and his statements regarding its whereabouts and his possession thereof were not prejudicial. Defendant readily admitted that he stabbed the victim, and his only defense at trial was that he

acted in self-defense.

Defendant failed to preserve for our review his further contention that the court erred in allowing the People to present evidence concerning prior uncharged crimes (*see People v Hunt*, 74 AD3d 1741), 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 also failed to preserve for our review his contention that the evidence is legally insufficient to support the assault conviction (*see People v Gray*, 86 NY2d 10, 19). Defendant further contends that the verdict is against the weight of the evidence because, inter alia, the jury did not give appropriate weight to his testimony that he stabbed the victim in self-defense. 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 that contention. "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which [observed] and heard the witnesses" (*People v Hernandez*, 288 AD2d 489, 490, *lv denied* 97 NY2d 729), and we conclude that the jury "did not fail to give the evidence the weight it should be accorded in rejecting defendant's justification defense" (*People v Wolf*, 16 AD3d 1167; *see generally People v Bleakley*, 69 NY2d 490, 495).

We reject the contention of defendant that he was denied effective assistance of counsel. Based on our review of the record, 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). Indeed, despite evidence that defendant told the police that he tried to kill the victim and that he would "finish the job" once he got out of prison, defense counsel obtained an acquittal for defendant on the top count of the indictment, charging him with attempted murder in the second degree (*see* Penal Law §§ 110.00, 125.25 [1]). Finally, in light of the brutal and unprovoked nature of the crimes and defendant's lack of remorse, it cannot be said that the sentence imposed is unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

995

KA 08-02649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD BRINK, DEFENDANT-APPELLANT.

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

RONALD BRINK, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered December 9, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of grand larceny in the fourth degree (Penal Law § 155.30 [1]) to petit larceny (§ 155.25) and vacating the sentence imposed on count two of the indictment and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for sentencing on the conviction of petit larceny.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and grand larceny in the fourth degree (§ 155.30 [1]), defendant contends the evidence is legally insufficient to support the conviction of grand larceny in the fourth degree because the People failed to establish that the value of the stolen property exceeded $1,000. We agree. At trial, the People presented evidence that the value of a camcorder stolen in the burglary was $600. The only remaining evidence presented with respect to the value of the other property stolen was that a used video game console had been purchased for $100 by the homeowner's son a few months before the burglary, and a new video game had been purchased for approximately $250 five to six months before the burglary, but it had several broken parts at the time of the burglary. Even assuming, arguendo, that such evidence was sufficient to establish that those prices accurately reflected the value of the property at the time of the burglary (*cf. People v Alexander*, 41 AD3d 1200, 1201, *lv denied* 9 NY3d 920), we conclude that the total value of the stolen property would be $950. Inasmuch as

there was no evidence presented concerning the value of any other item taken, any value attributed to the remaining property would be based on mere speculation (*cf. People v Pepson*, 61 AD3d 1399, 1400, *lv denied* 12 NY3d 919). Consequently, we cannot on this record conclude "that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold" of $1,000 (*People v Sheehy*, 274 AD2d 844, 845, *lv denied* 95 NY2d 938). We therefore modify the judgment by reducing the conviction of grand larceny in the fourth degree to petit larceny (Penal Law § 155.25) and vacating the sentence imposed on count two of the indictment (*see* CPL 470.15 [2] [a]), and we remit the matter to County Court for sentencing on the conviction of petit larceny (*see* CPL 470.20 [4]).

We reject the further contention of defendant that the verdict, as modified, is against the weight of the evidence. Viewing the evidence in light of the elements of the crime of burglary in the second degree as charged to the jury, as well as the elements of petit larceny (*see People v Danielson*, 9 NY3d 342, 349), we conclude that an acquittal would not have been unreasonable based on the questionable credibility of the accomplices who testified at trial (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Alexis*, 65 AD3d 1160; *People v Griffin*, 63 AD3d 635, 638, *lv denied* 13 NY3d 835). Nevertheless, "giving 'appropriate deference to the jury's superior opportunity to assess the witnesses' credibility' " (*People v Marshall*, 65 AD3d 710, 712, *lv denied* 13 NY3d 940), we conclude that the jury was entitled to credit their testimony concerning the events rather than defendant's version.

We reject defendant's further contention that the testimony of the accomplices was not sufficiently corroborated. We note at the outset that, as the court properly concluded, the issue whether defendant's former girlfriend was an accomplice was for the jury to determine (*see People v Basch*, 36 NY2d 154, 157; *People v McPherson*, 70 AD3d 1353, 1354, *lv denied* 14 NY3d 890; *People v Adams*, 307 AD2d 475, *lv denied* 1 NY3d 566). Even assuming, arguendo, that the jury determined that the former girlfriend was an accomplice, we reject the further contention of defendant that her testimony, and that of the other two accomplices, was not sufficiently corroborated. " 'The corroborative evidence need not show the commission of the crime; it need not show that defendant was connected with the commission of the crime. It is enough if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth' " (*People v Reome*, 15 NY3d 188, 191-192, quoting *People v Dixon*, 231 NY 111, 116). Here, the testimony of the accomplices was sufficiently corroborated by other evidence, including the testimony of a police officer establishing that defendant was in a vehicle with the accomplices and the stolen property a short time after the burglary, evidence establishing that defendant attempted to persuade his former girlfriend to change her testimony so that she would not implicate him in the burglary, and the testimony of defendant, in which he admitted that he accompanied the accomplices to the scene of the burglary (*see*

People v Potter, 270 AD2d 892, *lv denied* 95 NY2d 838; *People v Cousins*, 221 AD2d 923, 924-925, *lv denied* 87 NY2d 1018, 88 NY2d 965).

Defendant failed to preserve for our review his contention that the court penalized him for exercising his right to a trial by imposing a longer term of incarceration than that proposed during plea negotiations (*see People v Dorn*, 71 AD3d 1523; *People v Griffin*, 48 AD3d 1233, 1236-1237, *lv denied* 10 NY3d 840). In any event, that contention is without merit. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*People v Chappelle*, 14 AD3d 728, 729, *lv denied* 5 NY3d 786), and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial (*see generally People v Pena*, 50 NY2d 400, 411-412, *rearg denied* 51 NY2d 770, *cert denied* 449 US 1087). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1011

CA 10-00782

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

RUSSELL MARGETIN AND KATHY MARGETIN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROBERT T. JEWETT, JR. AND PATRICIA JEWETT,
DEFENDANTS-RESPONDENTS.

LAWRENCE BROWN, BRIDGEPORT, FOR PLAINTIFFS-APPELLANTS.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered May 13, 2009 in an action pursuant to RPAPL article 15. The judgment, insofar as appealed from, upon reargument determined the property line between certain parcels of real property owned by the parties.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the declaration is vacated, that part of defendants' motion for summary judgment dismissing the amended complaint is granted, and the amended complaint is dismissed.

Memorandum: The parties to this action own parcels of property in proximity to each other, fronting on Oneida Lake. Their dispute concerning the location of the boundary line allegedly separating their respective parcels resulted in the commencement of this action by plaintiffs seeking, inter alia, a declaration in their favor. Defendants' property is described by metes and bounds in a deed filed on January 2, 1912, while plaintiffs' property is likewise described by metes and bounds in a deed filed on January 19, 1912. Neither deed makes reference to a survey, subdivision or tract map. The parties' respective chains of title are derived from the 1912 conveyances that were made by a common grantor. We note, however, that a map filed in the Onondaga County Clerk's office on July 30, 1914 depicts the parties' respective lots in an adjoining position, with a common boundary line, while the metes and bounds descriptions contained in the 1912 deeds create a triangular parcel between the parcels. The parties agree that the triangular parcel was never conveyed to either defendants' or plaintiffs' predecessor in title. The parties have not joined the fee owner of the triangular parcel in this action, nor have they so much as identified the owner of that parcel. They instead seek a declaration concerning the location of the boundary line

between their allegedly adjoining parcels, without regard to the outstanding fee title ownership of the triangular parcel. Defendants moved for summary judgment seeking, inter alia, a declaration that the property line between the two parcels was established by the deed filed on January 2, 1912. Plaintiffs failed to respond to the motion and, in granting the motion, Supreme Court declared that the property line between the two parcels was established by the deed filed on January 2, 1912 in defendants' chain of title.

Plaintiffs thereafter moved for leave to renew and reargue, contending that a 2001 instrument survey upon which the parties had relied and submitted to the court incorrectly identified the property line. According to plaintiffs, if the correct property line as set forth in the January 2, 1912 deed was used, there nevertheless would be a property dispute because, according to that deed, defendants' shed would be encroaching on plaintiffs' property. In opposing the motion, defendants contended that the court had properly located the boundary line and that the 2001 survey relied upon the January 2, 1912 and January 19, 1912 deeds. The court granted plaintiffs' motion insofar as it sought leave to reargue and, upon reargument, the court relocated the property line using a 2009 survey. The court recognized the fact that, as previously noted, there would be some land to which neither plaintiffs nor defendants could claim title if the two 1912 deeds were used. Nonetheless, the court did not conduct a trial but, rather, summarily granted judgment locating a property line that divided the triangular parcel into two parcels, thereby granting plaintiffs additional lake frontage of 19.75 feet and granting defendants additional lake frontage of 11.25 feet beyond that contained within their respective deeds.

Plaintiffs contend that the deeds are ambiguous and that extrinsic evidence is required to resolve the ambiguity. Defendants respond that there is no additional extrinsic evidence that can shed light on the issues presented, although they implicitly concede that the deeds are ambiguous. We conclude that they are not ambiguous. We thus reverse the judgment insofar as appealed from, vacate the declaration issued upon reargument, and grant that part of defendants' motion for summary judgment dismissing the amended complaint. The subject of the instant action is the triangular parcel of land, and thus the proper vehicle for seeking relief is an adverse possession action against the owner or owners of record of the triangular parcel.

By their express terms, the two deeds unambiguously exclude the triangular parcel from the original conveyances by the common grantor to the parties' predecessors in title. Real Property Law § 240 (3) provides in pertinent part that "[e]very instrument creating [or] transferring . . . an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law." The "intent" to which the statute refers is the objective intent of the parties as manifested by the language of the deed; unless the deed is ambiguous, evidence of unexpressed, subjective intentions of the parties is irrelevant (*see Modrzynski v Wolfer*, 234 AD2d 901, 902, citing 2 New York Real Property Service §

20:68, at 78 [1987]). We reject plaintiffs' contention that extrinsic evidence, i.e., a subsequent tract map filed in 1914, "more accurately" describes the grantor's intent. The language of each of the 1912 deeds is not " 'susceptible of more than one interpretation' " (*Loch Sheldrake Assoc. v Evans*, 306 NY 297, 304), and thus consideration of the 1914 tract map as extrinsic evidence is unwarranted (*cf. Cordua v Guggenheim*, 274 NY 51, 57). Each deed unambiguously contains a metes and bounds description of the real property conveyed by each instrument. The fact that the descriptions contained in the deeds do not encompass the triangular parcel at issue does not render either of the deeds ambiguous. "The settled rule for the construction of [deeds] is that all evidence must be excluded which is offered to vary, explain or contradict a written instrument that was complete in itself and without ambiguity in its terms since, when words in a deed have a definite and precise meaning, it is not permissible to go elsewhere in search of conjecture in order to restrict or extend the meaning" (*Loch Sheldrake Assoc.*, 306 NY at 305 [internal quotation marks omitted]; *see Schweitzer v Heppner*, 212 AD2d 835, 838). Although extrinsic evidence "can be admissible to explain latent ambiguities or to apply a general deed description to a particular land to which it was intended to refer[, such evidence] may not be used to vary a boundary description . . . set forth in a deed" (*Schweitzer*, 212 AD2d at 838; *see generally* 4 Warren's Weed, New York Real Property § 37.107 [5th ed]). Because there are no ambiguities in the 1912 deeds with respect to boundary descriptions, we reject the contention of plaintiffs that they should have been afforded the opportunity to submit extrinsic evidence concerning the grantor's intent.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1031

CA 10-00749

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

NATHAN PFAFFENBACH AND JENNIFER L. PFAFFENBACH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DOUGLAS J. NEMEC AND HEATHER M. NEMEC,
DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ALAN J. DEPETERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 16, 2009 in a personal injury action. The order denied the motion of defendants 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: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Nathan Pfaffenbach (plaintiff) when he fell from a ladder while installing plywood in defendants' home. We conclude that Supreme Court erred in denying those parts of defendants' motion for summary judgment dismissing the claims pursuant to Labor Law § 240 (1) and § 241 (6). Those statutes require "[a]ll contractors and owners and their agents, except owners of one [-] and two-family dwellings who contract for but do not direct or control the work," to comply with certain safety requirements (§ 240 [1]; § 241). We agree with defendants that they are "entitled to the homeowner exemption because they neither directed nor controlled plaintiff's work" (*Schultz v Noeller*, 11 AD3d 964, 965).

Further, we conclude that the court erred in denying those parts of defendants' motion seeking summary judgment dismissing the common-law negligence cause of action and the Labor Law § 200 claim. "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner[s] exercise[] no supervisory control over the operation, no liability attaches to the owner[s] under the common law or [Labor Law § 200]" (*Lombardi v Stout*,

80 NY2d 290, 295; *see also Affri v Basch*, 13 NY3d 592, 596). Here, "both the method and the manner of plaintiff's work were left to his judgment and experience" (*Affri*, 13 NY3d at 596). Inasmuch as defendants did not supervise or control "the manner in which plaintiff's work was performed, and there is no evidence that [defendants] had either actual or constructive knowledge of any alleged dangerous condition" on the premises, they are not liable for any such condition (*Chapman v Town of Copake*, 67 AD3d 1174, 1176). Defendants also are not liable for defective equipment, i.e., the ladder, because they exercised no supervisory control over the injury-producing work (*see Sponholz v Benderson Prop. Dev.*, 273 AD2d 791, 792; *Farrell v Okeic*, 266 AD2d 892; *see also Santangelo v Fluor Constructors Intl.*, 266 AD2d 893).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1036

KA 08-02018

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE J. SINGLETON, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (CATHERINE A. WALSH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Renee Forgensi Minarik, A.J.), rendered July 15, 2008. The judgment convicted defendant, upon a jury verdict, of 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 two counts of assault in the second degree (Penal Law § 120.05 [2], [7]). Contrary to defendant's contention, County Court did not err in failing sua sponte to conduct a hearing to determine defendant's competency to stand trial. There is no indication in the record that defendant was " 'incapable of understanding the charge, indictment or proceedings or of making his defense' " to warrant such a hearing (*People v Armlin*, 37 NY2d 167, 171; *see* CPL 730.10 [1]; 730.30 [1]). Defendant further contends that the court committed reversible error by admitting evidence of the underlying crime for which defendant was incarcerated at the time of the assault charged pursuant to Penal Law § 120.05 (7). Although we agree with defendant that the court erred in that respect, we conclude that the error is harmless and thus that reversal is not required based on that error (*see generally People v Crimmins*, 36 NY2d 230, 241-242). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1045

CA 10-00746

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

GEOFFREY BOND AND SALLY T. BOOTEY,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

THOMAS A. TURNER, MICHELLE M. TURNER,
DEFENDANTS-RESPONDENTS-APPELLANTS,
AND VILLAGE OF LAKEWOOD, DEFENDANT-RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

DAMON MOREY LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

GOODELL & RANKIN, JAMESTOWN (ANDREW W. GOODELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered June 22, 2009 in a declaratory judgment action. The order and judgment determined the parameters of a certain right of way.

It is hereby ORDERED that the order and judgment so appealed from is modified on the law by vacating the 2nd through 5th, 7th and 10th decretal paragraphs and granting judgment in favor of plaintiffs as follows:

> It is ORDERED, ADJUDGED and DECREED that Lake Street is a 50-foot-wide public street by dedication as more particularly described in the survey prepared by Abate Associates Engineering and Surveyors PC dated August 4, 2008, that plaintiffs' property abuts Lake Street and thus, by operation of law, plaintiffs have the right to access the public street from their properties, and that the improvements constructed by defendants impede the rights of plaintiffs to access Lake Street from their properties

and as modified the order and judgment is affirmed without costs and the matter is remitted to Supreme Court, Chautauqua County, for further proceedings in accordance with the following Memorandum: In this declaratory judgment action, plaintiffs appeal and defendants cross-appeal from an order and judgment that established plaintiffs'

easement rights with respect to a right-of-way over defendants' property, including the width of that right-of-way. We agree with the contentions of plaintiffs and modify the judgment accordingly.

The parties are owners of three contiguous parcels of real property. According to plaintiffs, they have a 50-foot-wide easement over defendants' property, with the easement running along the northern boundary of the parcel owned by plaintiff Sally T. Bootey. Also according to plaintiffs, the easement is a public street, named "Lake Street." Defendants acknowledge that plaintiff Geoffrey Bond has a right-of-way over their property but deny that Lake Street is a public street. Plaintiffs commenced this declaratory judgment action shortly before defendants began constructing a shed along the northern edge of Bootey's property.

We note at the outset that defendants are estopped from denying that plaintiffs have easement rights in Lake Street by operation of law because their land abuts a public street. Defendants purchased their property with constructive, if not actual, notice that it was burdened with a public easement (*see Pallone v New York Tel. Co.* [appeal No. 1], 34 AD2d 1091, *affd* 30 NY2d 865; *Goldstein v Jones*, 32 AD3d 577, 582, *lv dismissed* 8 NY3d 939).

We further agree with plaintiffs in any event that Lake Street became a public street by dedication. Contrary to the position of the dissent, the record demonstrates that the original grantors intended to dedicate to the public a 50-foot right-of-way over defendants' property. At the time the original grantors conveyed the relevant parcels, two subdivision maps had been filed: one in September 1874 and one in November 1875. The 1874 map referenced the relevant parcels by lot numbers but did not depict Lake Street. The 1875 map was virtually identical to the 1874 map, the relevant difference being that Lake Street was depicted as a 50-foot right-of-way running along the northern boundary of the Bootey parcel. Although the deeds in the chains of title of the relevant parcels reference only the 1874 map, the 1875 map was filed when the original grantors of the subdivision owned the relevant parcels. Further, in September 1874, the original grantors conveyed the Bootey parcel and described the parcel by referencing the subdivision lot numbers and describing the parcel as being bounded on the north by a proposed boulevard. In every conveyance of the Bootey parcel thereafter, the deeds described the parcel in a similar manner. The conveyances from the original grantors of the Turner parcel also reserved to others "all rights[-]of[-]way" over that parcel. The 1875 map is therefore consistent with the 1874 map showing the layout of lots and streets, with the one exception of Lake Street, and is consistent with the original grantors' intent to create a street along the northern boundary of the Bootey parcel. Thus, the filing of the 1875 map "furnishes some evidence" of the grantors' intent to dedicate Lake Street for public use (*Village of E. Rochester v Rochester Gas & Elec. Corp.*, 289 NY 391, 396; *see People v Brooklyn & Queens Tr. Corp.*, 273 NY 394, 400-401; *Oak Hill Country Club v Town of Pittsford*, 264 NY 133, 136, *rearg denied* 264 NY 672). Nevertheless, we conclude that the combination of

the 1875 map together with the descriptions of the Turner and Bootey parcels in the conveyances by the original grantors evinces the requisite unequivocal intent of the original grantors to dedicate Lake Street for public use. Even assuming that the unequivocal intent to dedicate cannot be discerned from the original grantors' deeds and maps, we conclude that such intent was thereafter established when the parcels owned by defendants and Bootey were simultaneously conveyed in 1965, 1969 and 1973, subject to the rights of the public to Lake Street (*see generally Village of E. Rochester*, 289 NY at 395-396; *Matter of Common Council of City of Brooklyn*, 73 NY 184). Defendant Village of Lakewood (Village) accepted the dedication by maintaining and improving Lake Street as a public street (*see Oak Hill Country Club*, 264 NY at 136).

As owners of land adjoining a public street, plaintiffs possess, "as an incident to such ownership, easements of light, air and access, from and over the [street] in its entirety to every part of [their] land" (*Matter of Scoglio v County of Suffolk*, 85 NY2d 709, 712). Here, defendants' construction of a retaining wall and a shed along the northern boundary of the parcel owned by Bootey impedes the rights of Bond and Bootey to light, air, and access to the entire 50-foot right-of-way and impedes the ability of Bootey to access Lake Street from her property. Thus, we remit the matter to Supreme Court for a determination of the appropriate equitable or legal relief to which plaintiffs are entitled based on the impedement of their rights (*see De Ruscio v Jackson*, 164 AD2d 684, 688).

Lastly, we conclude that, contrary to the contention of the dissent, the court erred in declaring that Lake Street was only 15 to 20 feet wide. Even assuming, arguendo, that Lake Street is not a public street by dedication, we would nevertheless conclude that the record demonstrates that a 50-foot public right-of-way in Lake Street was established by way of prescription. The record is replete with evidence of consistent and unrestricted use of Lake Street for more than 10 years by the general public (*see* Highway Law § 189), while maps in the record indicate that the Village installed sewer lines along the remaining 30 to 35 feet of the right-of-way. In addition, deposition testimony in the record establishes that the County of Chautauqua maintains those sewer lines. Thus, the court erred in failing to include the 30 to 35 feet of defendants' property where the municipal sewer pipes are buried in the right-of-way.

All concur except CARNI, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully disagree with the conclusion of my colleagues that Lake Street became a public street by dedication. While I agree that defendant Village of Lakewood acquired an easement by prescription over some portion of Lake Street, I also disagree with the conclusion that it is established on this record that such right-of-way extends beyond the area that has been historically paved and improved. Therefore, I dissent in part.

It is well settled that an offer of dedication of land for use as a public street may be made by a grantor's filing of a subdivision map

designating certain land as a public street (*see Oak Hill Country Club v Town of Pittsford*, 264 NY 133, 136, *rearg denied* 264 NY 672). However, in this case the 1874 map identified by the parties as the common grantors' subdivision map simply does not contain or describe any land set aside as "Lake Street." Although there is an 1875 map in the record that depicts "Lake Street," there is nothing in the record establishing any connection between that map and the original grantors. Thus, I disagree with the conclusion of my colleagues that "the original grantors intended to reserve a right-of-way over [the Turner defendants'] property."

I also disagree with the conclusion of my colleagues that the simultaneous ownership of the Turner parcel and that of plaintiff Sally T. Bootey, together with subsequent and separate conveyances thereof in 1965 through 1973, established the intent of the original grantors to dedicate Lake Street as a public street. The majority cites no authority for that proposition and relies upon *Oak Hill Country Club* (264 NY at 136) for the defendant Village's acceptance of the dedication by maintaining and improving Lake Street. While I agree that a municipality may impliedly accept an offer of dedication without a formal resolution of acceptance, *Oak Hill Country Club* is a case where a filed subdivision map expressed a clear offer of dedication with subsequent acceptance by improvement (*id*. at 136). In my view, the 1965 through 1973 conveyances, which were made subject to "the rights of the public in and to the right[-]of[-]way known as Lake Street," reflects an acknowledgment by the grantors at that time that the public had already acquired a right of way in "Lake Street" by "user" or prescription (*see* Highway Law § 189), in contrast to an offer of dedication to be accepted in the future by subsequent municipal improvement. In my view, the public acquired a right-of-way by prescription prior to 1965, and the Turner defendants concede as much on appeal.

In line with my analysis, the only remaining issue is the extent of the right-of-way acquired by defendant Village through prescription. When a public road is established by user or prescription, "its width is determined by the width of the improvement" (*Schillawski v State of New York*, 9 NY2d 235, 238). I thus cannot agree with the conclusion of the majority that defendant Village or plaintiffs established on this record that the additional 30 to 35 feet beyond the paved area alleged to be the scope of the right-of-way was acquired by prescription. Although the majority relies upon, inter alia, the installation of sewer lines as a basis upon which to expand the right-of-way beyond the 15 to 20 feet that has been historically paved and used by the public, there is no competent evidence in this record establishing exactly where and under what circumstances the sewer line was installed and other maintenance was performed. In my view, a photocopy of a survey map that purportedly shows the location of the sewer line, coupled with the general testimony of the Mayor of defendant Village that, when installed, the sewer lines "went down the right[-]of[-]way of Lake Street," is not competent evidence to establish prescriptive use of the additional 30 to 35 feet for the prescriptive period.

Finally, in large part because of the litigious history of these parties and the enormous consumption of judicial resources attendant to resolving the rights of the parties with respect to the right-of-way known as “Lake Street,” I would merely modify the judgment by declaring in the appropriate decretal paragraphs that the right-of-way consists of the paved area to the full extent of its existing scope at its present location.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1071

CA 10-00740

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

DONNA PONHOLZER AND WILLIAM PONHOLZER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

EDWARD D. SIMMONS, M.D. AND SIMMONS
ORTHOPAEDIC & SPINE ASSOCIATES, LLP,
DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STAMM, REYNOLDS & STAMM, WILLIAMSVILLE (BRIAN G. STAMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered July 14, 2009 in a medical malpractice action. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the second cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Donna Ponholzer (plaintiff) when defendant Edward D. Simmons, M.D. allegedly exceeded the scope of her consent to cervical fusion surgery by taking the bone graft necessary for that surgery from her hip rather than using donor bone from a cadaver. We conclude that Supreme Court properly denied that part of defendants' motion for summary judgment dismissing the medical malpractice cause of action. Defendants contend that the only cognizable claim alleged by plaintiffs is one for battery, which is time-barred inasmuch as the applicable statute of limitations is one year (*see* CPLR 215 [3]). We reject that contention. It is well settled that, "[w]hile lack of informed consent is a proper element of a medical malpractice cause of action . . ., the failure to obtain such consent should not be used to elevate the cause of action to one for intentional tort" (*Twitchell v MacKay*, 78 AD2d 125, 129). "The [physician] in a malpractice case is ordinarily not an actor who intends to inflict an injury on his [or her] patient and any legal theory [that] presumes that intent appears to be based upon an erroneous supposition. Instead, the [physician] is not one who acts

antisocially as one who commits assault and battery, but is an actor who in good faith intends to confer a benefit on the patient" (*Dries v Gregor*, 72 AD2d 231, 235; *see Twitchell*, 78 AD2d at 129-130). Defendants mistakenly rely on cases from the First and Second Departments in which the plaintiff patient alleged that the defendant physician knew that he or she was exceeding the scope of the plaintiff's consent by performing a medical procedure that the plaintiff had not authorized (*see Wiesenthal v Weinberg*, 17 AD3d 270; *Cerilli v Kezis*, 16 AD3d 363; *Cross v Colen*, 6 AD3d 306; *Messina v Alan Matarasso, M.D., F.A.C.S., P.C.*, 284 AD2d 32, 34-35). Here, plaintiffs allege in the complaint, as amplified by the bill of particulars, that Simmons negligently exceeded the scope of plaintiff's consent when the bone graft was harvested from plaintiff's hip.

We further conclude, however, that the court erred in denying that part of defendants' motion for summary judgment dismissing the cause of action for lack of informed consent pursuant to Public Health Law § 2805-d. The record establishes that plaintiff was adequately informed of the risks and benefits of the various surgical options and that defendants did not fail to convey certain information to plaintiff concerning the surgery (*see generally Spano v Bertocci*, 299 AD2d 335, 337-338). We therefore modify the order accordingly.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1090

CA 10-00231

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

SUSAN C. KHUNS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BAY STATE INSURANCE COMPANY, DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, ALBANY (JOHN R. CASEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

PANZARELLA & COIA, P.C., ROCHESTER (CHAD HUMMEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered April 16, 2008. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this breach of contract action seeking insurance coverage resulting from damage to a structural foundation wall in her home. According to plaintiff, the damage was the "collapse" of the structural foundation wall, while defendant contended that the loss did not come within the definition of "collapse" set forth in the homeowners' insurance policy issued by defendant to plaintiff. In its letter informing plaintiff that there was no coverage, defendant set forth that the loss did not constitute a "collapse" within the meaning of the policy. In addition, defendant relied on the policy exclusions for water damage, loss caused by earth movement, and inadequate construction or design. Supreme Court denied both defendant's motion for summary judgment dismissing the complaint and plaintiff's cross motion for partial summary judgment on liability. Defendant appeals, and we affirm.

With respect to the issue whether the loss constitutes a "collapse" as defined by the policy, i.e., whether the claim is covered by the policy, we conclude that defendant failed to meet its initial burden of establishing as a matter of law that the loss did not involve a "collapse" within the meaning of the policy (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In support of its motion, defendant submitted the deposition testimony of plaintiff, who twice described the loss as a "cave in." Plaintiff also testified that there was a crack below the middle of the wall where light was visible from outside the wall and, more importantly,

that the wall "fell in to the point that [one] could see the outside in one portion," requiring immediate repair and replacement. In view of both plaintiff's deposition testimony and the policy language defining a collapse as "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose," we conclude that the submissions of defendant are insufficient to establish its entitlement to summary judgment on the issue whether the loss was a "collapse" within the meaning of the policy (*see generally id.*). Contrary to the view of our dissenting colleague, the facts in *Rector St. Food Enters., Ltd. v Fire & Cas. Ins. Co. of Conn.* (35 AD3d 177) are inapposite to the facts under consideration here. The building at issue in that case, although cracked, sinking and leaning, was not caving in.

We further conclude that there is an issue of fact whether the loss is covered in view of policy language concerning water damage, a policy provision that defendant characterizes as an "exclusion." We note that, "to 'negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case' " (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383; *see Chautauqua Patrons Ins. Assn. v Ross*, 38 AD3d 1190, 1191).

Defendant contends that there is no coverage for the instant loss because the policy provides that there is no coverage for loss caused by water pressure to a foundation. The subject provision states that defendant does "not insure . . . for loss . . . [c]aused by . . . [f]reezing, thawing, pressure or weight of water or ice . . . to a . . . [f]oundation." In view of that unambiguous policy language and the opinion of defendant's expert that hydrostatic groundwater contributed to the damage to the wall, we conclude that defendant met its initial burden of establishing that the loss caused by water pressure to a foundation is not covered by the policy (*see generally Zuckerman*, 49 NY2d at 562).

Nevertheless, we conclude that plaintiff raised a triable issue of fact whether she is entitled to coverage for the loss in light of the policy language in question. Initially, we reject defendant's characterization of that language as a policy exclusion inasmuch as it appears in the section of the policy concerning the "perils insured against," i.e., that portion that defines the initial specification of coverage, and is not included within that portion of the policy that sets forth the policy exclusions. To the extent that the subject language conflicts with other policy language providing coverage for loss caused by decay, that conflict is to be resolved against defendant, which drafted the policy (*see State of New York v Home Indem. Co.*, 66 NY2d 669, 671; *Topor v Erie Ins. Co.*, 28 AD3d 1199, 1200). In view of the opinion of plaintiff's expert that the loss was caused by "decay" concealed by the finished interior wall of the basement of plaintiff's home, we conclude that defendant is not entitled to summary judgment determining that there is no coverage for plaintiff by virtue of the application of the policy language in

question (*see generally Zuckerman*, 49 NY2d at 562).

The policy also contains an exclusion for loss caused by "water damage," including "water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure." Defendant further contends that the water damage exclusion defeats coverage for plaintiff. We again conclude on the record before us that there is an issue of fact with respect thereto (*see id.*). Although defendant's expert attributed the loss to hydrostatic ground forces, plaintiff's expert determined that the damage was caused by structural weakening, in which event the water damage exclusion would be inapplicable. Defendant's further contention that the policy's earth movement exclusion defeats coverage for plaintiff was raised in defendant's letter informing plaintiff that there was no coverage but was not raised by defendant in support of its motion, and thus that contention is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). There is also an issue of fact with respect to the applicability of the final exclusion upon which defendant relies, i.e., the exclusion for loss caused by inadequate construction or design. Even assuming, arguendo, that defendant met its burden on that part of the motion, we conclude that plaintiff raised an issue of fact concerning the applicability of the exclusion by submitting the affidavit of her expert, who concluded that ambient soil pressure, rather than inadequate construction or design methods, caused the loss (*see generally Zuckerman*, 49 NY2d at 562).

Finally, we agree with defendant that the court erred in concluding that defendant's letter to plaintiff concerning the absence of coverage did not meet "the specific and clear requirements under the law," although we note that defendant is not thereby entitled to summary judgment dismissing the complaint. Inasmuch as "this action involves a property insurance claim, it is not controlled by the high degree of specificity required . . . for a disclaimer of liability for death or bodily injury" (*Smith v General Acc. Ins. Co.*, 295 AD2d 738, 739-740; *see* Insurance Law § 3420 [d] [2]). Here, defendant's letter adequately sets forth the policy provisions on which defendant relied and, indeed, there is no indication that there was any confusion on plaintiff's part with respect to the policy provisions upon which defendant relied and thus that plaintiff was thereby prejudiced by any alleged lack of specificity (*cf. Vecchiarelli v Continental Ins. Co.*, 277 AD2d 992, 993).

All concur except CARNI, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent, inasmuch as I disagree with my colleagues that defendant is not entitled to summary judgment dismissing the complaint.

With respect to the issue whether the damage to plaintiff's foundation wall constituted a "collapse" within the meaning of the homeowners' insurance policy in question, I conclude that defendant established as a matter of law that there was no collapse within the meaning of the homeowners' insurance policy in question. The policy specifically defines its coverage for collapse with respect to

buildings as "an abrupt falling down or caving in" and provides that "[a] building or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion." Here, it is undisputed that plaintiff's home, and all component parts thereof, remained standing and had not abruptly fallen down or caved in. In my view, the nature of the damage was best described by plaintiff in her deposition testimony, wherein she stated that one of the foundation walls "moved in" and had not fallen in completely. The policy language concerning collapse is unambiguous and does not cover a condition that can at best be described as presenting a danger of imminent collapse rather than the actual and abrupt collapse or caving in covered by the policy (*see Rector St. Food Enters., Ltd. v Fire & Cas. Ins. Co. of Conn.*, 35 AD3d 177, 178).

I further disagree that what the majority refers to as "structural weakening" is a peril insured under the policy. "Structural weakening" is a *result* rather than a *cause* of a loss, and plaintiff's own expert opined that the "structural weakening" resulted from "ground frost during the 2003-2004 winter season." There is thus no coverage under the unambiguous language of the policy, which provides that defendant does not insure for loss "[c]aused by . . . [f]reezing, thawing, pressure or weight of water or ice . . . to a . . . [f]oundation, retaining wall, or bulkhead." "Ground frost" is the non-covered cause and "structural weakening" is the result.

I further disagree with the majority that plaintiff raised an issue of fact with respect to the policy exclusion for inadequate construction or design. The majority cites only to the conclusion of plaintiff's expert that the loss was caused by "ambient soil pressure," and thereby ignores that part of the opinion of the expert that the "ambient soil pressure exerted against the basement wall in its *weakened state* result[ed] in structural failure" (emphasis added). In my view, the "weakened state" is the same result, i.e., the structural weakening, caused by the "ground frost" discussed by the expert earlier in his affidavit. Thus, the opinion of plaintiff's own expert expressly establishes that the loss was caused by freezing water, a peril not covered under the policy. It is noteworthy that plaintiff's expert fails to explain how "ambient soil pressure" in the absence of the "weakened state" resulting from "ground frost" is a covered peril, rather than merely an expected or ordinary condition encountered by all foundations, "weakened" or not.

I therefore would reverse the order and grant defendant's motion for summary judgment dismissing the complaint.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1093

CA 10-00591

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

IN THE MATTER OF LISA HEATON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MONROE COUNTY AND MONROE COUNTY SHERIFF,
RESPONDENTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (EDWARD A. TREVVETT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 3, 2009 in a proceeding pursuant to CPLR article 78. The judgment granted the petition and annulled the determination of respondents.

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

Memorandum: Supreme Court properly granted the petition in this CPLR article 78 proceeding challenging the determination denying petitioner's application for General Municipal Law § 207-c benefits. Respondents denied the application on the ground, inter alia, that petitioner failed to report her injury in a timely manner pursuant to the requirements of a General Order issued by respondent Monroe County Sheriff. Contrary to respondents' contention, however, the record establishes that the reporting requirements of that General Order did not apply to petitioner's injury. Contrary to the contention of the dissent, moreover, we conclude that the statute of limitations defense, which was not addressed at Supreme Court, does not remain pending and undecided. "[I]t is well established that the court's failure to issue an express ruling is deemed a denial thereof" (*Rochester Equip. & Maintenance v Roxbury Mtn. Serv., Inc.*, 68 AD3d 1803, 1805, citing *Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864). On the merits of that defense, we reject respondents' contention that the proceeding was not timely commenced. "The statute of limitations is an affirmative defense which must be pleaded and proved by the party invoking it" (*Paladino v Time Warner Cable of N.Y. City*, 16 AD3d 646, 647; *see Mendez v Steen Trucking*, 254 AD2d 715, 716), and respondents failed to establish that the proceeding was commenced more than four months after petitioner received notice that her application

was denied (*see* CPLR 217 [1]; *cf. Matter of Raymond v Walsh*, 63 AD3d 1715, *appeal dismissed and lv denied* 14 NY3d 790).

All concur except CARNI, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully disagree with the conclusion of my colleagues that Supreme Court properly granted petitioner's application for General Municipal Law § 207-c benefits. Therefore, I dissent. I conclude that, on the record before us, there is an issue of fact as to when petitioner was first informed of the determination denying her application for General Municipal Law § 207-c benefits, and the resolution of that issue of fact is essential to determining the merits of respondents' statute of limitations defense (*see* CPLR 217 [1]). Respondents submitted the affidavit of petitioner's supervisor at the Monroe County Sheriff's Department, who averred that, on July 10, 2008, he personally advised petitioner that her application had been "denied." Petitioner, however, asserted in an affidavit that she was not told that she was being denied benefits until "on or about" October 2, 2008. It is well settled that " 'oral notification [of a determination] is sufficient to commence the running of the statute of limitations where, as here, petitioner is adversely impacted and aggrieved' " (*Matter of Feldman v New York State Teachers' Retirement Sys.*, 14 AD3d 769, 770; *see Matter of Bargstedt v Cornell Univ.*, 304 AD2d 1035, 1036-1037). Therefore, I would reverse the judgment and remit the matter to Supreme Court for a fact-finding hearing on that issue.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1095

CA 10-00682

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

SHAWN SULLIVAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RGS ENERGY GROUP, INC., AND RG&E, A SUBSIDIARY COMPANY OF RGS ENERGY GROUP, INC., DEFENDANTS-RESPONDENTS.

E. MICHAEL COOK, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE WOLFORD LAW FIRM, LLP, ROCHESTER (JAMES S. WOLFORD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered May 29, 2009 in a personal injury action. The judgment and order granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the judgment and 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 Labor Law and common-law negligence action seeking damages for injuries he sustained when he slipped and fell on ice at the work site. We conclude that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint. Plaintiff's claims pursuant to Labor Law § 241 (6) against each defendant, as amplified by the supplemental bill of particulars, are premised solely on defendants' alleged violation of 12 NYCRR 23-1.7 (d). That Industrial Code regulation is sufficiently specific to support a Labor Law § 241 (6) claim (*see Tronolone v New York State Dept. of Transp.*, 71 AD3d 1488), and there is an issue of fact whether the area where plaintiff fell was a passageway or walkway within the meaning of that regulation (*see generally Smith v McClier Corp.*, 22 AD3d 369; *Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348, 350; *Kerins v Vassar Coll.*, 293 AD2d 514, 515).

We further conclude that the court erred in granting those parts of defendants' motion with respect to the Labor Law § 200 claims and common-law negligence causes of action. With respect to Labor Law § 200 and common-law negligence, "[w]here a plaintiff's claim arises due to a defect or dangerous condition at the work site . . . [and] a

defendant moves for summary judgment dismissing a Labor Law § 200 claim [and a common-law negligence cause of action], it must establish, as a matter of law, that it did not create, nor have actual or constructive notice of, the dangerous condition alleged" (*Gadani v Dormitory Auth. of State of N.Y.*, 43 AD3d 1218, 1220-1221; *see Finger v Cortese*, 28 AD3d 1089, 1090). Inasmuch as this case arises from plaintiff's slip and fall on ice, i.e., "a dangerous premises condition" (*Navarro v City of New York*, 75 AD3d 590, 591), defendants were required to establish "that the ice formed so close in time to the accident that [they] could not reasonably have been expected to notice and remedy the condition" (*Piersielak v Amyell Dev. Corp.*, 57 AD3d 1422, 1423 [internal quotation marks omitted]; *see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838; *Navarro*, 75 AD3d at 591-592). Here, defendants' "own submissions raise an issue of fact" with respect thereto (*Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188; *see Simmons v Oswego County Sav. Bank*, 306 AD2d 825, 826). Finally, defendants contend that summary judgment was warranted because the ice on which plaintiff slipped was open and obvious. We reject that contention. "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" (*Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 863).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1146

TP 09-01446

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

IN THE MATTER OF JOHNNY BUNTING, PETITIONER,

V ORDER

GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

JOHNNY BUNTING, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [James P. Punch, A.J.], entered July 15, 2009) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1147

TP 10-01276

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

IN THE MATTER OF FRANCISCO SOLER, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (EDWARD L. CHASSIN OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered June 8, 2010) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1148

TP 10-00888

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

IN THE MATTER OF DONALD ROLF, PETITIONER,

V ORDER

WILLIAM HULIHAN, SUPERINTENDENT, MID-STATE CORRECTIONAL FACILITY, RESPONDENT.

DONALD ROLF, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET 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 April 14, 2010) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1149

KA 07-00535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW FREEMAN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

MATTHEW FREEMAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered January 3, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), aggravated assault upon a police officer or a peace officer, and criminal possession of a weapon 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 burglary in the first degree (Penal Law § 140.30 [1], [2]) and criminal possession of a weapon in the second degree (§ 265.03 former [2]) and one count of aggravated assault upon a police officer or peace officer (§ 120.11). 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 defendant was present at the scene of the crimes (*see People v Moore*, 29 AD3d 1077, 1078), and it is also legally sufficient to establish that the weapon at issue with respect to the conviction of criminal possession of a weapon under count six of the indictment was operable (*see People v Shaffer*, 130 AD2d 949, 950, *lv denied* 70 NY2d 717). 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).

The majority of the contentions of defendant in his main brief with respect to alleged instances of prosecutorial misconduct during summation are not preserved for our review (*see* CPL 470.05 [2]) and, in any event, we conclude that “[a]ny ‘improprieties were not so

pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, *lv denied* 100 NY2d 583). We reject the further contention of defendant in his main brief that he was denied effective assistance of counsel based on defense counsel's failure to object to the allegedly improper comments by the prosecutor (*see People v Cox*, 21 AD3d 1361, 1364, *lv denied* 6 NY3d 753). We reject defendant's contention that the sentence is unduly harsh or severe. We note, however, that the aggregate maximum term of the sentence exceeds the 40-year limitation set forth in Penal Law § 70.30 (1) (e) (iv), and thus the sentence should be recalculated accordingly by the Department of Correctional Services. Even assuming, arguendo, that County Court erred in denying defendant's request to instruct the jury that the witness who supplied a weapon to defendant was an accomplice as a matter of law, thus requiring corroboration of his testimony (*cf. People v Montanez*, 57 AD3d 1366, 1367, *lv denied* 12 NY3d 857), we conclude that "the failure of the court to give that instruction is of no moment, inasmuch as the testimony of the witness was in fact amply corroborated" (*People v Fortino*, 61 AD3d 1410, 1411, *lv denied* 12 NY3d 925). The contention of defendant in his pro se supplemental brief that the court erred in failing to submit to the jury the question whether that witness and another witness were accomplices as a matter of fact is not preserved for our review (*see People v Balser*, 185 AD2d 679, *lv denied* 81 NY2d 881), 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 the further contention of defendant in his pro se supplemental brief, the court's *Sandoval* ruling did not constitute an abuse of discretion (*see People v Walker*, 66 AD3d 1331, *lv denied* 13 NY3d 942). Finally, the contention of defendant in his pro se supplemental brief that the court erred in failing to respond to the request by the jury for a read back of the prosecutor's summation is unpreserved for our review (*see generally People v Williams*, 50 AD3d 472, 473, *lv denied* 10 NY3d 940) and, in any event, that contention lacks merit (*see People v Velasco*, 77 NY2d 469, 474).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1150

KA 07-00132

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. HENDERSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON 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 (Anthony F. Aloi, J.), rendered October 10, 2006. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, murder in the second degree, assault in the first degree (two counts) and attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and murder in the second degree (§ 125.25 [2]). We reject defendant's contention that the evidence is legally insufficient to support the conviction of two counts of assault in the first degree (§ 120.10 [3]) and one count each of attempted murder and murder (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to the contention of defendant, the jury's finding that he intended to murder one victim when he drove a vehicle into a crowd did not preclude a finding that he acted with depraved indifference with respect to the three other victims, "regardless of whether the evidence would have also supported a transferred intent theory" (*People v Hamilton*, 52 AD3d 227, 228, *lv denied* 11 NY3d 737; *see People v Douglas*, 73 AD3d 30, 33-34). "Where, as here, more than one potential victim was present at the [scene of the crimes], a defendant may be convicted of both [intentional and depraved indifference crimes] because he or she may have possessed different states of mind with regard to different potential victims" (*People v Page*, 63 AD3d 506, 507-508, *lv denied* 13 NY3d 837; *see Douglas*, 73 AD3d at 33-34). 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 accord great deference to the jury's resolution of credibility issues and conclude that the verdict is not against the

weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his further contention that the verdict is repugnant by failing to object to the verdict on that ground before the jury was discharged (*see People v Alfaro*, 66 NY2d 985, 987; *People v Louder*, 74 AD3d 1845). In any event, that contention is without merit, and we therefore reject the contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to object to the verdict on the ground that it was repugnant (*see People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1151

KA 09-01577

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUSHAWN A. WILLIAMS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered July 15, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and petit larceny.

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, burglary in the second degree (Penal Law § 140.25 [2]). 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).

We reject the further contention of defendant that County Court erred in refusing to suppress his statement to the police as the fruit of an illegal arrest on the ground that he was arrested in his "residence" without a warrant. It is undisputed that defendant was arrested in the registration area of a drug rehabilitation facility and that he had with him his possessions that he had removed from his last known address. Although the registration area was not subject to unlimited public access (*see generally People v Powell*, 54 NY2d 524, 530), we conclude that defendant was not "entitled to 'privacy, as one would have in his [or her] home,' " in that area (*id.*). The registration area was used by many people multiple times per day (*see People v Hernandez*, 98 NY2d 175, 183; *People v Dennis*, 263 AD2d 618, *lv denied* 94 NY2d 822, 830), and it was not residential in nature (*see Powell*, 54 NY2d at 531; *cf. People v Garriga*, 189 AD2d 236, 239, *lv*

denied 82 NY2d 718).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1153

KA 10-01128

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH SPARCINO, DEFENDANT-APPELLANT.

HOFFMANN, HUBERT & HOFFMANN, LLP, SYRACUSE (TERRANCE J. HOFFMANN 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 October 14, 2009. 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.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that County Court erred in denying his motion to withdraw the plea on the ground that it was coerced without conducting a hearing. Contrary to the People's contention, the contention of defendant survives his waiver of the right to appeal (*see People v Poleun*, 75 AD3d 1109; *People v Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912). We nevertheless reject defendant's contention. "There exists no hard-and-fast rule [that] prescribes the nature and extent of the fact-finding procedures prerequisite to the disposition of motions to withdraw a plea of guilty previously entered" (*People v Frederick*, 45 NY2d 520, 524-525). The court must allow the defendant an opportunity to present his or her claims such that it can make "an informed and prudent determination" (*id.* at 525). Here, defendant was afforded the requisite "reasonable opportunity to advance his claims" at sentencing, where there was extensive discussion of defendant's motion (*id.*; *see generally People v Fiumefreddo*, 82 NY2d 536).

Further, the court did not abuse its discretion in denying the motion. Defendant admitted each element of the offense during his plea allocution and did not claim either that he was innocent or that he had been coerced by defense counsel at that time. The court was presented with a credibility determination when defendant moved to withdraw his plea and advanced his belated claims of innocence and coercion, and it did not abuse its discretion in discrediting those

claims (*see People v Dixon*, 29 NY2d 55, 56; *see also People v Ramos*, 63 NY2d 640, 642-643). In addition, the court did not abuse its discretion in discrediting the unsupported and conclusory affidavits of defendant's family members that reiterated defendant's claims of innocence and coercion (*see generally People v Dozier*, 12 AD3d 1176; *People v Smith*, 5 AD3d 1095, *lv denied* 2 NY3d 807).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1154

KA 07-00578

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWON OWENS, DEFENDANT-APPELLANT.

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

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

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

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of incarceration of 25 years to life imprisonment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]). 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). "There was sufficient evidence from which a rational trier of fact could have found that the defendant, with the intent to kill, shot the victim once, causing a wound [that] contributed to his death, during the course of, and in furtherance of, [an attempted] robbery" (*People v Harrell*, 5 AD3d 503, 504, *lv denied* 3 NY3d 641; *see People v Garcia*, 45 AD3d 859, *lv denied* 10 NY3d 765). 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 People v VanDyne*, 63 AD3d 1681, 1682, *lv denied* 14 NY3d 845; *see generally Bleakley*, 69 NY2d at 495). Contrary to the contention of defendant, County Court properly refused to suppress his statement to the police. The record belies the contention of defendant that his statement was the product of coercive interrogation techniques that created a substantial risk that he might falsely incriminate himself and thus rendered his statement involuntary (*see* CPL 60.45 [1], [2] [b] [i]; *People v Jacques*, 158 AD2d 949, *lv denied* 75 NY2d 967). We agree with

defendant, however, that the sentence of life imprisonment without parole is unduly harsh and severe. Thus, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), we modify the judgment by reducing the sentence to an indeterminate term of incarceration of 25 years to life imprisonment.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1156

CA 10-00268

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

FAC CONTINENTAL LLC,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

YICKJING567 LLC,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

DREW & DREW, LLP, BUFFALO (CAROLYN NUGENT OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (LINDSAY M. SWENSEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered April 30, 2009 in a breach of contract action. The order denied the amended motion of plaintiff for summary judgment and granted in part and denied in part the cross motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the amended motion, and denying the cross motion in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging that defendant breached the real estate contract pursuant to which plaintiff was to purchase property owned by defendant. In appeal No. 1, plaintiff appeals from an order denying its amended motion seeking summary judgment on the complaint and granting that part of the cross motion of defendant seeking summary judgment on its second counterclaim for liquidated damages based on plaintiff's alleged breach of the contract. In appeal No. 2, plaintiff appeals from an order awarding defendant liquidated damages in the amount of the deposit made by plaintiff.

The contract required that defendant, as the seller, warrant that it had not received "any notices of any uncorrected violation of any . . . ordinances . . . ." The contract further provided that its terms "may . . . be amended, waived or terminated . . . only by written instrument signed by both [plaintiff and defendant]." It is undisputed that, prior to the closing, defendant received a notice from the City of Buffalo (City) that it was in violation of a City

ordinance requiring that all exterior surfaces be maintained in good condition. Defendant's principal and an agent of plaintiff met with the City's Building Inspector to discuss the violation. According to the affidavit of defendant's principal submitted in support of the cross motion, plaintiff's agent requested an extension of the deadline to paint the building and stated that plaintiff's principal had intended to paint the building after it was purchased. The extension was granted to defendant as the owner of the property. Thereafter, counsel for plaintiff advised defendant's counsel that plaintiff decided to terminate the contract inasmuch as the violation of the City ordinance "remain[ed] uncured," and thus defendant was in violation of the contract. Supreme Court determined that the violation was not an uncorrected violation pursuant to the contract because an extension to correct the violation had been granted by the City.

We agree with plaintiff that the violation was uncorrected and thus the court erred in denying the amended motion and granting that part of the cross motion with respect to the second counterclaim. We therefore modify the order in appeal No. 1 accordingly, and we reverse the order in appeal No. 2. It is axiomatic that " '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569; *see Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29). The terms of the contract are clear and unambiguous with respect to the requirement that defendant warrant, at the time of the closing, that it had not received notice of an uncorrected violation of an ordinance, and it is undisputed that the violation in question had not been corrected at the time of the closing. Indeed, in opposition to the amended motion, defendant did not allege that the extension to correct the violation granted by the City was sufficient to satisfy the terms of the contract but, rather, defendant alleged that plaintiff waived the requirement that defendant warrant that it did not have notice of a violation of any ordinance. The contract, however, required that any waiver be in writing, and it is undisputed that the respective principals of the parties did not sign a written instrument waiving the term of the contract that is in dispute (*see* General Obligations Law § 15-301 [1]).

Finally, we reject the contention of defendant in appeal No. 1 that, because it has not had the opportunity to conduct discovery, an award of summary judgment in favor of plaintiff is premature.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1157

CA 10-00269

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

FAC CONTINENTAL LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

YICKJING567 LLC, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LEWANDOWSKI & ASSOCIATES, WEST SENECA (LINDSAY M. SWENSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DREW & DREW, LLP, BUFFALO (CAROLYN NUGENT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered October 14, 2009 in a breach of contract action. The order awarded defendant money damages in the amount of $15,000.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the award of damages is vacated.

Same Memorandum as in *FAC Continental, LLC v Yickjing567* ([appeal No. 1] ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1160

CA 10-00542

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

DONNA M. AYLSWORTH, PLAINTIFF-APPELLANT,

V ORDER

GREGORY KOWALCZYK, DEFENDANT-RESPONDENT.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O' Donnell, J.), entered January 8, 2010 in a postjudgment divorce action. The order, among other things, recalculated defendant's past and current child support obligations.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1165

CA 10-00688

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

MOHAWK VALLEY WATER AUTHORITY,
PLAINTIFF-RESPONDENT,

V ORDER

STATE OF NEW YORK, ET AL., DEFENDANTS,
AND ERIE BOULEVARD HYDROPOWER, L.P.,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

HISCOCK & BARCLAY, LLP, SYRACUSE (DOUGLAS J. NASH OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 24, 2008. The order denied the motion of defendant Erie Boulevard Hydropower, L.P. to dismiss plaintiff's ninth and seventeenth causes of action and granted the motion of plaintiff for leave to file and serve an amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Russell Sage Coll.*, 78 AD2d 913, *affd* 54 NY2d 185, *rearg denied* 55 NY2d 878).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1166

CA 10-00689

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

MOHAWK VALLEY WATER AUTHORITY,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, ERIE BOULEVARD
HYDROPOWER, L.P., AND NEW YORK STATE
CANAL CORPORATION,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 2.)

HISCOCK & BARCLAY, LLP, SYRACUSE (DOUGLAS J. NASH OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT ERIE BOULEVARD HYDROPOWER, L.P.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS STATE OF NEW YORK AND NEW YORK STATE CANAL CORPORATION.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered May 28, 2009. The order and judgment, inter alia, declared that plaintiff has the right to divert at the Hinckley Reservoir water flow at a rate not to exceed 35 cubic feet per second.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying that part of plaintiff's cross motion seeking summary judgment dismissing the first counterclaim of defendants State of New York and New York State Canal Corporation and reinstating that counterclaim, by denying that part of plaintiff's cross motion seeking partial summary judgment on the 4th and 11th causes of action against those defendants and vacating the declaration, and by reinstating the 6th, 7th, 13th and 14th causes of action against those defendants and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff, a public corporation, diverts water from West Canada Creek at Hinckley Reservoir to provide drinking water to the City of Utica and several other municipalities in the Mohawk Valley region. In 2002 plaintiff applied to the New York State Department of Environmental Conservation for a water supply permit authorizing plaintiff to expand its service to four additional municipalities. That application was opposed by defendants Erie

Boulevard Hydropower, L.P. (Erie), the owner of two hydroelectric plants on West Canada Creek downstream from Hinckley Reservoir, and New York State Canal Corporation (Canal Corporation). Plaintiff thereafter commenced this action seeking, inter alia, a declaration that it "has an absolute and unconditional right to use up to 75 c.f.s. [cubic feet per second] of water from the West Canada Creek at Hinckley [R]eservoir" and that, to the extent that its right to draw up to 75 c.f.s. of water from West Canada Creek is deemed to be encumbered or restricted by an agreement between its predecessor and defendant State of New York (State) executed in 1917 (1917 Agreement), the flow compensation and reservoir requirements of that agreement may not be enforced against it. In addition, plaintiff sought a declaration against Erie that Erie is barred by release from asserting damages or seeking compensation for plaintiff's diversion of water from West Canada Creek at Hinckley Reservoir.

Supreme Court properly denied the motion of Erie seeking partial summary judgment dismissing all but the 16th cause of action against it and granted that part of plaintiff's motion seeking summary judgment dismissing Erie's counterclaims. Plaintiff established that Erie has no rights against it with regard to the flow of West Canada Creek at Hinckley Reservoir, and Erie failed to raise a triable issue of fact with respect thereto. Although the property owned by Erie along West Canada Creek may properly be classified as riparian land, "[t]he riparian right . . . can be severed from the riparian land by grant, condemnation, relinquishment or prescription" (*Matter of Niagara Mohawk Power Corp. v Cutler*, 109 AD2d 403, 405, *affd* 67 NY2d 812). Here, the State appropriated the waters of the West Canada Creek flowing at Hinckley and, by virtue of its 1921 Agreement with the State, Erie's predecessor released its claims against the State with respect to the flow of West Canada Creek at Hinckley Reservoir. Pursuant to a 1958 Agreement, Erie's predecessor also released plaintiff's predecessors from their prior obligation to provide flow compensation. Contrary to the contention of Erie on its appeal, the 1958 Agreement expressly preserved plaintiff's right to divert water at Hinckley Reservoir. "[T]he right to divert and use the water . . . is a claim to an estate or interest in real property" (*Niagara Falls Power Co. v White*, 292 NY 472, 480), and the 1958 Agreement provides that Erie's predecessor shall not modify, rescind, cancel or annul such interest.

The court also properly concluded that Erie has no right, as a third-party beneficiary, to enforce the reservoir or compensating flow requirements of the 1917 Agreement. That agreement expressly negates enforcement by third parties (*see IMS Engrs.-Architects, P.C. v State of New York*, 51 AD3d 1355, 1357-1358, *lv denied* 11 NY3d 706) and, in any event, Erie is no more than an incidental beneficiary of that agreement (*see Alicia v City of New York*, 145 AD2d 315, 317). In addition, Erie's counterclaim alleging that plaintiff tortiously interfered with the 1921 Agreement is time-barred (*see Bib Constr. Co. v City of Poughkeepsie*, 273 AD2d 186) and, in any event, it lacks merit (*see generally Costanza Constr. Corp. v City of Rochester*, 135 AD2d 1111).

We conclude, however, that the court erred in granting those parts of plaintiff's cross motion seeking summary judgment dismissing the first counterclaim of the State and the Canal Corporation (collectively, State defendants), alleging that plaintiff breached the 1917 Agreement, and seeking partial summary judgment on the 4th and 11th causes of action, alleging that the State defendants are barred by the equitable doctrines of estoppel, waiver "and/or" laches from enforcing the flow compensation and reservoir provisions of the 1917 Agreement, "to the extent that plaintiff is entitled to a declaration that it has the right to divert at the Hinckley Reservoir water flow at a rate not to exceed 35 [c.f.s.]." We therefore modify the order accordingly. The record contains conflicting evidence whether plaintiff's obligations under those provisions were ever triggered by low flow conditions in West Canada Creek above Hinckley Reservoir. Given that conflicting evidence, we conclude that there are triable issues of fact whether the State defendants intended to relinquish their rights under those provisions (*see Infotech Mgt. v Morse*, 150 AD2d 638, 639-640), whether the State defendants should be equitably estopped from enforcing those provisions (*see Cadlerock, L.L.C. v Renner*, 72 AD3d 454), and whether the delay of the State defendants in asserting their rights under the 1917 Agreement prejudiced plaintiff such that they are precluded by laches from asserting such rights (*see Trahan v Galea*, 48 AD3d 791). Further, even assuming that those equitable doctrines are applicable here, we agree with the respective contentions of plaintiff on its cross appeal and the State defendants on their appeal that the record does not support the court's determination that plaintiff is entitled to a declaration that it has the right to divert water at a rate not to exceed 35 c.f.s. We therefore vacate the court's declaration. Based on its erroneous determination that plaintiff was entitled to summary judgment on the 4th and 11th causes of action in part, the court sua sponte dismissed, inter alia, the 6th, 7th, 13th and 14th causes of action against the State defendants "as moot." Thus, we conclude that the 6th, 7th, 13th and 14th causes of action must be reinstated, and we note that plaintiff has abandoned any issues with respect to the dismissal of the remaining causes of action as moot (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We therefore further modify the order accordingly.

Finally, we note that neither plaintiff on its cross appeal nor the State defendants on their appeal have raised any specific challenges to the remainder of the order and judgment, and they therefore are deemed to have abandoned any such challenges (*see Ciesinski*, 202 AD2d 984).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1168

TP 10-01232

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

IN THE MATTER OF TOWN OF ONONDAGA, PETITIONER,

V ORDER

DIANA JONES RITTER, COMMISSIONER, NEW YORK STATE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NADINE C. BELL OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD 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, Onondaga County [John C. Cherundolo, A.J.], entered June 1, 2010) to review a determination of respondent. The determination, among other things, adjudged that Community Options Inc. may seek to establish an Individualized Residential Alternative at 5081 Rosemary Lane in the Town of Onondaga.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed for reasons stated in the decision of respondent New York State Office of Mental Retardation and Developmental Disabilities.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1169

TP 10-01277

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF AARON CALLENDER, 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 (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, Wyoming County [Mark H. Dadd, A.J.], entered June 8, 2010) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1171

KA 09-02052

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEFFREY LONGHINE, ALSO KNOWN AS JEFFREY D. LONGHINE, 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 August 25, 2009. 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.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1172

KA 08-02464

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS SAWYER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered November 7, 2006. 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 he was entitled to a downward departure from his presumptive risk level. We reject that contention. "A departure from the presumptive risk level is warranted where 'there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by . . . [the Risk Assessment Guidelines of the Sex Offender Registration Act].' There must exist clear and convincing evidence of the existence of special circumstance[s] to warrant an upward or downward departure" (*People v Guaman*, 8 AD3d 545). Here, defendant failed to establish his entitlement to a downward departure from the presumptive risk level. Contrary to defendant's contention, a downward departure is not warranted on the ground that the minor victims were not strangers. The risk assessment instrument adequately addressed that factor and assessed no points for it (*see People v Barnett*, 71 AD3d 1296, 1297). Finally, defendant contends that 25 points should not have been assessed for sexual contact with the victims because "the victim[s'] lack of consent is due only to inability to consent by virtue of age and . . . scoring 25 points in [that] category result[ed] in an over-assessment of [defendant's] risk to public safety" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 9 [2006]). It cannot be said that the 25 points assessed for sexual contact with the victims "result[ed] in

an over-assessment" of defendant's risk to public safety (*id.*), nor did defendant " 'present clear and convincing evidence of special circumstances justifying a downward departure' " (*People v Clark*, 66 AD3d 1366, 1367, *lv denied* 13 NY3d 713).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1173

KA 09-00173

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE PICCIONE, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered December 15, 2008. The judgment convicted defendant, upon a jury verdict, of arson in the second degree, burglary in the second degree, arson in the third degree, conspiracy in the fourth degree, reckless endangerment in the second degree and reckless driving.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts two, four through six, eight and nine of the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of, inter alia, arson in the second degree (Penal Law § 150.15), burglary in the second degree (§ 140.25 [2]), arson in the third degree (§ 150.10) and conspiracy in the fourth degree (§ 105.10 [1]). We agree with defendant that there is an "absence of record proof that [Supreme Court] complied with its core responsibilities under CPL 310.30 [in responding to a note from the jury during its deliberations, and that such failure on the part of the court constitutes] a mode of proceedings error . . . requiring reversal" (*People v Tabb*, 13 NY3d 852, 853). Although the record reflects that the three notes received from the jury were properly marked as court exhibits (*see People v O'Rama*, 78 NY2d 270, 277-278), only the second and third notes were discussed on the record. It is well settled that a "substantive written jury communication . . . should be . . . read into the record in the presence of counsel" before the jury is summoned to the courtroom in response thereto (*id.*), and here there is no indication in the record that either the prosecutor or defense counsel were even informed of the first note or what action, if any, the court took in response to that note (*see Tabb*, 13 NY3d at 853). In that note, the jury requested, as relevant, "a copy of law as it pertains to this case that you read to us."

Contrary to defendant's further contention, the evidence is legally sufficient to support his felony convictions of arson in the second and third degrees, burglary in the second degree, and conspiracy in the fourth degree (*see generally People v Bleakley*, 69 NY2d 490, 495). As the People correctly concede, however, arson in the third degree is an inclusory concurrent count of arson in the second degree, and thus upon the retrial the jury must be so charged (*see* CPL 300.40 [3] [b]; *see generally People v Ford*, 62 NY2d 275, 281; *People v Moore*, 41 AD3d 1149, 1152, *lv denied* 9 NY3d 879, 992). In light of our decision to grant a new trial, we do not address the issue whether the sentence is unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1174

KA 08-00786

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES EXTALE, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (JON P. GETZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered February 28, 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 of assault in the second degree (Penal Law § 120.05 [4]), defendant contends that County Court erred in allowing the prosecutor to withdraw the count charging him with vehicular assault in the first degree. We reject that contention. The People have "broad discretion in determining when and in what manner to prosecute a suspected offender" (*People v Di Falco*, 44 NY2d 482, 486), including the discretion to reduce a charge when they deem it appropriate (*see People v Urbaez*, 10 NY3d 773, 775). Although there is no provision in CPL article 210 authorizing the People to withdraw a count in an indictment, there is also no provision prohibiting the People from doing so. We thus conclude that, in the absence of a statutory provision limiting such authority, decisions concerning the manner in which to prosecute a defendant are within the prosecutor's " 'broad discretion' " (*People v McLaurin*, 260 AD2d 944, 944, *lv denied* 93 NY2d 1022).

Contrary to defendant's further contentions, the court properly charged assault in the second degree as a lesser included offense of assault in the first degree under Penal Law § 120.10 (1) (*see People v Flecha*, 43 AD3d 1385, 1386, *lv denied* 9 NY3d 990), and the court's submission of the lesser included offense did not violate defendant's double jeopardy rights (*see generally Matter of Suarez v Byrne*, 10 NY3d 523, 538, *rearg denied* 11 NY3d 753). On a prior appeal, we modified the judgment of conviction by reversing those parts convicting defendant of, inter alia, assault in the first degree and

vehicular assault in the first degree (*People v Extale*, 42 AD3d 897). In granting a new trial on those counts, we agreed with defendant that the verdict was inconsistent with respect to those counts and that they should have been charged in the alternative (*id.*). The record establishes that, in the first trial, the court properly instructed the jury to consider whether defendant was guilty of assault in the second degree only if the jury acquitted defendant of assault in the first degree. Because the jury in the first trial found defendant guilty of assault in the first degree, it "never reached-i.e., did not have 'a full opportunity to return a verdict' " on the lesser included count (*Suarez*, 10 NY3d at 537), and defendant therefore was never acquitted of that lesser included count (*see* CPL 300.50 [4]). Thus, "constitutional double jeopardy poses no impediment to [defendant's] retrial for" the lesser included offense (*Suarez*, 10 NY3d at 538). Finally, we conclude that the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1176

KA 07-01843

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON O. ALLEN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS 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 July 25, 2007. The judgment convicted defendant, upon a jury verdict, 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 a jury verdict of robbery in the first degree (Penal Law § 160.15 [2]), defendant contends that the police lacked the requisite reasonable suspicion to stop the vehicle that he was driving and thus that County Court erred in refusing to suppress the evidence seized as a result of that illegal stop. We reject defendant's contention. The record of the suppression hearing establishes that the police had reasonable suspicion to stop the vehicle, based on the description of the vehicle that was broadcast over the police radio, the proximity of the vehicle to the area where the robbery had occurred, and the fact that the stop was close in time to the commission of the robbery (*see People v Faller*, 19 AD3d 138, 139, *lv denied* 5 NY3d 828; *People v Schwing*, 14 AD3d 867, 868; *People v McFadden*, 244 AD2d 887, 888).

Defendant further contends that the court erred in denying his motion for a mistrial based upon the testimony of a police officer that defendant was driving a vehicle previously "involved in a couple robberies." We reject that contention. When defense counsel objected to that testimony, the court sustained the objection and instructed the jury to disregard the testimony. It is well settled that "the jury is presumed to have followed" that curative instruction (*People v Woods*, 60 AD3d 1493, 1494, *lv denied* 12 NY3d 922; *see People v Cruz*, 272 AD2d 922, 923, *affd* 96 NY2d 857), and we thus conclude that any prejudice resulting from that single statement by the police officer was thereby alleviated (*see People v Young*, 55 AD3d 1234, 1236, *lv*

denied 11 NY3d 901).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1177

KA 04-01659

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS A. VELEZ, ALSO KNOWN AS LUIS A. VELEZ ARROYO, ALSO KNOWN AS ANGEL PERALTA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Dennis M. Kehoe, A.J.), rendered June 27, 2003. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first 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, following a jury trial, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction in this circumstantial evidence case (*see generally People v Bleakley*, 69 NY2d 490, 495). "Where, as here, there is no evidence that defendant actually possessed the controlled substance, the People must establish that defendant 'exercised "dominion or control" over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized' " (*People v Pichardo*, 34 AD3d 1223, 1224, *lv denied* 8 NY3d 926, quoting *People v Manini*, 79 NY2d 561, 573; *see* § 10.00 [8]). We conclude that there is a valid line of reasoning and permissible inferences to support the jury's conclusion that defendant had constructive possession of the cocaine found in the trunk of the vehicle in question inasmuch as the police discovered documents linking defendant to the vehicle. 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 Bleakley*, 69 NY2d at 495).

Although defendant contends that Supreme Court should have severed his trial from that of his codefendant, he correctly concedes that his contention is not preserved for our review (*see People v Woods*, 284 AD2d 995, 996, *lv denied* 96 NY2d 926; *People v Santiago*, 204 AD2d 497, *lv denied* 84 NY2d 832). He thus contends that he was denied effective assistance of counsel based on defense counsel's failure to move for severance. We reject that contention. Severance was not warranted in this case (*see People v Mahboubian*, 74 NY2d 174, 184; *People v Clark*, 66 AD3d 1489, *lv denied* 13 NY3d 906), and "it is well settled that the failure to make motions with little or no chance of success does not constitute ineffective assistance of counsel" (*People v Guinyard*, 72 AD3d 1545, 1546; *see People v Nuffer*, 70 AD3d 1299, 1300).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1178

CA 09-00624

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, PETITIONER-RESPONDENT, TO ACQUIRE TITLE TO REAL PROPERTY DESCRIBED AS SBL NO. 114.-02-10.1 AND LOCATED AT 410 HIAWATHA BOULEVARD WEST AT INTERSECTION OF HIAWATHA BOULEVARD WEST AND CAROUSEL CENTER DRIVE IN CITY OF SYRACUSE, WHICH PARCEL COMPRISES A PORTION OF THE SITE FOR THE PHASED PUBLIC PROJECT KNOWN AS DESTINY USA.

MEMORANDUM AND ORDER

HESS CORPORATION, FORMERLY KNOWN AS AMERADA HESS CORPORATION, RESPONDENT-APPELLANT.

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

HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered March 3, 2009 in a proceeding pursuant to EDPL article 4. The order, among other things, granted the petition and authorized petitioner to acquire by condemnation certain real property owned by respondent.

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

Memorandum: Petitioner, City of Syracuse Industrial Development Agency (SIDA), commenced this proceeding pursuant to EDPL article 4 seeking to acquire title to a parcel of real property owned by respondent. SIDA previously authorized the condemnation of respondent's property, as well as the condemnation of other property, in proceedings commenced pursuant to EDPL article 2 (*Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, *lv denied* 99 NY2d 508; *Matter of J.C. Penney Corp. v City of Syracuse*, 301 AD2d 305, *appeal dismissed* 99 NY2d 609; *Matter of 843 Hiawatha Blvd. LLC v City of Syracuse Indus. Dev. Agency*, 301 AD2d 305). Contrary to respondent's contention, Supreme Court properly concluded that it lacked jurisdiction to determine the merits of the contention of respondent that its due process rights were violated and granted the petition (*see generally* EDPL 402 [B] [5]). "The power of the condemnation court to entertain claims raised by the pleadings in

a condemnation proceeding is limited to matters of procedural compliance not within the scope of review by the Appellate Division" (*Matter of UAH-Braendly Hydro Assoc. v RKDK Assoc.*, 138 AD2d 493, 493; *see* EDPL 207, 208; *Matter of Broome County [Havtur]*, 159 AD2d 790, *appeal dismissed* 76 NY2d 771, *lv denied* 76 NY2d 709; *Matter of Incorporated Vil. of Patchogue v Simon*, 112 AD2d 374). In contending that it was deprived of its right to due process by SIDA's alleged insufficient notice of the prior EDPL article 2 proceeding, respondent is in fact contending that the prior "proceeding was [not] in conformity with the federal and state constitutions" (EDPL 207 [C] [1]), and that contention therefore should have been raised before this Court in an original proceeding pursuant to EDPL 207 (*see* EDPL 208; *Broome County*, 159 AD2d 790). Respondent failed to raise that contention in such a proceeding, however, and "may not [now] circumvent the command of the statute with respect to the procedures governing judicial review by raising [its] objections within the context of an EDPL article 4 vesting proceeding" (*Incorporated Vil. of Patchogue*, 112 AD2d 374, 375, *lv denied* 66 NY2d 605).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1179

CA 10-00612

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

KARA R. MCCANN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HARLEYSVILLE INSURANCE COMPANY OF NEW YORK,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (CHRISTOPHER R. POOLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered August 19, 2009 in a personal injury action. The order denied the motion of defendant to compel disclosure.

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

Memorandum: Plaintiff commenced an action seeking damages for injuries she sustained when the vehicle she was operating collided with a vehicle driven by defendant's insured. Plaintiff thereafter settled that action and commenced the instant action against defendant seeking "supplementary uninsured/underinsured motorist coverage." In appeal No. 1, defendant appeals from an order denying its motion to compel disclosure of photographs and seeking "an authorization for plaintiff's Facebook account." According to defendant, the information sought was relevant with respect to the issue whether plaintiff sustained a serious injury in the accident. We conclude in appeal No. 1 that Supreme Court properly denied defendant's motion "as overly broad," without prejudice "to service of new, proper discovery demands" (*see generally Slate v State of New York*, 267 AD2d 839, 841).

In appeal No. 2, defendant appeals from an order denying its subsequent motion seeking to compel plaintiff to produce photographs and an authorization for plaintiff's Facebook account information and granting plaintiff's cross motion for a protective order. Although defendant specified the type of evidence sought, it failed to establish a factual predicate with respect to the relevancy of the evidence (*see Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421). Indeed, defendant essentially sought permission to conduct "a fishing expedition" into plaintiff's Facebook account based on the

mere hope of finding relevant evidence (*Auerbach v Klein*, 30 AD3d 451, 452). Nevertheless, although we conclude that the court properly denied defendant's motion in appeal No. 2, we agree with defendant that the court erred in granting plaintiff's cross motion for a protective order. Under the circumstances presented here, the court abused its discretion in prohibiting defendant from seeking disclosure of plaintiff's Facebook account at a future date. We therefore modify the order in appeal No. 2 accordingly.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1180

CA 10-00613

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

KARA R. MCCANN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HARLEYSVILLE INSURANCE COMPANY OF NEW YORK,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (CHRISTOPHER R. POOLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 26, 2010 in a personal injury action. The order denied the motion of defendant to compel disclosure and granted the cross motion of plaintiff for a protective order.

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

Same Memorandum as in *McCann v Harleysville Ins. Co. of N.Y.* ([appeal No. 1] ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1184

CA 10-00673

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

NATIONAL URBAN VENTURES, INC., THE NIAGARA VENTURE, AND NIAGARA SPLASH, INC., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS AND NIAGARA FALLS URBAN RENEWAL AGENCY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (RICHARD I. ZUCCO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 14, 2009. The order granted the motion of defendants for summary judgment, dismissed the complaint and vacated and cancelled the notice of pendency filed by plaintiffs.

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

Memorandum: Plaintiffs commenced this action seeking specific performance of a lease agreement or, alternatively, damages in the event that specific performance was no longer an available remedy. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint inasmuch as the action is time-barred. The statute of limitations for a breach of contract action is six years (*see* CPLR 213 [2]), and the statute of limitations generally begins to run "from the time the cause of action accrued" (CPLR 203 [a]). "In New York, a breach of contract cause of action accrues at the time of the breach," even in the event that damages do not accrue until a later date (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402; *see John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550). We note in addition that the statute of limitations begins to run from the date of the first alleged breach (*see Sullivan v Troser Mgt., Inc.*, 15 AD3d 1011). Here, defendants purported to terminate the lease agreement in 1992 and again in 2000, following an amendment to the lease agreement. Plaintiffs did not commence this action until 2008, well beyond the six-year statute of limitations.

Contrary to plaintiffs' contention, the statute of limitations was not tolled by virtue of other actions between the parties. Although "[a]n acknowledgment will toll or restart the running of the applicable statute of limitations if it is in writing, recognizes the existence of the obligation and contains nothing inconsistent with an intent to honor the obligation" (*id.* at 1011-1012), nothing in the declaratory judgment action commenced by defendants in 2000 constituted an acknowledgment of any existing obligations.

Because we conclude that the defendants' motion was properly granted on the ground that the action was time-barred, we see no need to address plaintiffs' remaining contentions with respect to the merits of the motion.

Finally, plaintiffs contend for the first time on appeal that the court was biased in favor of defendants, and thus that contention is not preserved for our review (*see Ginther v Ginther*, 13 AD3d 1128; *Matter of Aaron v Kavanagh*, 304 AD2d 890, 891, *lv denied* 1 NY3d 502). In any event, we conclude that plaintiffs' contention lacks merit.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1185

CA 10-00950

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
MICHAEL DRENNEN, AS PRESIDENT OF AMERICAN
FEDERATION OF STATE, COUNTY AND MUNICIPAL ORDER
EMPLOYEES, LOCAL 650, AFL-CIO,
PETITIONER-RESPONDENT,

AND

CITY OF BUFFALO, BYRON BROWN, MAYOR, AND
KARLA THOMAS, COMMISSIONER OF HUMAN RESOURCES,
RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JEFFREY F. SWIATEK OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from a judgment and order (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 30, 2009 in a proceeding pursuant to CPLR 75. The judgment and order granted the petition to confirm an arbitration award.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1186

CAF 09-02255

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF JOSHUA M. HARNANTO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

YVONNE GANDASAPUTRA, RESPONDENT-APPELLANT.

SHEILA SULLIVAN DICKINSON, BUFFALO, FOR RESPONDENT-APPELLANT.

SHEFFER, MURPHY & WHITE, CLARENCE (DAVID D. WHITE OF COUNSEL), FOR PETITIONER-RESPONDENT.

MARY CARNEY, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR JEREMIAH C.H., JOEL S.H. AND JONATHAN E.H.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered September 25, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner's application to relocate with the subject children to the State of New Jersey.

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

Memorandum: Respondent mother contends on appeal that Family Court erred in denying her petition seeking a modification of the parties' existing custody arrangement. The mother sought joint custody, with primary physical residence of the parties' children with her. She further contends that the court erred in granting the petition in which petitioner father sought permission for the parties' children to relocate with him from Buffalo to New Jersey. We affirm. Upon our review of the record, we agree with the court that the best interests of the children would not be served by granting the mother's petition (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174; *Fox v Fox*, 177 AD2d 209, 210). Furthermore, we conclude that the court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727) in determining that the children's best interests would be served by granting the father's petition (*see generally Matter of Gillard v Gillard*, 241 AD2d 966, 968).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1188

CA 10-00639

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

PAMELA PALASZYNSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BEVERLY J. MATTICE, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

CELLINO & BARNES, P.C., BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered December 11, 2009 in a personal injury action. The order granted the motion of defendant Beverly J. Mattice for leave to serve an amended answer and denied the cross motion of plaintiff to disqualify counsel for Beverly J. Mattice.

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

Same Memorandum as in *Palaszynski v Mattice* ([appeal No. 2] ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1189

CA 10-00722

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

PAMELA PALASZYNSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BEVERLY J. MATTICE, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

CELLINO & BARNES, P.C., BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered February 24, 2010 in a personal injury action. The order granted the motion of defendant Beverly J. Mattice for leave to serve an amended answer and denied the cross motion of plaintiff to disqualify counsel for Beverly J. Mattice.

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 allegedly sustained when she was a passenger in a vehicle that struck a tree. The vehicle was owned by defendant Beverly J. Mattice and operated by defendant Merissa A. McGill. In appeal No. 1, plaintiff appeals from an order that, inter alia, granted the motion of Mattice for leave to amend her answer and, in appeal No. 2, she appeals from a subsequent order that, inter alia, granted that same relief. We thus dismiss appeal No. 1 inasmuch as the order in appeal No. 2 necessarily superseded the order in appeal No. 1.

We conclude in appeal No. 2 that Supreme Court properly granted the motion of Mattice for leave to amend the answer. "Generally, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court" (*Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, *rearg granted* 41 AD3d 1324 [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Carro v Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277). Here, there is no prejudice to plaintiff arising from the amended answer, and the proposed amendment is not patently

insufficient on its face. We thus perceive no basis for disturbing the court's determination (*see generally Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). We have considered plaintiff's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1190

CA 10-00675

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

NATIONAL URBAN VENTURES, INC., THE NIAGARA VENTURE, AND NIAGARA SPLASH, INC., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS AND NIAGARA FALLS URBAN RENEWAL AGENCY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (RICHARD I. ZUCCO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 14, 2009. The order granted the motion of defendants for summary judgment, dismissed the complaint and vacated and cancelled the notice of pendency filed by plaintiffs.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, to enjoin defendants from making any conveyance, agreement or transaction that conflicts with a covenant in a 1982 agreement between plaintiff National Urban Ventures, Inc. (formerly known as Lehr's Greenhouse Restaurant of New York, Inc.) and defendants. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Contrary to plaintiffs' contention, the covenant contained in the 1982 agreement did not run with the land, and thus the action is time-barred.

"Restrictive covenants are also commonly categorized as negative easements. They restrain servient landowners from making otherwise lawful uses of their property . . . However, the law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them" (*Witter v Taggart*, 78 NY2d 234, 237-238). "Subject to a few exceptions not important at this time, there is now in this State a settled rule of law that a covenant to do an affirmative act, as distinguished from a covenant merely negative in effect, does not run

with the land" (*Guaranty Trust Co. of N.Y. v New York & Queens County Ry. Co.*, 253 NY 190, 204, *rearg denied* 254 NY 126, *appeal dismissed* 282 US 803). Where, however, a covenant runs with the land, the covenant will be enforceable against any subsequent purchaser of the land (*see generally Neponsit Prop. Owners' Assn. v Emigrant Indus. Sav. Bank*, 278 NY 248, 254-255, *rearg denied* 278 NY 704). Here, plaintiffs seek to enforce an affirmative covenant in the 1982 agreement. We note in addition that defendants established that there was no apparent intent for the covenant to run with the land, and plaintiffs failed to raise a triable issue of fact with respect to intent (*see generally 328 Owners Corp. v 330 W. 86 Oaks Corp.*, 8 NY3d 372, 382-383; *Village of Philadelphia v FortisUS Energy Corp.*, 48 AD3d 1193, 1194-1195).

Because the covenant does not run with the land, the issue before us is whether plaintiffs timely commenced this action seeking to enforce it. As defendants correctly contend, "[i]t is a familiar principle of law that[,] where no time is fixed in a contract, the law may imply a reasonable time" for, in this case, seeking to enforce a covenant (*Webster's Red Seal Publs. v Gilberton World-Wide Publs.*, 67 AD2d 339, 343, *affd* 53 NY2d 643; *see Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765, *rearg denied* 82 NY2d 889; *Sharper v Harlem Teams for Self-Help*, 257 AD2d 329, 332). The length of time that is reasonable "will depend upon the facts and circumstances of the particular case" (*Sharper*, 257 AD2d at 332). We have previously held, in a similar action involving Niagara Falls Urban Renewal Agency, a defendant in this action, that a delay of 17 years before seeking to enforce a covenant was unreasonable as a matter of law (*see Bainbridge-Wythe Partnership v Niagara Falls Urban Renewal Agency*, 294 AD2d 806, *lv denied* 98 NY2d 613). We thus conclude that this action to enforce the covenant in the 1982 agreement was not commenced within a reasonable time.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1192.1
CA 10-00785
PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ.

SUBURBAN TOOL & DIE CO., INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CENTURY MOLD COMPANY, INC.,
DEFENDANT-RESPONDENT.

RELIN, GOLDSTEIN & CRANE, LLP, ROCHESTER, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (KEVIN TOMPSETT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), dated June 10, 2009. The order, among other things, denied plaintiff's motion for summary judgment and granted defendant's cross motion for partial summary judgment.

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

Memorandum: Plaintiff appeals from an order denying its motion for summary judgment on the complaint for breach of contract and granting the cross motion of defendant for partial summary judgment on liability on its counterclaims, for breach of contract and quantum meruit. Although we conclude that Supreme Court properly denied plaintiff's motion, we agree with plaintiff that the court erred in granting defendant's cross motion. We therefore modify the order accordingly. Generally, " '[w]hen interpreting a written contract, the court should give effect to the intent of the parties as revealed by the language and structure of the contract . . ., and should ascertain such intent by examining the document as a whole' " (*Village of Hamburg v America Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89, *lv denied* 97 NY2d 603). Here, neither party established that its interpretation of the contract is the only reasonable interpretation thereof (*see Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923). "Thus, the intent of the parties must be determined by evidence outside the contract," rendering summary judgment at this juncture inappropriate (*id.*). We note in particular that we are unable to discern from the record before us whether plaintiff might have a valid claim for an account stated with respect to any of the purchase orders

in question (*see generally M. Paladino, Inc. v Lucchese & Son Contr. Corp.*, 247 AD2d 515, 516).

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court

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

1194

KA 07-02558

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLES REED, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JON STERN, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 15, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1195

KA 09-00856

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DENNIS WASHINGTON, 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 (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 6, 2009. 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 Lococo*, 92 NY2d 825, 827).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1196

KA 08-00136

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLIE J. SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered June 18, 2007. 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]). Even assuming, arguendo, that defendant preserved for our review his contention that the prosecutor violated County Court's *Molineux* ruling and that he was thereby denied a fair trial, we conclude that defendant's contention is without merit. The prosecutor's questions at issue were innocuous and not designed to circumvent the court's *Molineux* ruling and, in any event, any alleged prosecutorial misconduct did not " 'cause[] such substantial prejudice to the defendant that he has been denied due process of law' " (*People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711).

We reject defendant's further contention that the prosecutor improperly bolstered the testimony of one of the People's witnesses. Defense counsel opened the door to the disputed testimony (*see People v Marji*, 43 AD3d 961, *lv denied* 9 NY3d 1007; *see generally People v Massie*, 2 NY3d 179, 183-184; *People v Melendez*, 55 NY2d 445, 451-452) and, even assuming, arguendo, that the court erred in admitting that testimony, 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 generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court

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

1197

KA 09-02278

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHON A. VANANTWERP, DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AURORA, 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 September 24, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (two counts) and burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the judgment is affirmed, and the matter is remitted to Cayuga County Court for a hearing to determine the amount of restitution.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the second degree (Penal Law § 160.10 [1]) and one count of burglary in the second degree (§ 140.25 [2]). We agree with defendant that County Court erred in directing him to pay restitution without first conducting a hearing on the amount of restitution to be paid. It is not clear from the record how the court determined the amount of restitution (*see People v White*, 266 AD2d 831) and, in any event, the record is insufficient to support "a finding [with respect] to the dollar amount of the fruits of the offense[s] and the actual out-of-pocket loss[es] to the victim[s]" (§ 60.27 [2]; *see People v Dibble* [appeal No. 2], 277 AD2d 969). We therefore modify the judgment by vacating the amount of restitution, and we remit the matter to Cayuga County Court for a hearing to determine the amount of restitution to be paid by defendant.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1198

KA 07-01225

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK J. POVOSKI, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered July 26, 2006. The judgment convicted defendant, upon his plea of guilty, of arson in the third degree (four counts) and criminal mischief 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 four counts of arson in the third degree (Penal Law § 150.10 [1]) and one count of criminal mischief in the second degree (§ 145.10). Defendant contends that his plea was not knowing and voluntary because Supreme Court, Monroe County, erred in requiring as a condition of the plea that defendant withdraw a notice of appeal from a prior judgment entered in Ontario County. Although that contention survives defendant's waiver of the right to appeal, defendant failed to preserve that contention for our review (*see People v Poleun*, 75 AD3d 1109; *People v Diaz*, 62 AD3d 1252, *lv denied* 12 NY3d 924). In any event, that contention is without merit. The record establishes that the court indicated to defendant that its determination whether the sentences imposed on the conviction would run concurrently with the sentence previously imposed in Ontario County depended upon whether defendant waived his right to appeal from the Ontario County judgment. The court further explained to defendant that he would be asked at sentencing to sign a written waiver of his right to appeal from the judgment entered in Ontario County, and defendant signed that waiver. Thus, we conclude that the court did not impermissibly foreclose our review of those contentions raised in the appeal from the Ontario County judgment that survived defendant's waiver of the right to appeal in that case (*see generally People v Callahan*, 80 NY2d 273, 285; *People v Seaberg*, 74 NY2d 1, 10-11). Indeed, defendant did not withdraw his notice of appeal from that

judgment and, in that prior appeal, we concluded that defendant's waiver of the right to appeal was knowing and voluntary, despite the fact that it was executed as a condition of the plea entered in Monroe County (*People v Povoski*, 55 AD3d 1221, *lv denied* 11 NY3d 929).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1199

KA 07-01033

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES REED, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JON STERN, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 30, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]), defendant contends that Supreme Court erred in enhancing his sentence based on his arrest between the time of his plea and the time of sentencing. Defendant, however, did not object to the enhanced sentence and did not move to withdraw his plea or to vacate the judgment of conviction, and he therefore failed to preserve his contention for our review (*see People v Cox*, 27 AD3d 1170, *lv denied* 6 NY3d 893; *People v Holmes*, 306 AD2d 889, *lv denied* 100 NY2d 621). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1200

KA 10-01195

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN R. MORRICE, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered July 14, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). We previously reversed the judgment convicting defendant of burglary in the second degree and grand larceny in the third degree (§ 155.35) and granted defendant a new trial (*People v Morrice*, 61 AD3d 1390), and the judgment now on appeal is the result of the retrial. Defendant again contends that he was deprived of a fair trial based on prosecutorial misconduct on summation. Defendant preserved that contention for our review only with respect to two of the prosecutor's comments on summation and, in any event, "we conclude that . . . '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Diaz*, 52 AD3d 1230, 1231, *lv denied* 11 NY3d 831). Defendant further contends that County Court erred in denying his pretrial motion for the issuance of a subpoena for the NYSIIS reports of all potential prosecution witnesses. We reject that contention inasmuch as defendant already had copies of the witnesses' conviction records that the prosecutor had turned over pursuant to CPL 240.45 (1) (b). When a prosecution witness allegedly gave false testimony concerning a prior conviction, defendant never sought to obtain a certified copy of that witness's NYSIIS record or introduce it in evidence pursuant to CPL 60.40 (1) to prove such a conviction. Indeed, defendant never objected to that witness's testimony or otherwise raised the issue before the court until after the retrial.

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish that he knowingly entered or remained unlawfully in the residence (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit inasmuch as the evidence established that defendant was not licensed or privileged to enter the residence (*see* Penal Law § 140.00 [5]; § 140.25 [2]; *see generally People v Graves*, 76 NY2d 16, 20). Finally, 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 People v Bleakley*, 69 NY2d 490, 495).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1203

CAF 09-01781

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

IN THE MATTER OF LISA L. LOMANTO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY M. SCHNEIDER, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

SCOTT T. GODKIN, UTICA, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered July 29, 2009 in a proceeding pursuant to Family Court Act article 4. The order, among other things, denied respondent's objection to an order of the Support Magistrate which determined that respondent was in wilful violation of his child support obligation and was not entitled to a modification of that obligation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the objection in part and reinstating respondent's petition and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, respondent father contends that Family Court erred in confirming the Support Magistrate's order that granted the petition seeking, inter alia, a determination that he willfully failed to pay child support pursuant to the judgment of divorce and dismissed the petition of the father seeking a downward modification of his child support obligation. We note at the outset that, although the order in appeal No. 1 does not specify that the Support Magistrate's order is confirmed insofar as it dismissed the father's petition, Family Court in its written decision underlying the order expressly stated that there was "no basis for disturbing the [Support] Magistrate's decision" in that regard. It is, of course, well established that, where there is a discrepancy between a decision and an order, the decision controls (*see Matter of Edward V.*, 204 AD2d 1060, 1061). We therefore deem the order in appeal No. 1 to include a provision that Family Court confirmed the order of the Support Magistrate insofar as it dismissed the father's petition seeking a downward modification in child support, and thereby denied that part of the father's objection to the Support Magistrate's order dismissing that petition. In appeal No. 2, the father contends that the court erred in sentencing him to a jail term based on his willful failure to pay child support, as set forth in the order in appeal No. 1.

Addressing first the order in appeal No. 2, we note that the father did not seek a stay of the sentence pursuant to Family Court Act § 1114 (b). Inasmuch as the sentence expired on January 31, 2010, we dismiss appeal No. 2 as moot (*see Matter of Lewis v Cross*, 72 AD3d 1228, 1229; *Matter of Leslie v Rodriguez*, 303 AD2d 1016; *Matter of Johnson v Boone*, 289 AD2d 938).

With respect to the order in appeal No. 1, we agree with the father that both the Support Magistrate and Family Court applied an incorrect standard in determining that he was not entitled to a downward modification of child support. "[W]here a judgment of divorce incorporates by reference, but does not merge with, a stipulation of settlement between the parties . . . , the parties to such agreement may contractually provide for a support modification on a lesser standard than legally required" (*Glass v Glass*, 16 AD3d 120, 120-121; *see Matter of Vincent Z. v Dominique K.*, 62 AD3d 402; *Heller v Heller*, 43 AD3d 999, 1000). Here, the parties' stipulation specifically provided that the father could seek a downward modification of child support based upon a showing of his inability to earn the amount of income imputed to him in the stipulation, without a showing of any change of circumstances. The Support Magistrate therefore erred in denying the request of the father for a downward modification of his child support obligation on the ground that he failed to demonstrate a "substantial and unforeseen change of circumstances," and the court erred in denying that part of his objection to the Support Magistrate's order insofar as it dismissed his petition on that ground. We therefore modify the order by granting the objection in part and reinstating the petition of the father for a downward modification of his child support obligation, and we remit the matter to Family Court, Oneida County, for further proceedings on that petition, consistent with the terms of the parties' stipulation.

We reject the further contention of the father, however, that the court erred in denying that part of his objection to the Support Magistrate's order insofar as it determined that he willfully failed to pay child support pursuant to the judgment of divorce. The admission by the father at the start of the hearing that he had not paid child support as required by the judgment of divorce constituted prima facie evidence of a willful violation of that judgment, and thus the burden shifted to the father to present some competent and credible evidence justifying his failure to pay child support (*see Matter of Powers v Powers*, 86 NY2d 63, 69-70; *Matter of Maldonado v Maldonado*, 74 AD3d 971; *Lewis*, 72 AD3d at 1229-1230). We conclude that the father failed to meet that burden. His efforts to contact the Support Collection Unit (SCU) to arrange payment of child support through that office does not rebut the presumption of willful violation inasmuch as the father did not contact the SCU until after the mother commenced this proceeding alleging that he had willfully violated the judgment of divorce. Further, the fact that, prior to entering the judgment of divorce, Supreme Court failed to conduct an inquiry into the father's ability to earn the amount imputed to him pursuant to the parties' stipulation is insufficient to rebut the

presumption of willful violation. " 'Stipulations of settlement are favored by the courts and a stipulation made on the record in open court will not be set aside absent a showing that it was the result of fraud, overreaching, mistake, or duress' " (*Matter of Abidi v Antohi*, 64 AD3d 772, 773; *see Matter of Hanlon v Hanlon*, 62 AD3d 702, 703; *Cheruvu v Cheruvu*, 59 AD3d 876, 878). Here, the parties knowingly and voluntarily entered into the stipulation providing for child support after full disclosure of their respective financial situations and extensive negotiations while represented by counsel. We note that the stipulation addresses the possibility that the father might not be able to earn the income imputed to him inasmuch as the terms thereof permit the father to seek a downward modification of child support based on his inability to earn the imputed amount, without demonstrating a change of circumstances. Finally, the father failed to preserve for our review his contention that petitioner mother's summons failed to include the warning required by Family Court Act § 453 (b) (*see generally Matter of Yamillette G.*, 74 AD3d 1066, 1068; *Matter of Shalyse WW.*, 63 AD3d 1193, 1197, *lv denied* 13 NY3d 704).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1204

CAF 09-01782

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

IN THE MATTER OF LISA L. LOMANTO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY M. SCHNEIDER, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

SCOTT T. GODKIN, UTICA, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered July 29, 2009 in a proceeding pursuant to Family Court Act article 4. The order, among other things, committed respondent to the Oneida County Jail.

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

Same Memorandum as in *Matter of Lomanto v Schneider* ([appeal No. 1] ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1205

CAF 09-02496

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

IN THE MATTER OF MARGUERITE MACWILLIAMS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT MACWILLIAMS, RESPONDENT-APPELLANT.

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

THE ODORISI LAW FIRM, EAST ROCHESTER (TERRENCE C. BROWN-STEINER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered October 7, 2009 in a proceeding pursuant to Family Court Act article 4. The order modified the order of the Support Magistrate.

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

Memorandum: Respondent appeals from an order granting the petition seeking, inter alia, to modify the award of spousal support to respondent. We conclude that Family Court properly determined that petitioner met her burden of establishing a substantial change of circumstances to warrant downward modification (*see Matter of Fafinski v Bialaszewski*, 289 AD2d 1066). " '[S]pousal support should be awarded for a duration that would provide the recipient with enough time to become self-supporting' " (*Walter v Walter*, 38 AD3d 763, 765). Here, respondent was awarded spousal support to enable him to obtain full-time employment as a teacher. Nevertheless, respondent failed to secure a full-time teaching position or to obtain a Master's degree that would have assisted him in doing so for four years, and thus the court properly reduced the award of spousal support.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1207

CAF 09-02307

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

IN THE MATTER OF BETSY LUTZ,
PETITIONER-RESPONDENT,

V ORDER

JASON STERLING, RESPONDENT-RESPONDENT.

SUSAN B. MARRIS, ESQ., ATTORNEY FOR
THE CHILD, APPELLANT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, APPELLANT PRO SE.

EDWARD G. KAMINSKI, UTICA, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered September 25, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted continued physical custody of the child to 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.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1208

CA 10-01182

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

HOWARD A. ABBUHL AND GEORGIA F. ABBUHL,
PLAINTIFFS-RESPONDENTS,

V ORDER

AMERICU CREDIT UNION, DEFENDANT-APPELLANT.

NASTO LAW FIRM, YORKVILLE (JOHN A. NASTO, JR., OF COUNSEL) FOR DEFENDANT-APPELLANT.

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered July 6, 2009. The order affirmed a judgment (denominated order) of the Utica City Court, which granted plaintiffs' motion for summary judgment and awarded judgment to plaintiffs in the amount of $7,391 plus interest.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1209

CA 09-01780

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

STEVEN CHRISTOPHER, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 108185.)

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER G. JOHNSON, ROCHESTER, FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Renee Forgensi Minarik, J.), entered June 4, 2009 in a personal injury action. The judgment, among the other things, resolved the issue of reckless disregard in favor of claimant and determined that defendant is 100% at fault for causing the accident.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on August 6 and 9, 2010,

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1210

TP 10-00958

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

IN THE MATTER OF ELLIS WARE, PETITIONER,

V MEMORANDUM AND ORDER

ANDREA EVANS, CHAIRWOMAN, NEW YORK STATE DIVISION OF PAROLE, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (SUSAN K. JONES OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH 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 March, 26, 2010) to review a determination of respondent. The determination revoked petitioner's parole.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the Administrative Law Judge revoking his release to parole supervision. We conclude that the determination is supported by substantial evidence (*see Matter of Shaw v Murray*, 24 AD3d 1268, *lv denied* 6 NY3d 712). The evidence presented at the hearing on the petition established that petitioner violated several conditions of his parole, including the condition that he successfully complete the program at the facility where he was assigned.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1211

CA 10-00886

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

JANINE ZENZILLO, DOING BUSINESS AS AUTO DIMENSIONS PLUS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNDERWRITERS AT LLOYD'S LONDON, DEFENDANT-APPELLANT.

GINSBERG, BECKER & WEAVER, LLP, NEW YORK CITY (ROBERT D. BECKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GEORGE F. ANEY, HERKIMER, HANCOCK & ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Romano, J.), entered July 9, 2009. The order, insofar as appealed from, denied the motion of defendant to dismiss the complaint or vacate the note of issue.

It is hereby ORDERED that the order insofar as 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 the amount allegedly owed pursuant to an insurance policy issued to plaintiff by defendant. On June 1, 2006, the parties' counsel stipulated to an indefinite extension of time for defendant to answer the complaint. By letter dated January 19, 2007, plaintiff's counsel requested that defendant answer the complaint so that plaintiff could prosecute the action. Defendant never did so but, on February 3, 2009, it moved to dismiss the complaint pursuant to, inter alia, CPLR 3215 (c). Supreme Court erred in denying the motion on that ground. CPLR 3215 (c) provides that, "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [the defendant's] default, the court shall . . . dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed" (*see Livingston v Livingston*, 303 AD2d 975). In opposition to the motion, plaintiff included an affirmation from plaintiff's counsel, who agreed that the January 19, 2007 letter terminated the stipulation extending defendant's time to answer. Defendant therefore defaulted 20 days after January 19, 2007 by failing to appear in the action (*see* CPLR 320 [a]), and plaintiff failed to demonstrate sufficient cause

why the complaint should not be dismissed (*see* CPLR 3215 [c]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1212

TP 10-00994

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

IN THE MATTER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS AND LEONARD J. SCARDINO, PETITIONERS,

V MEMORANDUM AND ORDER

INDEPENDENT AUTO APPRAISERS, INC., UPSTATE AUTO APPRAISERS, INC., DOING BUSINESS AS AUTO COLLISION APPRAISERS, AS SUCCESSOR-IN-INTEREST, AND GEORGE ORNT, INDIVIDUALLY, RESPONDENTS.

CAROLINE J. DOWNEY, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR PETITIONERS.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Ann Marie Taddeo, J.], dated April 16, 2010) to enforce a determination of the Commissioner of the New York State Division of Human Rights. The determination found, among other things, that respondent discriminated against petitioner Leonard J. Scardino on the basis of age in violation of the Human Rights Law.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by vacating the award of compensatory damages for mental anguish and humiliation and as modified the determination is confirmed without costs, and respondents are directed to pay petitioner Leonard J. Scardino the sum of $36,607 for lost wages, with interest at the rate of 9% per annum, commencing September 1, 1989.

Memorandum: Petitioners commenced this proceeding pursuant to Executive Law § 298 seeking to enforce the order determining that respondents discriminated against petitioner Leonard J. Scardino based on his age and awarding him compensatory damages for mental anguish and humiliation and for lost wages. Petitioners also sought to enforce the order determining that respondents failed to comply with the prior order. Scardino worked as an appraiser for respondents and filed a complaint with petitioner New York State Division of Human Rights (SDHR) alleging that he was terminated from his job because of his age. We conclude that the determination of the Commissioner of SDHR that Scardino was the victim of age discrimination is supported by substantial evidence (*see generally* § 298; *300 Gramatan Ave. Assoc.*

v State Div. of Human Rights, 45 NY2d 176, 180-182; *Matter of New York State Div. of Human Rights v Adams Sec., Inc.*, 38 AD3d 1194, 1195). We further conclude that the award of damages for lost wages is reasonably related to the discriminatory conduct (*see Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 217), and thus there is no reason to disturb the determination of the Commissioner with respect thereto, inasmuch as the Commissioner "may fashion a remedy to make the victim whole for injuries suffered as a result of discriminatory employment practices . . . [and] 'has broad powers to adopt measures [that] he . . . reasonably deems *necessary to redress the injury*' " (*Matter of Beame v DeLeon*, 87 NY2d 289, 297). We conclude, however, that the record does not support an award of damages for mental anguish and humiliation (*see generally Matter of Iroquois Nursing Home, Inc. v New York State Div. of Human Rights*, 55 AD3d 1285, 1286, *lv denied* 12 NY3d 708), and we therefore modify the determination accordingly.

Finally, the Commissioner's determination after the compliance hearing that respondents failed to comply with the order determining that they discriminated against Scardino is supported by substantial evidence (*see Matter of New York State Div. of Human Rights v Tripi*, 2 AD3d 1360; *see generally 300 Gramatan Ave. Assoc.*, 45 NY2d at 180-182).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1213

CA 09-02450

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

JOHN MURPHY, PLAINTIFF-RESPONDENT,

V ORDER

CSX TRANSPORTATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ANSPACH MEEKS ELLENBERGER, LLP, BUFFALO, HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (PATRICK DONOGHUE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered July 13, 2009 in a personal injury action. The order, among other things, awarded plaintiff prejudgment interest.

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]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1214

CA 09-02452

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

JOHN MURPHY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CSX TRANSPORTATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ANSPACH MEEKS ELLENBERGER, LLP, BUFFALO, HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (PATRICK DONOGHUE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered July 13, 2009 in a personal injury action. The judgment awarded plaintiff the sum of $930,401.59 as against defendant together with interest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting those parts of defendant's post-trial motion to set aside the verdict in part and setting aside the award of damages for past lost wages and benefits and past medical expenses and by providing that interest on the total amount of damages at the rate of 9% per annum shall commence July 13, 2009 and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, to reduce the award of damages for past lost wages and benefits and past medical expenses following a further hearing, if necessary, in accordance with the following Memorandum: Plaintiff commenced this action pursuant to the Federal Employers' Liability Act (45 USC § 51 *et seq*.) seeking damages for injuries he allegedly sustained during the course of his employment by defendant as a locomotive engineer. Contrary to defendant's contention, Supreme Court properly granted the motion of plaintiff seeking, inter alia, partial summary judgment on liability with respect to the cause of action alleging that defendant violated the Federal Locomotive Inspection Act ([LIA] 49 USC § 20701 *et seq*.). In support of the motion, plaintiff established that the locomotive was " 'in use' " for purposes of the LIA when he slipped on a puddle of oil and fell to the ground below (*Holfester v Long Island R.R. Co.*, 360 F2d 369, 372; *see Hardlannert v Illinois Cent. R.R. Co.*, 340 Ill Dec 453, 459-460, 928 NE2d 172, 178-179). He also established that the locomotive was not "in proper condition and safe to operate without unnecessary danger of personal injury" based on the accumulation of oil (49 USC § 20701 [1]; *see* 49 CFR 229.119 [c]).

Defendant failed to raise a triable issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Following the trial on causation and damages, judgment was entered on the jury verdict awarding plaintiff damages for, inter alia, past lost wages and benefits and past medical expenses. The court properly denied that part of defendant's post-trial motion to set aside the verdict insofar as it awarded damages for past lost wages and benefits on the ground that such award was speculative and unsupported by sufficient evidence. "It cannot be said that there was 'no valid line of reasoning and permissible inferences [that] could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial' with respect to that part of the verdict" (*Mergler v CSX Transp., Inc.*, 60 AD3d 1462, 1463, quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499). We agree with defendant, however, that the court erred in denying that part of its post-trial motion with respect to the award for past lost wages and benefits on the ground that plaintiff is entitled to recover only the "net, after-tax amount" of his past lost wages. That award should therefore have been reduced by the amount of Tier 1 Railroad Retirement Board taxes that would have been deducted from plaintiff's wages (*see Roselli v Hellenic Lines, Ltd.*, 524 F Supp 2, 4; *see generally Fanetti v Hellenic Lines Ltd.*, 678 F2d 424, 431-432, *cert denied* 463 US 1206).

We also agree with defendant that the court erred in denying that part of its motion seeking to set aside the verdict with respect to past medical expenses inasmuch as the court failed to provide for a collateral source offset. Pursuant to the collective bargaining agreement between defendant and the union representing plaintiff, benefits provided under the policy insuring defendant's employees are to "be offset against any right of recovery [an e]mployee may have against [defendant] for hospital, surgical, medical or related expenses of any kind . . . ." Defendant therefore is entitled to an offset for the amount of such benefits (*see generally CSX Transp., Inc. v Williams*, 230 Ga App 573, 576-577, 497 SE2d 66, 69-70). We therefore modify the judgment by granting those parts of defendant's post-trial motion seeking to set aside the verdict in part and setting aside the award of damages for past lost wages and benefits and past medical expenses, and we remit the matter to Supreme Court to reduce that award following a further hearing, if necessary.

Finally, we agree with defendant that the court erred in directing that interest on the judgment accrue from April 10, 2009, 60 days from the date of the verdict. Pursuant to 28 USC § 1961 (a), "interest shall be calculated from the date of the entry of the judgment," and thus the proper date from which interest on the judgment is calculated is July 13, 2009, the date of entry. We therefore further modify the judgment accordingly.

We have considered defendant's remaining contentions and conclude

that none warrants further modification of the judgment.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1216

KA 07-02349

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSE J. SANTIAGO, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (Alex R. Renzi, J.), rendered August 22, 2007. Defendant was resentenced upon his conviction of murder in the first degree (four counts).

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1218

KA 09-00159

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NATHANIEL B. BOWERS, DEFENDANT-APPELLANT.

ROBERT TUCKER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered October 22, 2008. 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 weapon in the fourth degree.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1219

KA 10-00605, KA 10-00332

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JONATHAN BENTON AND TIMOTHY JONES,
DEFENDANTS-RESPONDENTS.

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

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

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered November 4, 2009. The order granted the motions of defendants pursuant to CPL 330.30 (1) to set aside a nonjury verdict.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motions are denied, the verdict is reinstated and the matter is remitted to Supreme Court, Erie County, for sentencing.

Memorandum: The People appeal from an order granting the respective motions of defendants pursuant to CPL 330.30 (1) to set aside the verdict following a bench trial finding them each guilty of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]). We agree with the People that Supreme Court erred in granting those motions. Thus, we reverse the order and reinstate the verdict. Pursuant to CPL 330.30 (1), following the issuance of a verdict and before sentencing a court may set aside a verdict on "[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would *require* a reversal or modification of the judgment *as a matter of law* by an appellate court" (emphasis added). Here, the court granted the motions based on the People's failure to disclose a DNA report that had been requested by both defendants and that defendants contended constituted *Brady* material. "Reversal of a judgment of conviction based on [the People's failure to disclose *Brady* material] is not 'mandated on appeal as a matter of law' unless the issue has been preserved for appellate review by a timely [objection]" (*People v Tillman*, 273 AD2d 913, 913, *lv denied* 95 NY2d 939; *see People v Caswell*, 56 AD3d 1300, 1303, *lv denied* 11 NY3d 923, 12 NY3d 781). The record establishes that, despite discussing the lack of disclosure in court, neither

defendant objected to the lack of disclosure or otherwise alerted the court to the basis for reversal set forth in the CPL 330.30 motions. Thus, because preservation of the contention underlying the CPL 330.30 motions was required and there was no preservation of that contention (*see Caswell*, 56 AD3d at 1303), reversal by an appellate court based on that contention was not required as a matter of law and the court lacked the authority to grant the CPL 330.30 motions (*see generally People v Carter*, 63 NY2d 530, 536).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1220

KA 09-01255

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered October 6, 2008. The judgment convicted defendant, upon his plea of guilty, of unlawful imprisonment in the first degree and attempted criminal possession of a weapon in the third 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, the plea is vacated, and the matter is remitted to Cattaraugus County Court for further proceedings on the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon a guilty plea, of unlawful imprisonment in the first degree (Penal Law § 135.10) and attempted criminal possession of a weapon in the third degree (§§ 110.00, 265.02 [1]) and, in appeal No. 2, he appeals from the resentence imposed on that conviction. We agree with defendant in appeal No. 1 that his plea must be vacated because it was not knowingly, intelligently and voluntarily entered. "A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences" (*People v Ford*, 86 NY2d 397, 402-403). Here, it was not made clear during the plea colloquy whether the sentences to be imposed were to run consecutively or concurrently, and that patent ambiguity is further evidenced by the parties' subsequent revisiting of that issue at sentencing, as well as by the fact that the court resentenced defendant twice, once after the original sentencing and again by the resentence in appeal No. 2. Although defendant failed to preserve his contention for our review (*see People v Moore*, 59 AD3d 983, *lv denied* 12 NY2d 857), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We therefore reverse the judgment

in appeal No. 1, vacate defendant's plea of guilty, and remit the matter to County Court for further proceedings on the indictment. In view of our determination in appeal No. 1, we need not address defendant's remaining contentions therein, and we dismiss as moot the appeal from the resentence in appeal No. 2. We note with respect to appeal No. 2, however, that we agree with defendant that the court erred in resentencing him in absentia (*see* CPL 380.40 [1]; 380.50 [1]; *People v Dennis* [appeal No. 2], 6 AD3d 1211).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1221

KA 10-00165

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a resentence of the Cattaraugus County Court (Larry M. Himelein, J.), rendered May 12, 2009. Defendant was resentenced upon his conviction of unlawful imprisonment in the first degree and attempted criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *People v Aloi* ([appeal No. 1] ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1224

KA 09-00860

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES T. JOHNSON, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SARAH E. RYAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered April 22, 2009. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, a class E felony, aggravated unlicensed operation of a motor vehicle in the first degree and failure to stay within a single lane.

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 felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]) and failure to stay within a single lane (§ 1128 [a]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction because his motion for a trial order of dismissal "was not specifically directed at the ground[s] advanced on appeal" (*People v Vassar*, 30 AD3d 1051, 1052, *lv denied* 7 NY3d 796; *see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). In any event, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). The sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1225

KA 09-01516

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLORENCE COPP, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 7, 2009. The judgment convicted defendant, upon her plea of guilty, of criminal possession of stolen property in the third degree, grand larceny in the fourth degree (two counts) and grand larceny in the third 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 one count each of criminal possession of stolen property in the third degree (Penal Law § 165.50) and grand larceny in the third degree (§ 155.35), and two counts of grand larceny in the fourth degree (§ 155.30 [1]). The contention of defendant that her plea was not knowing, voluntary, or intelligent because neither she nor County Court recited the value of the property she had stolen is actually a challenge to the factual sufficiency of the plea allocution. Defendant failed to preserve that challenge for our review by failing to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665; *People v Thomas*, 72 AD3d 1483), and this case does not fall within the narrow exception to the preservation requirement set forth in *Lopez* (71 NY2d at 665).

Contrary to the further contention of defendant, the court did not abuse its discretion in denying her motion to withdraw her guilty plea on the ground that she allegedly was innocent and was coerced into pleading guilty (*see People v Spikes*, 28 AD3d 1101, 1102, *lv denied* 7 NY3d 818). That contention, which is based on the fact that the arresting officers were present at the time of her plea, is "belied by [her] statements made under oath during the plea colloquy" (*id.*; *see People v McKoy*, 60 AD3d 1374, *lv denied* 12 NY3d 856).

Finally, we reject the contention of defendant that the court erred in refusing to suppress her statements made to the Sheriff's deputies. The record supports the court's determination that the statements were not the product of custodial interrogation but, rather, were made in response to investigatory questioning before she was advised of her *Miranda* rights and waived them (*see People v O'Hanlon*, 5 AD3d 1012, *lv denied* 3 NY3d 645).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1226

CAF 09-00991

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF LOUIS J. JACKSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DEBBRA K. BEACH AND JESSICA R. JACKSON,
RESPONDENTS-RESPONDENTS.

ANN LEONARD ANDERSON, ORCHARD PARK, FOR PETITIONER-APPELLANT.

RICHARD L. SOTIR, JR., ATTORNEY FOR THE CHILD, JAMESTOWN, FOR MARCEL J.

Appeal from an order of the Family Court, Chautauqua County (Stephen W. Cass, A.J.), entered March 26, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed a petition for modification of custody.

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

Memorandum: Petitioner father, as limited by his brief, contends on appeal that Family Court erred in dismissing his petition seeking modification of a prior custody order with prejudice following a hearing. Contrary to the father's contention, there is a sound and substantial basis in the record for the court's determination that the father did not make a sufficient showing of a change in circumstances to warrant an inquiry into whether the best interests of the subject child would be served by a change in custody (*see Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225; *see generally Matter of Perry v Korman*, 63 AD3d 1564, 1565; *Matter of McLeod v McLeod*, 59 AD3d 1011). Indeed, the father failed to make "the requisite evidentiary showing of a 'change of circumstances warranting a reexamination of the existing custody arrangement' " (*Amy L.M.*, 31 AD3d at 1225).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1227

CAF 09-01388

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF BABY GIRL A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ISABEL A.-R., ET AL., RESPONDENTS,
AND EDWIN R.-E., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 2, 2009 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, granted an order of protection in favor of the child.

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

Same Memorandum as in *Matter of Jezekiah R.-A.* ([appeal No. 2] ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1228

CAF 09-01389

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF JEZEKIAH R.-A. AND JOSE R.-A.

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

ISABEL A.-R., ET AL., RESPONDENTS,
AND EDWIN R.-E., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR JEZEKIAH R.-A. AND JOSE R.-A.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 2, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined the subject children to be severely abused.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the findings of severe abuse with respect to Jezekiah R.-A. and derivative severe abuse with respect to Jose R.-A. and as modified the order is affirmed without costs.

Memorandum: These consolidated appeals arise from two related child protective proceedings pursuant to article 10 of the Family Court Act. Appeal No. 1 concerns a petition alleging, inter alia, that respondent father derivatively abused and severely abused Baby Girl A., the daughter of respondent mother, while appeal No. 2 concerns a petition alleging that the father and other respondents abused and severely abused Jezekiah R.-A and derivatively abused and severely abused Jose R.-A, the children of both the father and the mother. With respect to the order in appeal No. 1, the father has not raised any issues concerning that order in his brief on appeal, and we thus deem any such issues abandoned (*see Matter of Sportello v Sportello* [appeal No. 1], 70 AD3d 1446; *Ciesinski v Town of Aurora*, 202 AD2d 984).

We reject the contention of the father in appeal No. 2 that the court erred in finding that Jezekiah was abused and that Jose was

derivatively abused. Petitioner established by the requisite preponderance of the evidence that Jezekiah sustained injuries consistent with shaken baby syndrome, including a corner fracture of his right femur, bilateral subdural hematomas, and retinal hemorrhages (*see generally* Family Ct Act § 1046 [b] [i]). In addition, the physician who examined him opined that some of the hematomas were days or weeks older than others, and that the fracture preceded the most recent hematoma. None of the explanations offered by the child's mother or father to the child protective caseworker was consistent with the nature and severity of the injuries (*see Matter of Devre S.*, 74 AD3d 1848, 1849). The father declined to testify at the fact-finding hearing, and thus the court was entitled to draw "the strongest inference [against him] that the opposing evidence permits" (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79). Petitioner also established by the requisite preponderance of the evidence that Jose was derivatively abused, i.e., petitioner established that the abuse of Jezekiah "is so closely connected with the care of [Jose] as to indicate that the second child is equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374, *cert denied* 540 US 1059; *see Devre S.,* 74 AD3d at 1849; § 1046 [a] [i]).

We agree with the father in appeal No. 2, however, that there is insufficient evidence that Jezekiah was severely abused by him inasmuch as Jezekiah was also in the care of the mother and grandparents during the relevant time period. It is well settled that severe abuse may be found if "the child has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in [Penal Law § 10.00 (10)]" (Social Services Law § 384-b [8] [a] [i]; *see Matter of Alijah C.*, 1 NY3d 375, 378-379). Furthermore, pursuant to Family Court Act § 1046 (b) (ii) and § 1051 (e), a finding of severe abuse must be supported by clear and convincing evidence (*see Alijah C.*, 1 NY3d at 378 n 2). Although the evidence supports a finding that Jezekiah was abused, we cannot conclude on the record before us that there is clear and convincing evidence establishing that the father acted under circumstances evincing a depraved indifference to human life, and thus we agree with the father that the evidence of severe abuse with respect to Jezekiah is insufficient (*cf. Matter of Jamaal NN.*, 61 AD3d 1056, *lv denied* 12 NY3d 711). For the same reasons, we further conclude in appeal No. 2 that the finding that the father derivatively severely abused Jose is not supported by the requisite clear and convincing evidence (*see generally Marino S.*, 100 NY2d at 374-375). We therefore modify the order in appeal No. 2 accordingly. In view of our determination, we need not address the father's remaining contention in appeal No. 2.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1231

CAF 09-01862

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF SYIRA W., KQUAMERE R.,
AND TONISHA G.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

LATASHA B., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR SYIRA W., KQUAMERE R., AND TONISHA G.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered August 17, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children.

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

Memorandum: Respondent mother appeals from an order that, inter alia, adjudicated her three children to be neglected. We note at the outset that, although the order of disposition in this child neglect proceeding has expired, the appeal by the mother from that order brings up for review the underlying fact-finding order (*see Matter of Jimmy D.*, 302 AD2d 892, *lv denied* 100 NY2d 503). We conclude that Family Court properly determined, following a hearing, that she neglected her children. The mother did not move to dismiss the petition on the ground that the evidence of neglect was insufficient to support the petition and thus failed to preserve for our review her present contention that the evidence is insufficient to establish that any of her children were present during the incident of domestic violence that formed the basis for the neglect petition (*see generally Matter of Lorelei M.*, 67 AD3d 1383*; Matter of Yorimar K.-M.*, 309 AD2d 1148). In any event, the record contains sufficient evidence from which the court could have determined that at least one of the mother's children was present during that incident. Contrary to the mother's contention, the domestic violence case worker did not recant her testimony that at least one child had been present during the altercation but, rather, she clarified the basis for that testimony.

In any event, even if the mother is correct, the case worker thereby would have created a credibility determination for the court, and the court's credibility determinations are of course entitled to great deference (*see Matter of Kayla N.*, 41 AD3d 920, 922).

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1232

CA 10-01003

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

DERRICK A. SWARTZ AND ANN MARIE SWARTZ,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

VICTOR F. KALSON AND LINDA A. MEADOW,
DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (SCOTT R. ORNDOFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 21, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, damages for injuries sustained by plaintiff Derrick A. Swartz (plaintiff) when the vehicle he was operating collided with a vehicle operated by defendant Victor F. Kalson. Contrary to the contention of defendants, Supreme Court properly denied those parts of their motion seeking summary judgment dismissing the complaint insofar as plaintiffs allege that plaintiff sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories set forth in Insurance Law § 5102 (d). In support of their motion, defendants relied on, inter alia, the affirmed medical report of the physician who examined plaintiff on defendants' behalf. Defendants' expert addressed the allegation that plaintiff sustained a qualifying psychological injury, i.e., posttraumatic stress disorder, in merely a conclusory fashion (*see Brandt-Miller v McArdle*, 21 AD3d 1152, 1154; *cf. Taranto v McCaffrey*, 40 AD3d 626; *see generally Landman v Sarcona*, 63 AD3d 690), and the brief statements of defendants' expert concerning plaintiff's alleged traumatic brain injury were similarly conclusory (*see generally Landman*, 63 AD3d 690; *Hughes v Cai*, 31 AD3d 385). Defendants thus failed to meet their initial burden on the motion with respect to those two categories of serious injury, based on both the conclusory statements in their expert's report and the medical records of plaintiff submitted by

defendants in support of their motion indicating that plaintiff did in fact sustain injuries within the meaning of those two categories. Because defendants failed to meet their initial burden, we do not examine the sufficiency of plaintiffs' opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1236

CA 10-01235

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF DEBORAH MELLON, BRIAN SYKES, MARY SYKES, MICHAEL WOODWARD, AND SUSAN WOODWARD, PETITIONERS-APPELLANTS,

V ORDER

CITY OF NIAGARA FALLS, VINCE SPADORCIA, LINDA SEEFELDT, ERNEST KITCHEN, ANTHONY SCRICCO, JOSEPH SCHIRO, ANTONIO RESTAINO, AND ZACHARY CASALES, CONSTITUTING THE ZONING BOARD OF APPEALS OF CITY OF NIAGARA FALLS, BASIL C. STAHLMAN, JR., AND BASIL C. STAHLMAN, III, RESPONDENTS-RESPONDENTS.

SEAMAN, JONES, HOGAN & BROOKS, LLP, LOCKPORT (ABRAHAM J. PLATT OF COUNSEL), FOR PETITIONERS-APPELLANTS.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (THOMAS M. O'DONNELL OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF NIAGARA FALLS, VINCE SPADORCIA, LINDA SEEFELDT, ERNEST KITCHEN, ANTHONY SCRICCO, JOSEPH SCHIRO, ANTONIO RESTAINO, AND ZACHARY CASALES, CONSTITUTING THE ZONING BOARD OF APPEALS OF CITY OF NIAGARA FALLS.

MALONEY & MALONEY, NIAGARA FALLS (MICHAEL V. MALONEY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS BASIL C. STAHLMAN, JR. AND BASIL C. STAHLMAN, III.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 19, 2010 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1237

CA 10-01283

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF ONE NIAGARA LLC,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, NIAGARA FALLS OFFICE
OF PLANNING AND ENVIRONMENTAL SERVICES AND
NIAGARA FALLS INSPECTIONS DEPARTMENT,
RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL C. OLIVERIO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (JAMES C. ROSCETTI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 10, 2010 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, denied the motion of respondents to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, respondents' motion is granted and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, a "declaration" that respondents had previously approved the improvements made by petitioner to a building owned by it, pursuant to site plans approved by the Planning Board of respondent City of Niagara Falls, and to enjoin respondents from interfering with the allegedly ministerial duties of respondent Niagara Falls Inspections Department (NFID). Petitioner also moved by order to show cause for the same relief. We note at the outset that petitioner improperly sought a declaration inasmuch as that relief is not an available remedy for challenging an administrative determination (*see Matter of Potter v Town Bd. of Town of Aurora*, 60 AD3d 1333, 1334, *appeal dismissed* 12 NY3d 882, *lv denied* 13 NY3d 707; *Home Bldrs. Assn. of Cent. N.Y. v Town of Onondaga*, 267 AD2d 973, 974). We conclude in any event that Supreme Court erred in denying respondents' pre-answer motion to dismiss the petition.

Petitioner purchased a building and obtained site plan approval for the building project, but respondents thereafter revoked the site plan approval for that part of the project concerning the ninth floor.

In January 2009, the Deputy Corporation Counsel for respondent City of Niagara Falls (City) wrote to the Acting Building Commissioner for the NFID advising him that his department "should not accept and review any engineered design drawings" regarding petitioner's property and that the City "should take no action with regard to [petitioner's] property except those required by ordinance, statute or regulation." In response, by letter dated January 13, 2009, the Acting Building Commissioner issued a letter to "All Affected Parties," advising them that the NFID would "NOT accept plans, renderings, architectural/engineering drawings, or permits from subcontractors with regard to any building permit or anticipated issuance of any building permit." It is undisputed that approved site plans were required before building permits or certificates of occupancy could be issued.

The petition, in our view, does not adequately identify the determination for which it seeks review, but we deem the January 2009 letters, read together, to be the "determination" being challenged. Those letters, however, do not constitute a final determination, as required by CPLR 7801 (1), "because no definite position [was] expressed with respect to petitioner's eligibility" for site plan approval (*Matter of Putnam v City of Watertown*, 213 AD2d 974, 974; *see also Cambridge Dev., LLC v Novello*, 26 AD3d 220). Petitioner had other avenues available to address respondents' actions (*see generally Matter of Essex County v Zagata*, 91 NY2d 447, 453-454). Similarly, we conclude that the petition should have been dismissed, because petitioner failed to seek administrative review of the alleged determination made in the 2009 letters and thus failed to exhaust its administrative remedies (*see Matter of Charest v Morrison*, 48 AD3d 1178).

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1238

CA 10-00374

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

RICHARD WINIARSKI AND CATHLEEN WINIARSKI,
PLAINTIFFS-RESPONDENTS,

V ORDER

LINDA HARRIS, M.D., UNIVERSITY AT BUFFALO
SURGEONS, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

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

STAMM, REYNOLDS & STAMM, WILLIAMSVILLE (GREGORY STAMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered January 12, 2010 in a medical malpractice action. The order granted the application of defendants Linda Harris, M.D. and University at Buffalo Surgeons, Inc. for a collateral source reduction of an award of damages.

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]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1239

CA 10-00490

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

RICHARD WINIARSKI AND CATHLEEN WINIARSKI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LINDA HARRIS, M.D., UNIVERSITY AT BUFFALO
SURGEONS, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

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

STAMM, REYNOLDS & STAMM, WILLIAMSVILLE (GREGORY STAMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered January 26, 2010 in a medical malpractice action. The judgment awarded plaintiffs money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the post-trial motion of defendants Linda Harris, M.D. and University at Buffalo Surgeons, Inc. in part and setting aside the award of damages for past and future pain and suffering and as modified the judgment is affirmed without costs, and a new trial is granted on damages for past and future pain and suffering only unless those defendants, within 30 days of service of a copy of the order of this Court with notice of entry, stipulate to increase the award of damages for past pain and suffering to $162,000 and for future pain and suffering to $400,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Richard Winiarski (plaintiff) during surgery due to the medical malpractice of his surgeon, Linda Harris, M.D. (defendant). We reject the contention of defendants-appellants (hereafter, defendants) that Supreme Court erred in denying their post-trial motion to set aside the jury verdict on the ground that plaintiffs failed to establish a prima facie case of medical malpractice. In order to establish their entitlement to that relief, defendants had to establish that the evidence was legally insufficient, i.e., "that there [was] simply no valid line of reasoning and permissible inferences which could possibly lead

rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499; *see Stewart v Olean Med. Group, P.C.*, 17 AD3d 1094, 1095). Here, there is a valid line of reasoning supporting the jury's verdict that defendant deviated from the applicable standard of care in her performance of plaintiff's surgery, and that such deviation was a proximate cause of plaintiff's injures (*see generally Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 882-883). Contrary to the alternative contention of defendants in support of their post-trial motion, the verdict was not against the weight of the evidence, i.e., it did not so preponderate in defendants' favor such that the jury could not have found for plaintiffs on any fair interpretation of the evidence (*see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Stewart*, 17 AD3d at 1095-1096). Indeed, "[t]his trial was a prototypical battle of the experts, and the jury's acceptance of [plaintiffs'] case was a rational and fair interpretation of the evidence" (*Lillis v D'Souza*, 174 AD2d 976, 977, *lv denied* 78 NY2d 858).

We agree with the contention of defendants in their post-trial motion that Supreme Court erred in permitting plaintiffs' counsel to attempt to impeach defendant by reading into the record a passage from an unidentified medical treatise during plaintiffs' direct examination of defendant. "Although opinion in a publication which an expert deems authoritative may be used to impeach an expert on cross-examination . . ., the introduction of such testimony on direct examination constitutes impermissible hearsay" (*Lipschitz v Stein*, 10 AD3d 634, 635). Further, even considering that, as an adverse party, the direct examination of defendant by plaintiffs' counsel could and, in fact did, "assume the nature of cross-examination" (*Jordan v Parrinello*, 144 AD2d 540, 541), here defendant never accepted the medical treatise as authoritative (*see Labate v Plotkin*, 195 AD2d 444, 445). Nevertheless, we cannot conclude that such an isolated error warrants reversal under the circumstances of this case (*cf. id.*; *see generally Messina v Renison*, 21 AD2d 803). Although we also agree with defendants that plaintiffs' counsel erred on summation in referring to testimony that had been stricken from the record, we note that defendants did not object (*see Stewart*, 17 AD3d at 1096-1097). In any event, that error, as well as the other alleged errors in the summation of plaintiffs' counsel "to the extent that they are preserved, 'are not so flagrant or excessive that a new trial is warranted' " (*Dombrowski v Moore*, 299 AD2d 949, 951).

Contrary to the further alternative contention of defendants in their post-trial motion, the court properly determined that the jury's award for past pain and suffering of $12,000 and for future pain and suffering of $40,000 deviated materially from what would be reasonable compensation for plaintiff's injuries (*see* CPLR 5501 [c]; *Garrow v Rosettie Assoc., LLC*, 60 AD3d 1125, 1125-1126). Plaintiff, who is right-handed, suffered from scapular winging and a permanent limitation of his right shoulder and arm as a result of defendant's malpractice. As plaintiffs correctly concede, however, the court erred in unconditionally increasing the jury verdict inasmuch as

"[t]he proper procedure when a damages award is inadequate is to order a new trial on damages unless [a] defendant stipulates to the increased amount" (*Rajeev Sindhwani, M.D., PLLC v Coe Bus. Serv., Inc.*, 52 AD3d 674, 677; *see Feathers v Walter S. Kozdranski, Inc.*, 129 AD2d 975). Further, although we conclude that the increased award of $162,000 for past pain and suffering does not "deviate[] materially from what would be reasonable compensation" (CPLR 5501 [c]), we conclude that an award of $400,000 for plaintiff's future pain and suffering, rather than the sum of $540,000 as determined by the court, is the highest amount a jury could have awarded plaintiffs (*see generally Garrow*, 60 AD3d at 1125-1126).

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1240

CA 10-00585

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

RICHARD WINIARSKI AND CATHLEEN WINIARSKI,
PLAINTIFFS-RESPONDENTS,

V ORDER

LINDA HARRIS, M.D., UNIVERSITY AT BUFFALO
SURGEONS, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

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

STAMM, REYNOLDS & STAMM, WILLIAMSVILLE (GREGORY STAMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered June 3, 2009 in a medical malpractice action. The order denied the motion of defendants Linda Harris, M.D. and University at Buffalo Surgeons, Inc. to set aside a jury verdict and granted the motion of plaintiffs to increase the award of damages for pain and suffering.

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] [2]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1244

KA 08-00491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LYNDA O'CONNOR, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH 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 January 15, 2008. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1246

KA 08-02679

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN P. FRANCIS, 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 August 1, 2008. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree and petit larceny.

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 third degree (Penal Law § 155.35) and petit larceny (§ 155.25). We reject the contention of defendant that he was denied his right to be informed of the charges against him based upon the failure of the People to specify whether they were proceeding under a theory of larceny by false pretenses (§ 155.05 [2] [a]) or by commission of the crime of issuing a bad check (§ 155.05 [2] [c]). "The People are not required to specify any particular theory of larceny in the indictment . . .[, and t]he present indictment and discovery provided sufficient information to prepare and present a defense" (*People v Cannon*, 194 AD2d 496, 498, *lv denied* 82 NY2d 715, 805; *see People v Farruggia*, 41 AD2d 894). The general motion by defendant for a trial order of dismissal failed to preserve for our review his further contention that the evidence is legally insufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19). 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).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1247

KA 09-02640

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK L. ARCHIE, DEFENDANT-APPELLANT.

ADAM H. VANBUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

DEREK L. ARCHIE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Stephen R. Sirkin, A.J.), rendered November 23, 2009. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and criminally using drug paraphernalia 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 nonjury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant contends in his main brief that County Court erred in failing to conduct a hearing with respect to that part of his omnibus motion seeking to suppress evidence seized from a hotel room and in failing to decide that part of the motion. Defendant abandoned that contention inasmuch as he "did not obtain a ruling on [that part of his] motion, nor did [he] object when the [evidence] was admitted in evidence at trial" (*People v Smith*, 13 AD3d 1121, 1122, *lv denied* 4 NY3d 803; *see also People v Sommerville*, 6 AD3d 1232, *lv denied* 3 NY3d 648). In any event, we conclude that there was no basis for the court to conduct a hearing (*see Smith*, 13 AD3d at 1122). To warrant a hearing on such a motion, a defendant must make sufficient factual allegations to demonstrate a personal legitimate expectation of privacy in the searched premises (*see People v Scully*, 14 NY3d 861, 863-864), and defendant failed to do so here (*see People v Christian,* 248 AD2d 960, *lv denied* 91 NY2d 1006). Contrary to the further contention of defendant in his main brief, the court did not abuse its discretion in denying his CPL 330.30 (3) motion to set aside the verdict on the ground of newly discovered evidence without

conducting a hearing. Defendant "failed to show that the allegedly new evidence could not have been discovered earlier in the exercise of reasonable diligence" (*People v Robertson*, 302 AD2d 956, 958, *lv denied* 100 NY2d 542; *see* CPL 330.30 [3]; *People v McCullough*, 275 AD2d 1018, 1019, *lv denied* 95 NY2d 936; *People v Sharpe*, 166 AD2d 620, 622-623, *lv denied* 77 NY2d 882).

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review the contention in his main brief that the evidence is legally insufficient to support the conviction (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant contends that he did not have constructive possession of the cocaine and glassine envelopes found in a jar in the hotel room and thus that the People failed to establish that he committed the offenses. We reject that contention. "Where, as here, defendant is not found in actual possession of drugs [that] were not in plain view, the People must establish his [or her] constructive possession . . . with proof supporting the conclusion that he [or she] exercised dominion and control over the hotel room" (*People v Echavarria*, 53 AD3d 859, 861, *lv denied* 11 NY3d 832; *see generally People v Manini*, 79 NY2d 561, 572-575). A prosecution witness testified at trial that she rented three rooms for defendant and his companions and that the room in which the drugs were found was defendant's room. Defendant testified at trial that he paid that witness for a room, and he admitted that he had a key to the room in question. When the police executed the search warrant, defendant and a woman were found sleeping in that room. There was men's clothing scattered throughout the room, and defendant admitted that a jacket and pair of shoes in the room belonged to him. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is sufficient to establish defendant's constructive possession of the contents of the jar found in the hotel room (*see People v Ennis*, 186 AD2d 145, 146, *lv denied* 81 NY2d 762). Contrary to defendant's contention, the fact that other individuals had access to that room does not preclude a finding of constructive possession by defendant because possession may be joint (*see Echavarria*, 53 AD3d at 862; *People v Elhadi*, 304 AD2d 982, 984, *lv denied* 100 NY2d 580). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*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).

We reject the contention of defendant in his main and pro se supplemental briefs that he was denied effective assistance of counsel. Defendant failed "to demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's" stipulation to the admission in evidence of the laboratory report (*People v Rivera*, 71 NY2d 705, 709; *see People v Johnson*, 30 AD3d 1042, 1043, *lv denied* 7 NY3d 790, 902). Defendant has also failed to demonstrate that defense counsel was ineffective in his questioning of a defense witness and his review of *Rosario* material. Viewing the evidence, the

law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant's remaining contentions with respect to allegedly ineffective assistance of counsel involve matters outside the record on appeal, and thus the proper procedural vehicle for raising those contentions is a motion pursuant to CPL 440.10 (*see People v Dunbar*, 74 AD3d 1227, 1229; *People v Slater*, 61 AD3d 1328, 1329-1330, *lv denied* 13 NY3d 749).

Defendant further contends in his main and pro se supplemental briefs that the court failed to address an alleged *Brady* violation that defendant raised at sentencing. That contention is not preserved for our review (*see generally People v Lundy*, 48 AD3d 1046, *lv denied* 10 NY3d 936; *People v Singh*, 5 AD3d 403, *lv denied* 2 NY3d 806) and, in any event, it is without merit. " '[I]t is well settled that evidence is not deemed to be *Brady* material when the defendant has knowledge of it,' and here the record establishes that defendant was aware [of the evidence in question]" (*People v Wall*, 38 AD3d 1341, 1341, *lv denied* 9 NY3d 852; *see People v McClain*, 53 AD3d 556, *lv denied* 11 NY3d 791; *Singh*, 5 AD3d 403). We have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1248

KA 08-02470

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. CALDWELL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 27, 2007. The judgment convicted defendant, upon his plea of guilty, of 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 his plea of guilty, of burglary in the first degree (Penal Law § 140.30 [4]). We reject the contention of defendant that County Court erred in refusing to suppress evidence obtained as a result of an allegedly unlawful arrest without conducting a hearing. In support of that part of the omnibus motion seeking to suppress such evidence, defendant submitted only defense counsel's affirmation containing conclusory statements, and he therefore failed to raise factual issues sufficient to require a hearing (*see* CPL 710.60 [3] [b]; *see generally People v Bryant*, 8 NY3d 530, 533; *People v Mendoza*, 82 NY2d 415, 426). When there is "no dispute as to the underlying facts, but only as to application of the law to the facts, . . . the motion [can] be determined on papers alone" (*Mendoza*, 82 NY2d at 427).

Contrary to the further contention of defendant, the court did not abuse its discretion in denying his motion to withdraw the plea without conducting a hearing. "Only in the rare instance will a defendant be entitled to an evidentiary hearing" with respect to such a motion (*People v Tinsley*, 35 NY2d 926, 927) and, here, the contention of defendant that he did not understand that he was entering a guilty plea is belied by his statements during the plea colloquy (*see People v James*, 71 AD3d 1465). Finally, the sentence is

not unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1251

CAF 10-00890

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

IN THE MATTER OF CHRISTINE L. KING,
PETITIONER-APPELLANT,

V ORDER

WILLIAM P. FOSTER, RESPONDENT-RESPONDENT.

BRUCE R. BRYAN, SYRACUSE, FOR PETITIONER-APPELLANT.

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

KELLY M. CORBETT, ATTORNEY FOR THE CHILDREN, FAYETTEVILLE, FOR KAITLYN E.F. AND ALEXYS M.F.

Appeal from an order of the Family Court, Onondaga County (Robert J. Rossi, J.H.O.), entered August 27, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of custody.

Now, upon reading and filing the stipulation to discontinue appeal signed by the attorneys for the parties on October 13 and 19, 2010,

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1252

CAF 09-02045

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

IN THE MATTER OF AYODEJI W.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MONIQUE (W.)C., RESPONDENT-APPELLANT.

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

FREDERICK H. AHRENS, JR., COUNTY ATTORNEY, BATH (JESSICA M. DRAKE OF COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLYN KELLOGG JONAS, ATTORNEY FOR THE CHILD, WELLSVILLE, FOR AYODEJI W.

Appeal from an order of the Family Court, Steuben County (Joseph W. Latham, J.), entered September 11, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order adjudicating the child at issue to be permanently neglected and terminating her parental rights with respect to him. Contrary to the mother's contention, petitioner met its burden of establishing by clear and convincing evidence that it exercised diligent efforts to encourage and strengthen the parental relationship and to reunite the mother and the child (*see* Social Services Law § 384-b [7] [a]; *Matter of Noemi D.*, 43 AD3d 1303, *lv denied* 9 NY3d 814; *see generally Matter of Sheila G.*, 61 NY2d 368, 373). Petitioner established that it provided mental health and parenting services for the mother, family counseling for the mother and the child, and supervision and transportation for visitation when needed. We further conclude that the record supports Family Court's determination that termination of the mother's parental rights with respect to the child, while allowing the mother to have post-termination contact with him, was in the best interests of the child (*see Matter of Samantha K.*, 59 AD3d 1012).

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court

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

1253

CAF 09-01767

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

IN THE MATTER OF KIMBERLY BRAY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT DESTEVENS, RESPONDENT-RESPONDENT.

DAVIS LAW OFFICE, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR PETITIONER-APPELLANT.

A.J. BOSMAN, ATTORNEY FOR THE CHILD, ROME, FOR NATHANIEL B.

Appeal from an order of the Family Court, Oswego County (Bobette J. Morin, R.), entered August 18, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of custody.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Oswego County, for further proceedings on the petition.

Memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 6 seeking communication, including telephone contact, and visitation with the parties' child. Family Court dismissed the petition based on the failure of the mother to comply with a prior order requiring that she "complete her alcohol and drug assessment and physiological assessment" as a condition precedent to any further visitation with the child. The mother was incarcerated at the time the order appealed from was entered, but she was released to parole supervision during the pendency of this appeal. We note at the outset that the mother's release to parole supervision does not render the appeal moot inasmuch as the mother did not seek communication and visitation with the child only for the duration of her incarceration (*cf. Matter of Ryan M.B. v Mary R.*, 43 AD3d 1304).

We conclude that the court erred in dismissing the petition based on the mother's failure to comply with a condition precedent. "It is well settled that [communication and] visitation with a noncustodial parent is generally presumed to be in a child's best interests" (*Matter of Mark C. v Patricia B.*, 41 AD3d 1317, 1318). A court lacks authority to impose conditions precedent to the resumption of a parent's contact and visitation with a child (*see Matter of Hameed v Alatawaneh*, 19 AD3d 1135; *Matter of Davenport v Ouweleen*, 5 AD3d

1079). We therefore reverse the order, reinstate the petition and remit the matter to Family Court for further proceedings on the petition.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1255

CAF 09-02187

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

IN THE MATTER OF ROBERT GRANDALL,
PETITIONER-RESPONDENT,

V ORDER

TRACY FETHERS, RESPONDENT-APPELLANT.

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

VIVIAN CLARA STRACHE, ATTORNEY FOR THE CHILDREN, BATH, FOR DEVON G. AND CHEYANNE G.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, A.J.), entered October 16, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner sole custody of the parties' child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Kelly F. v Gregory A.F.*, 34 AD3d 1277).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1256

CA 10-00065

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

JAMES B. HANSEN AND ROBIN S. HANSEN,
PLAINTIFFS-APPELLANTS,

V ORDER

CAROUSEL CENTER COMPANY, L.P. AND PYRAMID
MANAGEMENT GROUP, INC., DEFENDANTS-RESPONDENTS.
(AND A THIRD-PARTY ACTION.)

FREDERICK P. DAVIES, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (MATTHEW LERNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 10, 2009 in a personal injury action. The order granted the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiffs for partial summary judgment.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1257

CA 10-00474

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

NEW YORK STATE THRUWAY AUTHORITY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KTA-TATOR ENGINEERING SERVICES, P.C.,
DEFENDANT-RESPONDENT.

KTA-TATOR ENGINEERING SERVICES, P.C.,
THIRD-PARTY PLAINTIFF-RESPONDENT,

V

LIBERTY INSURANCE CORPORATION, THIRD-PARTY
DEFENDANT-APPELLANT.

LIBERTY INSURANCE CORPORATION, SECOND-THIRD-PARTY
PLAINTIFF-APPELLANT,

V

CONTINENTAL INSURANCE COMPANY, SECOND-THIRD-PARTY
DEFENDANT-RESPONDENT.

JAFFE & ASHER LLP, NEW YORK CITY (MARSHALL T. POTASHNER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT AND SECOND-THIRD-PARTY PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (MAUREEN G. FATCHERIC OF COUNSEL), FOR SECOND-THIRD-PARTY DEFENDANT-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM D. CHRIST OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 8, 2010. The judgment, insofar as appealed from, declared that Liberty Insurance Corporation is the sole insurer of the costs of the defense for KTA-Tator Engineering Services, P.C. in the main action up to the $100,000 deductible/SIR in the insurance policy issued by Continental Insurance Company.

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

Memorandum: Third-party defendant and second-third-party plaintiff, Liberty Insurance Corporation (Liberty), contends on appeal that Supreme Court erred in granting that part of the cross motion of second-third-party defendant, Continental Insurance Company (Continental), seeking a declaration that Liberty is the sole insurer of the costs of the defense for defendant-third-party plaintiff, KTA-Tator Engineering Services, P.C. (KTA), "in the main action up to the $100,000 deductible/[self-insured retention (SIR)] set forth in the Continental [insurance] policy." Liberty further contends that the court erred in granting that part of Continental's cross motion seeking a declaration that Liberty and Continental "should share the costs of defense of KTA in the main action on an equal . . . basis following the exhaustion of that $100,000 deductible/SIR." At the outset, we agree with Liberty that the doctrine of law of the case does not apply based on the prior judgment that, inter alia, granted KTA's prior motion for partial summary judgment and granted in part Continental's prior cross motion seeking a declaration, nor does it apply based on our decision in the prior appeal affirming that judgment (*New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 43 AD3d 1405). That doctrine "requires that once an issue is judicially determined, it is deemed to be conclusive as to courts of co-ordinate jurisdiction" (*Metropolitan Package Store Assn. v Koch*, 89 AD2d 317, 321, *appeal dismissed* 58 NY2d 1112, 464 US 802, *reh denied* 464 US 1003; *see Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1663). Here, the issue whether Liberty was a coinsurer with Continental was not previously judicially determined, either explicitly or implicitly, and Liberty therefore may raise that issue on this appeal.

We nevertheless conclude that the court properly issued the declaration sought by Continental in its cross motion. Although the Continental policy refers to a "deductible," we conclude that the policy actually contains a SIR in the amount of $100,000. "A SIR differs from a deductible in that a SIR is an amount that an insured retains and covers before insurance coverage begins to apply. Once a SIR is satisfied, the insurer is then liable for amounts exceeding the retention. In contrast, a deductible is an amount that an insurer subtracts from a policy amount, reducing the amount of insurance" (*Matter of September 11th Liab. Ins. Coverage Cases*, 333 F Supp 2d 111, 124 n 7; *see Tokio Mar. & Fire Ins. Co. v Insurance Co. of N. Am.*, 262 AD2d 103).

It is well settled that a contract must be read as a whole to give effect and meaning to every term (*see Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89, *lv denied* 97 NY2d 603). Indeed, "[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible" (*Green Harbour Homeowners' Assn., Inc. v G.H. Dev. & Constr., Inc.*, 14 AD3d 963, 965; *see Village of Hamburg*, 284 AD2d at 89). Here, the Continental policy provided that the policy limit and $100,000 "deductible" included

claim expenses, which were defined to include defense costs. The policy further provided that the policy limit "applies as excess over any deductible amount." Inasmuch as the policy explicitly provided that the $100,000 would not reduce the policy limit, it cannot be said that the policy contained a deductible that would be subtracted from the policy limits. We thus conclude that the Continental policy contained a SIR and that Liberty was obligated to provide sole primary coverage to KTA for its defense costs up to $100,000 (*see New York State Dormitory Auth. v Scottsdale Ins. Co.*, 27 AD3d 1102).

The court properly determined that Liberty and Continental should share equally in KTA's defense costs in excess of $100,000. The Liberty policy provided coverage for general liability and excluded coverage for professional liability, whereas the Continental policy provided coverage only for professional liability. "Thus, while the two policies provided coverage for the same insured, the policies did not insure the same risk" (*Pennsylvania Manufacturers' Assn. Ins. Co. v Liberty Mut. Ins. Co.*, 39 AD3d 1161, 1162, *lv denied* 9 NY3d 810; *see HRH Constr. Corp. v Commercial Underwriters Ins. Co.*, 11 AD3d 321, 323, *lv denied* 5 NY3d 705). We therefore reject Liberty's contention that the court should have ordered Liberty and Continental to share the defense costs on a pro rata basis pursuant to their different policy limits (*cf. Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 687; *Federal Ins. Co. v Empire Mut. Ins. Co.*, 181 AD2d 568, 569-570).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1265

CA 10-01186

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

WAYNE A. BOIVIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE MARRANO/MARC EQUITY CORP.,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (WENDY A. SCOTT 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 (Tracey A. Bannister, J.), entered September 23, 2009 in a personal injury action. The order, insofar as appealed from, granted the motion of plaintiff for leave to amend the complaint nunc pro tunc.

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 installing a roof on a home that was under construction. Supreme Court properly granted plaintiff's motion seeking leave to amend the complaint with respect to the alleged location of the accident. "The proposed amendment, based upon information that came to light during discovery, will not prejudice defendant[] . . ., and it is not plainly lacking in merit" (*Haga v Pyke*, 19 AD3d 1053, 1055; *see Hernandez v City of Yonkers*, 74 AD3d 1025, 1026-1027; *Haggerty v Everett Realty*, 21 AD3d 268).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1266

CA 10-00345

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

RANDALL WEST, PLAINTIFF-APPELLANT,

V ORDER

FORTEQ NORTH AMERICA, INC., ET AL., DEFENDANTS,
AND ENGEL MACHINERY, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

THE KAMMHOLZ LAW FIRM, FAIRPORT (BRADLEY P. KAMMHOLZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (LEONARD A. ROSNER OF COUNSEL), FOR DEFENDANT-RESPONDENT ENGEL MACHINERY, INC.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered April 30, 2009 in a personal injury action. The order denied the cross motion of plaintiff for leave to amend the complaint.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1267

CA 10-00347

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

RANDALL WEST, PLAINTIFF-APPELLANT,

V ORDER

FORTEQ NORTH AMERICA, INC., ET AL., DEFENDANTS,
AND ENGEL MACHINERY, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

THE KAMMHOLZ LAW FIRM, FAIRPORT (BRADLEY P. KAMMHOLZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (LEONARD A. ROSNER OF COUNSEL), FOR DEFENDANT-RESPONDENT ENGEL MACHINERY, INC.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 14, 2009 in a personal injury action. The order granted the motion of defendant Engel Machinery, Inc. for summary judgment and dismissed the complaint against it.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1268

CA 10-00348

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

RANDALL WEST, PLAINTIFF-APPELLANT,

V ORDER

FORTEQ NORTH AMERICA, INC., MIKRON CORPORATION ROCHESTER, AXXICON COMPONENTS ROCHESTER, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 3.)

THE KAMMHOLZ LAW FIRM, FAIRPORT (BRADLEY P. KAMMHOLZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (AMANDA R. INSALACO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered October 5, 2009. The order granted the motion of defendants Forteq North America, Inc., Mikron Corporation Rochester and Axxicon Components Rochester, Inc. to dismiss the complaint against those parties.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1271

KA 08-00030

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAMARCUS DEAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered September 12, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1272

KA 09-02088

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD K. STILES, DEFENDANT-APPELLANT.

ADAM H. VANBUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered September 24, 2009. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree and criminal sexual act in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [2]) and criminal sexual act in the third degree (§ 130.40 [2]), defendant contends that County Court erred in imposing a greater sentence than that agreed to at the time of the plea. We reject that contention. The court "retains discretion in fixing an appropriate sentence up until the time of the sentencing" (*People v Schultz*, 73 NY2d 757, 758). Indeed, it is well established that "the sentencing decision is a matter committed to the exercise of the court's discretion and that it can be made only after careful consideration of all facts available at the time of sentencing" (*People v Farrar*, 52 NY2d 302, 305). Here, the court received information in the presentence report warranting enhancement of the negotiated sentence and properly afforded defendant the opportunity to withdraw his plea before imposing the enhanced sentence (*see People v Herber,* 24 AD3d 1317, *lv denied* 6 NY3d 814; *People v Langworthy*, 1 AD3d 1013, *lv denied* 2 NY3d 763; *People v Jackson*, 216 AD2d 950, *lv denied* 86 NY2d 796).

Contrary to defendant's further contention, the court properly directed that the sentence imposed for rape in the third degree run consecutively to the sentence imposed for criminal sexual act in the third degree, inasmuch "as each count involved a separate sexual act constituting a distinct offense" (*People v Colon*, 61 AD3d 772, 773, *lv denied* 13 NY3d 743; *see People v Lussier*, 298 AD2d 763, 765, *lv denied* 99 NY2d 630; *People v Benn*, 213 AD2d 489, *lv denied* 85 NY2d 969). The

sentence is not unduly harsh or severe. We have reviewed defendant's remaining contention and conclude that it is without merit.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1273

KA 09-00939

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONALDO M. DONALD, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 21, 2009. 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.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1274

KA 09-00201

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRY COX, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, 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 April 29, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of robbery in the first degree (Penal Law § 160.15 [1], [2]), defendant contends that Supreme Court erred in refusing to grant a mistrial based on the testimony of a prosecution witness that he was required to undergo a polygraph examination as part of a plea agreement. We reject that contention. The record establishes that the testimony was elicited by defense counsel in cross-examining that witness, and that the court instructed the jury that the testimony was not relevant and twice directed the jury to disregard it. We conclude that the court's curative instructions " 'were sufficient to alleviate any prejudice to defendant' " and thus that the court did not abuse its discretion in refusing to grant a mistrial (*People v Robinson*, 309 AD2d 1228, 1229, *lv denied* 1 NY3d 579; *see People v Adeline*, 122 AD2d 61, *lv denied* 69 NY2d 707; *see generally People v Ortiz*, 54 NY2d 288, 292).

Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct on summation. With respect to that part of the summation to which defendant objected, we note that the court issued an immediate curative instruction and that defendant did not further object or seek a mistrial. Thus, "the curative instruction 'must be deemed to have corrected [any] error to the defendant's satisfaction' " (*People v Sweeney*, 15 AD3d 917, 917, *lv denied* 4 NY3d 891, quoting *People v Heide*, 84 NY2d 943, 944). Defendant failed to preserve for our review his contention with respect to the remainder

of the comments on summation (*see* CPL 470.05 [2]), and we decline to exercise our power to review his contention with respect to those remaining comments as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his contention that the testimony of the accomplice was not sufficiently corroborated, as required by CPL 60.22 (1) (*see* CPL 470.05 [2]), and in any event that contention is without merit (*see generally People v Reome*, 15 NY3d 188, 191-192). Contrary to defendant's further 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).

We reject the further contention of defendant that remarks of the court at sentencing indicated that the court, in determining an appropriate sentence, improperly considered the murder charges of which defendant was acquitted (*see People v Green*, 72 AD3d 1601, 1602; *People v Calderon*, 66 AD3d 314, 322, *lv denied* 13 NY3d 858; *cf. People v Reeder*, 298 AD2d 468, *lv denied* 99 NY2d 538). Defendant is correct that, during the sentencing proceedings, the court mentioned that a death had occurred and noted the loss sustained by the family of the victim. "Manifestly, a sentencing court must consider all circumstances relating to the crime and the defendant when imposing a sentence following conviction (*see generally* Penal Law § 65.00 [1] [a]). Accordingly, defendant's acquittal on the [murder charges] did not require [Supreme] Court to overlook the fact that the circumstances of defendant's crime included a death" (*People v Hamlin*, 21 AD3d 701, 702, *lv denied* 5 NY3d 852). Furthermore, the robbery charge of which defendant was convicted in count three required that the People prove that defendant or another participant in the crime caused a non-participant in the crime to sustain a serious physical injury (*see* § 160.15 [1]), which is defined, inter alia, as "physical injury which . . . causes death" (§ 10.00 [10]). Therefore, in imposing sentence, the court properly commented upon one of the elements of a crime of which defendant was convicted. In addition, the court repeatedly noted that it was only considering the robbery charges of which defendant was convicted in imposing the sentence. Also contrary to defendant's contention, the sentence is not unduly harsh or severe.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1275

KA 09-01765

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MONTRELL A. BARNES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Ontario County Court (Frederick G. Reed, J.), dated August 3, 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.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1276

KA 09-01276

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS CLARKSON, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered November 18, 2008. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child (two counts) and course of sexual conduct against a child in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a jury trial, of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]) and two counts of endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that the verdict is repugnant insofar as the jury found him guilty of course of sexual conduct against a child and acquitted him of 23 counts of sexual abuse in the first degree under Penal Law § 130.65 (3) with respect to the same victim (*see People v Alfaro*, 66 NY2d 985, 987; *People v Haberer*, 24 AD3d 1283, 1284, *lv denied* 7 NY3d 756, 848). In any event, that contention is without merit inasmuch as each of the 23 counts of sexual abuse alleged that the abuse occurred within a specified one-week period, while the single count of course of sexual conduct against a child alleged only that two or more acts of sexual conduct were committed over a period of time "not less than three months in duration, namely between October 6, 2006 and January 5, 2007." We further reject defendant's contention that County Court abused its discretion in refusing to admit evidence that an individual who was dating the victim's mother during the relevant time period had been convicted of a sex crime in 2005. " 'While evidence tending to show that another party might have committed the crime would be admissible, before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly to point out someone besides the [defendant] as the guilty

party' " (*People v Schulz*, 4 NY3d 521, 529, quoting *Greenfield v People*, 85 NY 75, 89). " 'Remote acts, disconnected and outside of the crime itself, cannot be separately proved' to show that someone other than the defendant committed the crime" (*id*.). We conclude under the circumstances of this case that proof of the conviction of the individual dating the victim's mother would have caused "undue delay, prejudice and confusion" (*id.*).

The court also properly refused to allow defendant to "introduce extrinsic evidence on a collateral matter solely to impeach [the] credibility" of the victim (*People v Alvino*, 71 NY2d 233, 247; *see People v Simmons*, 21 AD3d 1275, *lv denied* 6 NY3d 781), i.e., unfounded reports made by the victim to Child Protective Services (*see* Social Services Law § 412 [6]). Contrary to defendant's contention, the People did not fail to turn over *Brady* material in a timely manner. Even assuming, arguendo, that the material at issue was exculpatory, we note that defendant received it "as part of the *Rosario* material provided to him and was given a meaningful opportunity to use the exculpatory evidence" (*People v Middlebrooks*, 300 AD2d 1142, 1143-1144, *lv denied* 99 NY2d 630). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we 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 support the conviction. Furthermore, viewing the evidence in light of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, we conclude that defendant was not denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147), and that the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1277

CAF 09-02035

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

IN THE MATTER OF AUDRIANNA W., ANJALINA W.,
AND MARANDA J.
---------- ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

JOANNA W., RESPONDENT,
AND MARTIN L., RESPONDENT-APPELLANT.

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

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR AUDRIANNA W., ANJALINA W., AND MARANDA J.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered August 17, 2009 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent Martin L. had neglected the children.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1278

CAF 09-01656

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

IN THE MATTER OF ROSEMARIE B., PETITIONER,

V ORDER

CAROL C., RESPONDENT-APPELLANT,
RONNIE C. AND CATTARAUGUS COUNTY DEPARTMENT
OF SOCIAL SERVICES, RESPONDENTS-RESPONDENTS.

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

STEPHEN J. RILEY, OLEAN, FOR RESPONDENT-RESPONDENT CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES.

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR THOR C.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered July 15, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*Matter of Rivera v Perez*, 299 AD2d 944).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1279

CAF 09-01726

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

IN THE MATTER OF MIKIA H. AND NIANNI H.

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

MONIQUE K., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

SHEILA SULLIVAN DICKINSON, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR MIKIA H. AND NIANNI H.

Appeal from an amended order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered August 11, 2009 in a proceeding pursuant to Social Services Law § 384-b. The amended order terminated the parental rights of respondent.

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

Memorandum: These two consolidated appeals arise from a petition to terminate the parental rights of respondent mother with respect to her children. The mother consented to a finding of permanent neglect with respect to her two daughters, and Family Court entered a default order terminating her parental rights with respect to her son. In appeal No. 1, the mother appeals from an order, entered after a dispositional hearing, terminating her parental rights with respect to her two daughters and, in appeal No. 2, she appeals from an order denying her motion to vacate the default order entered with respect to her son.

We note at the outset that the court issued an amended decision and order in appeal No. 1 that superseded the order from which the mother appeals. We nevertheless exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the amended order (*see* CPLR 5520 [c]; *Miller v Richardson*, 48 AD3d 1298, 1300, *lv denied* 11 NY3d 710).

Addressing the merits of the amended order in appeal No. 1, we reject the contention of the mother that the court erred in terminating her parental rights with respect to her daughters.

Petitioner established that the mother failed to comply with her service plan, inasmuch as she did not successfully complete substance abuse and domestic violence counseling. Indeed, the record supports the court's conclusion that she continued to use drugs after she stipulated to the finding of permanent neglect. Contrary to the contention of the mother, " '[t]he progress made by [her] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status' " (*Matter of Roystar T.*, 72 AD3d 1569, 1569, *lv denied* 15 NY3d 707; *see Matter of Elijah D.*, 74 AD3d 1846, 1847). Also contrary to the contention of the mother, the court did not abuse its discretion in refusing to enter a suspended judgment with respect to her daughters. "Freeing the child[ren] for adoption provided [them] with prospects for permanency and some sense of the stability [they] deserved, rather than the perpetual limbo caused by unfulfilled hopes of returning to [the mother's] care" (*Matter of Raine QQ.*, 51 AD3d 1106, 1107, *lv denied* 10 NY3d 717).

We conclude in appeal No. 2 that the court did not abuse its discretion in denying the motion of the mother seeking to vacate the default order terminating her parental rights with respect to her son. As previously noted, a petition was filed seeking to terminate her parental rights, and the mother consented to a finding of permanent neglect on the petition only concerning her two daughters. She failed to appear on the petition in connection with her son, however, and in moving to vacate the default order she failed to establish a reasonable excuse for her failure to appear and a meritorious defense to the petition with respect to her son (*see Matter of Raymond Anthony A.*, 192 AD2d 529, *lv dismissed* 82 NY2d 706).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1280

CAF 09-01675

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

IN THE MATTER OF NOREON K.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MONIQUE K., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

SHEILA SULLIVAN DICKINSON, ATTORNEY FOR THE CHILD, BUFFALO, FOR NOREON K.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered August 11, 2009 in a proceeding pursuant to Social Services Law § 384-b and Family Court Act article 6. The order denied the motion of respondent to vacate a default order.

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

Same Memorandum as in *Matter of Mikia H.* ([appeal No. 1 ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1282

CAF 10-00114

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

IN THE MATTER OF MELISSA L. RIGGS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM VANDUSEN, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered August 24, 2009 in a proceeding pursuant to Family Court Act article 4. The order adjudged that defendant must make a cash undertaking in the amount of $5,000 in order to purge himself of a remand commitment of the court.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent appeals from an order in which Family Court directed him to make a cash undertaking for child support arrears in the amount of $5,000 in order to purge himself of a six-month jail sentence. We affirm.

Pursuant to Family Court Act § 454 (3) (a), "[u]pon a finding by the court that a respondent has willfully failed to obey any lawful order of support, the court . . . may in addition to or in lieu of any or all of the powers conferred in subdivision two of this section or any other section of law . . . commit the respondent to jail for a term not to exceed six months" (*see generally Matter of Powers v Powers*, 86 NY2d 63).

To the extent that respondent contends that the court erred in finding that he willfully violated the child support order, we note that petitioner made out a prima facie case by asserting respondent's failure to pay, which respondent did not dispute (*see id.* at 69). The burden then shifted to respondent to establish his inability to make the required payments, and respondent failed to "offer [any] competent, credible evidence of his inability" to do so (*id.* at 69-70). The contention of respondent that he believed that a sum of money was being wrongfully withheld by the State of Texas is unavailing. The record contains no evidence of his efforts to obtain that money (*see generally Matter of Bucek v Rogers*, 301 AD2d 973, 974) and, in any event, the record establishes that he had the financial

ability to make the child support payments after the issuance of the order of support (*see Matter of Leslie v Rodriguez*, 303 AD2d 1016, 1017; *Matter of Modica v Thompson*, 258 AD2d 653). We note in addition that respondent presented no evidence that he was unable to find employment (*see Leslie*, 303 AD2d at 1017).

We reject the contention of respondent that the court erred in declining to accept his offer to turn over to petitioner his entire paycheck from a job that he had not yet begun. Inasmuch as a willful violation of the support order had been established, the court had the discretion pursuant to Family Court Act § 454 to reject respondent's offer and to impose a jail sentence, without considering "alternative enforcement measures" (*Powers*, 86 NY2d at 71). Finally, the court did not abuse its discretion in imposing the maximum term of six months, particularly in view of the fact that respondent "made no effort to comply" with the order of support (*Matter of Houk v Meyer*, 263 AD2d 688, 689).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1284

CAF 09-01567

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

IN THE MATTER OF ANNASTASIA C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RONNIE C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR ANNASTASIA C.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered June 30, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Memorandum: In these consolidated appeals, respondent father appeals from two orders adjudging that he had abused one of his children and derivatively neglected two of his other children as a result of that abuse. Contrary to the sole contention of the father on appeal, the out-of-court allegations of abuse made by one child against him were sufficiently corroborated (*see Matter of Annastasia C.* [appeal No. 3] ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1285

CAF 09-01568

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

IN THE MATTER OF LOKI C. AND WILLOW C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RONNIE C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILDREN, MACHIAS, FOR LOKI C. AND WILLOW C.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered June 30, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had abused Willow C. and neglected Loki C.

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

Same Memorandum as in *Matter of Annastasia C.* ([appeal No. 1] ___ AD3d ___ [Nov. 12, 2010]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1286

CA 10-00586

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

IN THE MATTER OF LEONID G. GARTH,
PETITIONER-APPELLANT,

V ORDER

LISA BENET, ASSESSOR, RICHMOND BOARD OF
ASSESSMENT REVIEW AND TOWN OF RICHMOND,
RESPONDENTS-RESPONDENTS.

SEAN T. HANNA, WEBSTER, FOR PETITIONER-APPELLANT.

JONES & MORRIS, VICTOR (MATTHEW A. MOTIWALA OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered June 12, 2009 in a proceeding pursuant to RPTL article 7. The order, insofar as appealed from, denied the motion of petitioner for summary judgment.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1288

CA 10-01263

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

MARLIN DAVIS, PLAINTIFF-RESPONDENT,

V ORDER

HOSPITALITY MOTELS USA, INC., ALSO KNOWN AS TRAVEL LODGE, DEFENDANT-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR DEFENDANT-APPELLANT.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 15, 2009 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1290

CAF 09-01566

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

IN THE MATTER OF ANNASTASIA C., LOKI C., AND WILLOW C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

CAROL C., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

MEMORANDUM AND ORDER

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

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILDREN, MACHIAS, FOR ANNASTASIA C., LOKI C., AND WILLOW C.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered June 30, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject children and placed subject children in the custody of petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the findings that respondent "permitted the two older children to attend school daily both dirty and inappropriately dressed and did not administer [the older child's] medication in accordance with the direction by his doctor" and as modified the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order adjudging that she neglected three of her children. The finding of neglect is based in part on a finding by Family Court that the mother "failed to take appropriate action to protect the children from their father" when she was told that one of the three children was abused by the father (*see Matter of Annastasia C.* [appeal No. 1] ___ AD3d ___ [Nov. 12, 2010]). We reject the mother's contention that the out-of-court statements of one of the children were not sufficiently corroborated to establish that the father had abused that child (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Colberdee C.*, 2 AD3d 1316; *Matter of Addie F.*, 22 AD3d 986, 987). Here, the child's out-of-court statements were sufficiently corroborated by, inter alia, the testimony of an examining physician, who opined that the child's symptoms were consistent with sexual abuse (*see Matter of Tristan R.*, 63 AD3d 1075,

1077; *Colberdee C.*, 2 AD3d at 1317), as well as by the testimony of a psychologist, who opined that the child's statements made during a videotaped interview between the child and a caseworker for child protective services were credible (*see Matter of Victoria KK.*, 233 AD2d 801, 802-803). We also reject the further contention of the mother that the court erred in admitting the videotaped interview in evidence. The accuracy and authenticity of the videotape was sufficiently established by the testimony of the caseworker during the fact-finding hearing (*see generally Matter of Hirsh v Stern*, 74 AD3d 967). Thus, contrary to the mother's contention, the evidence is sufficient to support the finding that the mother neglected all three children based on her failure to take appropriate action following the abuse of one child by the father. That failure "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 children (*Matter of Lynelle W.*, 177 AD2d 1008, 1009; *see* § 1012 [f] [i]).

Although we conclude that the evidence is sufficient to establish that the mother neglected the three children, we agree with the mother that the evidence is insufficient to support the specific findings that she neglected the two older children with respect to the manner in which she permitted them to attend school, both "dirty and inappropriately dressed," and with respect to her alleged failure to administer medication to the oldest child in accordance with the direction of his physician. We therefore modify the order by vacating those findings. "[A] finding of neglect may be entered where, 'though [being] financially able to do so or offered financial or other reasonable means to do so,' a parent fails to provide the child[ren] with adequate clothing and basic medical care" (*Matter of Jalesa P.*, 75 AD3d 730, 732, quoting Family Ct Act § 1012 [f] [i] [A]). No evidence was presented at the fact-finding hearing concerning the financial status of the mother and her ability to provide adequate clothing (*see id.* at 732-733). Similarly, although petitioner presented evidence that the prescription medications for the older child were low or had not been filled in a few months, there was insufficient evidence of that child's need for the medication or the appropriate dosage thereof (*see id.*).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1291

CA 10-00437

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

TIMOTHY P. MCCORMICK AND CATHLEEN MCCORMICK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

257 W. GENESEE, LLC AND DUKE CONSTRUCTION
LIMITED PARTNERSHIP, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered January 13, 2010 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: In this Labor Law and common-law negligence action commenced by plaintiffs to recover damages for injuries allegedly sustained by Timothy P. McCormick (plaintiff) when he fell at a construction site, defendants contend that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. We agree. Unlike other sections of the Labor Law, "section 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352). "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877). Contrary to the contention of plaintiffs, monitoring and oversight of the timing and quality of the work is insufficient to raise a triable issue of fact with respect to supervision or control for the purposes of the Labor Law § 200 claim or common-law negligence cause of action to defeat those parts of defendants' motion (*see Kagan v BFP One Liberty Plaza*, 62 AD3d 531, 532, *lv denied* 13 NY3d 713; *Kvandal v Westminster Presbyt. Socy. of Buffalo*, 254 AD2d 818; *Gielow v Coplon Home*, 251 AD2d 970, 972-973, *lv dismissed in part and denied in part* 92 NY2d 1042, *rearg denied* 93 NY2d 889). In addition, a general duty

to ensure compliance with safety regulations or the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to that claim and cause of action to defeat those parts of defendants' motion (*see Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157).

Plaintiffs are correct in further contending that, in order to impose liability under section 200 and common-law negligence, they need not establish that defendants had supervisory control over the work being performed in the event that the accident was caused by a defective condition on the premises and defendants had actual and constructive notice of such defect (*see Konopczynski v ADF Constr. Corp.*, 60 AD3d 1313, 1314-1315). Nevertheless, the worker's injuries must have resulted from a hazardous condition existing at the work site, rather than from the manner in which the work is being performed (*see Martinez v Tambe Elec., Inc.*, 70 AD3d 1376, 1377), and here plaintiff's injuries did not result from a hazardous condition at the work site. Plaintiffs themselves established that plaintiff tripped on a protruding pin that had been stored on a wooden form, and that the pin was to be inserted into the form to hold it together while concrete was poured into it. "Thus, the protruding [pin] was not a defect inherent in the property, but rather was created by the manner in which plaintiff's employer performed its work. Accordingly, defendants cannot be held liable under section 200 [or for common-law negligence] even if they had constructive notice of the protruding [pin]" (*Dalanna v City of New York*, 308 AD2d 400, 400).

We also agree with defendants that the court further erred in denying that part of their motion for summary judgment dismissing the Labor Law § 241 (6) claim. Defendants met their burden of establishing that none of the Industrial Code provisions upon which plaintiffs rely on appeal will permit recovery in this case, and plaintiffs failed to raise a triable issue of fact. Plaintiffs may not recover pursuant to 12 NYCRR 23-1.7 (e) (1) or (2) inasmuch as the object over which plaintiff tripped was "an integral part of the construction" (*O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806; *see Verel*, 41 AD3d at 1157; *Adams v Glass Fab*, 212 AD2d 972, 973). Contrary to plaintiffs' further contention, 12 NYCRR 23-1.5 " 'sets forth only a general safety standard' and is thus incapable of supporting a Labor Law § 241 (6) claim" (*Boyd v Mammoet W., Inc.*, 32 AD3d 1257, 1258). In addition, 12 NYCRR 23-2.2 does not apply because "plaintiff's injury was not caused by an unstable form, shore or bracing during the placing of concrete" (*Gielow*, 251 AD2d at 972). Finally, plaintiffs on appeal have abandoned any contention with respect to the remaining alleged violations of the Industrial Code sections and Occupational Safety and Health Administration regulations set forth in their bill of particulars, and we therefore do not address them (*see Roosa v Cornell Real Prop. Servicing, Inc.*, 38 AD3d 1352, 1354*; Ciesinski v Town of Aurora*, 202 AD2d 984).

Entered: November 12, 2010

Clerk of the Court
Patricia L. Morgan

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

1292

KA 07-00800

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMION SMITH, DEFENDANT-APPELLANT.

LIBERTYBELL LAW GROUP, BURBANK, CALIFORNIA (EDWARD THOMAS DUNN, JR., OF THE CALIFORNIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS 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, Erie County (Penny M. Wolfgang, J.), entered February 26, 2007. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order summarily denying his motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him, after a jury trial, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). In support of his motion, defendant contended that he was denied his right to effective assistance of counsel based on the manner in which defense counsel represented him with respect to two *Rosario* issues that arose during the course of the trial. We conclude that Supreme Court properly denied defendant's motion and that, indeed, it was required to do so pursuant to CPL 440.10 (2) (c), because sufficient facts appeared in the trial record to enable adequate appellate review of that contention on direct appeal from the judgment (*see People v Maldonado*, 34 AD3d 497, 498, *lv denied* 8 NY3d 847; *People v Jossiah*, 2 AD3d 877, *lv denied* 2 NY3d 742; *People v La Mountain*, 288 AD2d 503, 504, *lv denied* 97 NY2d 730, 98 NY3d 731). In the event that defendant's contention was properly before us, we would nevertheless conclude that it lacks merit.

Defendant further contends for the first time on this appeal from the order denying his CPL article 440 motion that he was denied effective assistance of appellate counsel on his direct appeal. That

contention is based on his appellate attorney's failure to raise the two *Rosario* issues that are the subject of the motion. The proper vehicle for challenging the representation of appellate counsel, however, is by way of a motion for a writ of error coram nobis (*see People v Bachert*, 69 NY2d 593, 595-596; *People v Hogue*, 62 AD3d 410, 411; *People v Watson*, 49 AD3d 570, *lv denied* 10 NY3d 872).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1293

KA 09-00596

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL GILBERT, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 27, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). We agree with defendant that Supreme Court failed to comply with Correction Law § 168-n (3), pursuant to which it was required to set forth the findings of fact and conclusions of law upon which it based its determination. "[T]he 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 [RAI] and the case summary, and that recitation was insufficient to fulfill the statutory mandate" (*People v Hubel*, 70 AD3d 1492, 1493-1494). "[W]e nevertheless conclude that the record before us is sufficient to enable us to make our own findings of fact and conclusions of law, thus rendering remittal unnecessary" (*People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707).

Based on the evidence in the record before us, including the case summary and the RAI, we make the following findings of fact. With respect to the underlying offense, we find that defendant followed the victim, with whom he was acquainted, into her apartment. He assaulted her while she held her seven-month-old child in her arms and then raped her while threatening her and her children with injury and death. He pleaded guilty to attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]), and was sentenced to a term of

imprisonment. In addition, defendant engaged in acts of sexual intercourse with a 15-year-old girl when he was 20 years old. Based on those acts, he pleaded guilty to sexual abuse in the first degree (§ 130.65 [1]), and he was sentenced to probation. We further find that defendant was unsuccessfully discharged from his term of probation based on, inter alia, his continued use of marijuana and cocaine and his failure to attend substance abuse counseling.

Defendant does not challenge the assessment of 90 points against him based upon the factors set forth in the RAI. In any event, we conclude that the People established by clear and convincing evidence that defendant should be assessed 10 points for using forcible compulsion under risk factor 1, 25 points for engaging in sexual intercourse, oral or anal sexual intercourse or aggravated sexual abuse under risk factor 2, 10 points for being 20 years old or less at the time of the first act of sexual misconduct under risk factor 8, 30 points for having a prior violent felony under risk factor 9, and 15 points for having a history of drug or alcohol abuse pursuant to risk factor 11. Contrary to defendant's contention, we also conclude that "[t]he People established, by clear and convincing evidence[, i.e., the certificate of conviction], that the defendant was previously convicted of a felony sex crime . . . and was presumptively a level three sex offender by application of automatic override number one, which deals with a prior felony conviction for a sex crime" (*People v King*, 74 AD3d 1162, 1163; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 3-4, 19 [2006]; *People v McClelland*, 38 AD3d 1274). Furthermore, the case summary also established defendant's prior felony conviction for a sex crime. "Evidence included in the case summary may provide clear and convincing evidence in determining a defendant's risk assessment level where[, as here, the] defendant did not dispute its contents insofar as relevant" (*People v Wasley*, 73 AD3d 1400, 1401).

Contrary to the further contention of defendant, his prior conviction "may be used as both an override factor and a basis upon which to add 30 points for risk factor [nine] on the [RAI]" (*People v Barrier*, 58 AD3d 1086, 1087, *lv denied* 12 NY3d 707). Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708; *People v Regan*, 46 AD3d 1434). In any event, we conclude that defendant's multiple convictions of sexual crimes constitute "compelling evidence that [defendant] poses a serious risk to public safety" (Risk Assessment Guidelines and Commentary, at 4), and thus a downward departure from the presumptive risk level is not warranted. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court

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

1295

KA 09-01145

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARK K. HADSELL, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered April 13, 2009. 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.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1296

KA 09-00616

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRADLEY R. STANISTREET, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 25, 2008. The judgment convicted defendant, upon his plea of guilty, of gang assault in the first degree.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1298

KA 09-01511

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVIS V. DEVANE, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (AARON D. CARR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered February 23, 2009. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree (two counts), endangering the welfare of a child (three counts), and course of sexual conduct against a child in the second degree.

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

Memorandum: On appeal from a judgment convicting him after a jury trial of, inter alia, two counts of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), defendant contends that the evidence is legally insufficient to support the conviction. Defendant failed to preserve that contention for our review because his motion for a trial order of dismissal was not specifically directed at the issue raised on appeal (*see People v Gray*, 86 NY2d 10, 19). In any event, we reject that contention (*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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant also failed to preserve for our review his contention that his responses to the police investigator's questions constituted inadmissible prearrest silence and, in any event, that contention lacks merit (*see People v Solomon*, 73 AD3d 1440, 1442).

Contrary to the further contention of defendant, County Court properly denied that part of his omnibus motion seeking an order directing the People to provide more specific dates and time periods with respect to the charges. "[C]ourse of sexual conduct against a child in the first degree . . . is a continuing offense to which 'the usual requirements of specificity with respect to time do not apply' "

(*People v Muhina*, 66 AD3d 1397, 1398, *lv denied* 13 NY3d 909; *see People v Green*, 17 AD3d 1076, *lv denied* 5 NY3d 789; *People v Palmer*, 7 AD3d 472, *lv denied* 3 NY3d 710). "The period[s] . . . alleged in the indictment [were] sufficient to give defendant adequate notice of the charges to enable him to prepare a defense, to ensure that the crimes for which he was tried were in fact the crimes with which he was charged, and 'to protect [his] right not to be twice placed in jeopardy for the same conduct' " (*People v McLoud*, 291 AD2d 867, 868, *lv denied* 98 NY2d 678; *see generally* CPL 200.50 [7] [a]; *People v Morris*, 61 NY2d 290, 293-294). Finally, we note that, "[i]f defendant[] had a need for greater specificity [with respect to the dates of the offenses, his] remedy was a timely request for a bill of particulars" (*People v Duell*, 266 AD2d 649, *lv denied* 94 NY2d 918).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1299

KA 06-03139

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES E. WASHINGTON, JR., DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered June 20, 2006. The judgment convicted defendant, upon his plea of guilty, of murder 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 murder in the first degree (Penal Law § 125.27 [1]), defendant contends that Supreme Court erred in refusing to suppress his statements to the police because they knew he was represented by counsel on unrelated charges. We reject that contention. Although we agree with defendant that the investigating officers knew that he was represented by counsel on unrelated charges, defendant was questioned only with respect to the present charges, and we conclude that he knowingly and voluntarily waived his *Miranda* rights and did not invoke his right to counsel (*see People v Scaccia*, 6 AD3d 1105, *lv denied* 3 NY3d 681; *People v Jones*, 236 AD2d 780, *lv denied* 89 NY2d 1036; *see generally People v Steward*, 88 NY2d 496, 500-502, *rearg denied* 88 NY2d 1018; *People v Bing*, 76 NY2d 331, 348-351, *rearg denied* 76 NY2d 890).

We further conclude that defendant was not denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). The record belies the contention of defendant that defense counsel failed to inform him of his right to withdraw the plea. Defendant acknowledged in his plea colloquy that he had discussed the plea with defense counsel, that he was satisfied with defense counsel's performance, and that he discussed with defense counsel the fact that he would not be allowed to withdraw his plea in the event that he violated the plea agreement (*see generally People v Cobb*, 19

AD3d 506, *lv denied* 5 NY3d 827).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1305

CA 10-00321

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

SCOTT MURCH, PLAINTIFF-RESPONDENT,

V ORDER

FIRST UNITED METHODIST CHURCH OF CANANDAIGUA, DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FITZSIMMONS, NUNN, FITZSIMMONS & PLUKAS, LLP, ROCHESTER (MARK S. NUNN 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 personal injury action. The order, among other things, granted plaintiff's motion for partial summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 25, 2010, and filed in the Monroe County Clerk's Office on September 17, 2010,

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1306

CA 10-00528

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

FAYE M. EATON, JACQUELINE SIWICKI, AND
MAUREEN M. DOYLE, PLAINTIFFS-APPELLANTS,

V ORDER

WAYNE TEACHERS ASSOCIATION, ET AL.,
DEFENDANTS-RESPONDENTS.

EMMELYN LOGAN-BALDWIN, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

JAMES R. SANDNER, LATHAM (PAUL D. CLAYTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered December 21, 2009. The order, among other things, granted defendants' motion for summary judgment dismissing the complaint.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1309

CA 10-00964

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

KEIKO HOWARD AND EDDIE HOWARD,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PATRICK J. ROBB, DEFENDANT-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 12, 2009 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant for summary judgment dismissing any claims of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.

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 Keiko Howard (plaintiff) when the vehicle she was operating was rear-ended by a vehicle operated by defendant. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Contrary to defendant's contention, we conclude that Supreme Court properly denied the motion with respect to the serious injury categories of permanent consequential limitation of use and significant limitation of use. Although defendant met his initial burden on the motion, plaintiffs raised triable issues of fact with respect to the permanent consequential limitation of use and significant limitation of use categories (*see Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328, 1329; *Levin v Khan*, 73 AD3d 991; *Barry v Valerio*, 72 AD3d 996).

In opposition to the motion, plaintiffs established that, shortly after the accident, plaintiff was treated by a chiropractor for pain in her neck and lower back. The chiropractor conducted range of motion (ROM) tests and concluded that plaintiff had reduced ROM in every category of flexion, extension and rotation in both her cervical and lumbar areas. The chiropractor also ordered a second MRI, which showed mild bulging of the cervical discs and a more severe

asymmetrical bulge and annular tear of her lumbar disc at L4-5. Plaintiff continued treatments with the chiropractor and her condition improved somewhat, but another ROM test conducted two years after the accident established that the condition of plaintiff's cervical and lumbar area had further declined. The chiropractor concluded that plaintiff suffered from a chronic, permanent and disabling injury to her cervical and lumbar spine caused by the accident. Plaintiffs also submitted the affidavit of a physician who examined plaintiff and reviewed her medical records 2½ years after the accident. He concluded that plaintiff suffered from cervical and lumbar disc herniations caused by the accident. We thus conclude that plaintiffs submitted evidence of contemporaneous and recent findings with respect to plaintiff's injuries (*see Tai Ho Kang*, 74 AD3d at 1329; *see generally Resek v Morreale*, 74 AD3d 1043, 1044-1045; *Vilomar v Castillo*, 73 AD3d 758, 759; *Carrillo v DiPaola*, 56 AD3d 712; *Chinnici v Brown*, 295 AD2d 465), as well as objective and quantitative evidence concerning the limitation of use of plaintiff's cervical and lumbar spine (*see generally Vargas v Tomorrow Travel & Tour, Inc.*, 74 AD3d 1626, 1627-1628; *Charlie v Guerrero*, 60 AD3d 570).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1310

CA 10-00901

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

IN THE MATTER OF THE ESTATE OF GERALDINE PERRY, DECEASED.

EUGENE ENDRES, EXECUTOR OF THE ESTATE OF HELEN ENDRES, DECEASED, PETITIONER-APPELLANT,

V ORDER

ACEY M. MOSEY, ERIE COUNTY PUBLIC ADMINISTRATOR, ROGER B. SIMON, GUARDIAN AD LITEM, AND ANDREW M. CUOMO, ATTORNEY GENERAL, STATE OF NEW YORK, RESPONDENTS-RESPONDENTS.

KATZ AND BAEHRE, WILLIAMSVILLE (JEFFREY H. KATZ OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered June 30, 2009. The order distributed one half of the estate of Geraldine Perry to the estate of Helen Endres.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1311

CA 09-02503

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

IN THE MATTER OF NORMAN E. ROTH, STAMPEDE, LLC, STAMPEDE II, LLC, STAMPEDE III, LLC, STAMPEDE IV, LLC, STAMPEDE V, LLC AND UNIVERSITY HILL REALTY, LLC, PETITIONERS-APPELLANTS,

V ORDER

CITY OF SYRACUSE, BOARD OF ASSESSMENT REVIEW OF CITY OF SYRACUSE AND JOHN GAMAGE, COMMISSIONER OF ASSESSMENT OF CITY OF SYRACUSE, RESPONDENTS-RESPONDENTS.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PETITIONERS-APPELLANTS.

JUANITA PEREZ WILLIAMS, CORPORATION COUNSEL, SYRACUSE (JOSEPH FRANCIS BERGH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 12, 2009 in a proceeding pursuant to RPTL article 7. The order denied the petition.

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

All concur, except LINDLEY, J., who is not participating.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1313

TP 10-00364

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

IN THE MATTER OF REBECCA E. OZOLINS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES AND NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENTS.

SCHLATHER, STUMBAR, PARKS & SALK, ITHACA (RAYMOND M. SCHLATHER OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR RESPONDENT NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered February 9, 2010) to review a determination of respondent New York State Division of Human Rights. The determination dismissed her complaints of sexual and retaliatory discrimination.

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

Memorandum: In this proceeding pursuant to Executive Law § 298, petitioner seeks to annul the determination of respondent New York State Division of Human Rights (SDHR) dismissing her complaints following a public hearing. Contrary to petitioner's contention, there is substantial evidence to support SDHR's determination that respondent New York State Department of Correctional Services (DOCS) did not subject petitioner to a hostile work environment (*see Matter of Bowler v New York State Div. of Human Rights*, ___ AD3d ___ [Oct. 1, 2010]), and that it did not otherwise unlawfully discriminate against her on the basis of gender (*see Matter of Childs v New York State Div. of Human Rights*, 57 AD3d 1457, *lv dismissed* 12 NY3d 888, 13 NY3d 926). Further, there is substantial evidence to support SDHR's determination that petitioner was not subjected to retaliation for complaining about the alleged unlawful discrimination (*see Bowler*, ___ AD3d at ___; *see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313).

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court

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

1314

KAH 10-00951

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
LEROY HAYES, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-RESPONDENT.

HUGHES HUBBARD & REED LLP, NEW YORK CITY (KEVIN F. CLINES OF COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 7, 2009 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.

Memorandum: Supreme Court properly dismissed the petition seeking a writ of habeas corpus. Petitioner contends that, because he was incarcerated when he committed the assault underlying the parole violation charges, he was not on parole and therefore could not violate his parole. We reject that contention (*see People ex rel. Wilson v Jackson*, 2 AD2d 638). As a parolee, petitioner remained in the legal custody of the Division of Parole "until expiration of the maximum term or period of sentence, or expiration of the period of supervision, including any period of [postrelease] supervision, or return to the custody of [respondent]" (Executive Law § 259-i [2] [b]). Thus, petitioner was on parole despite the fact that he was incarcerated when he committed the assault in question.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1315

KAH 10-01010

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JASON LANCASTER, ALSO KNOWN AS JASON LIVINGSTON,
PETITIONER-RESPONDENT,

V ORDER

MICHAEL NASH, ACTING SUPERINTENDENT, WILLARD
DRUG TREATMENT CAMPUS, RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), dated July 24, 2009 in a habeas corpus proceeding. The judgment ordered that petitioner be released to parole supervision.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed (*see People ex rel. Van Steenburg v Wasser*, 69 AD3d 1135, *lv denied in part and dismissed in part* 14 NY3d 883; *People ex rel. Muhammad v Bradt*, 68 AD3d 1391; *People ex rel. Almodovar v Berbary*, 67 AD3d 1419, *lv denied* 14 NY3d 703).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1316

KA 09-00726

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BURNIE DANIELS, ALSO KNOWN AS BURNIE E. DANIELS,
ALSO KNOWN AS BERNIE E. DANIELS,
DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (KEVIN T. FINNELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 12, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal mischief in the third degree (Penal Law § 145.05 [2]), defendant contends that his plea was not voluntarily entered because County Court and the People forced him to plead guilty to that crime. 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, in any event, his contention lacks merit. Additionally, 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), and his challenge does not fall within the rare exception to the preservation requirement (*see id*. at 666).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1317

KA 09-02436

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PEREZ D. WATTS, DEFENDANT-APPELLANT.

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

PEREZ D. WATTS, 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, III, J.), rendered September 29, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant has failed to preserve for our review his contention that the plea was not voluntary, knowing, and intelligent (*see People v Zuliani*, 68 AD3d 1731, *lv denied* 14 NY3d 894). Moreover, this case does not fall within the rare exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666), because nothing in the plea colloquy casts any doubt on defendant's guilt or the voluntariness of the plea (*see People v Loper*, 38 AD3d 1178). In any event, we conclude that defendant's contention lacks merit. Although County Court did not mention during the plea colloquy that the sentence to be imposed for the instant crime might run consecutively to an undischarged sentence on a previous conviction, the court also did not inform defendant at that time that he would receive concurrent sentences, nor did the court give defendant " 'any reason to think that part or all of [the] sentence [imposed for the instant crime] would be effectively nullified, by running simultaneously with [the] sentence[] he had already received' " (*People v Lagas*, 76 AD3d 384, 387, quoting *People ex rel. Gill v Greene*, 12 NY3d 1, 6, *cert denied* ___ US ___, 130 S Ct 86; *see People v Silva*, 220 AD2d 230, 231, *lv denied* 87 NY2d 973,

977).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1318

KA 10-00929

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LLOYD KINNEAR, DEFENDANT-APPELLANT.

FIANDACH & FIANDACH, ROCHESTER (TERENCE MCCARTY OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (NEAL P. MCCLELLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Stephen R. Sirkin, A.J.), rendered June 5, 2009. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, a class E felony (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 nonjury trial of two counts of driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [2], [3]; § 1193 [1] [c] [former (i)]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish that he previously had been convicted of driving while intoxicated, and thus that the judgment must be modified to reduce the conviction to two counts of driving while intoxicated as a misdemeanor (*see* CPL 470.05 [2]; *cf. People v Vollick*, 148 AD2d 950, *affd* 75 NY2d 877). In any event, we reject that contention. The certificate of conviction that was admitted in evidence identified defendant by name and date of birth and was corroborated by evidence of the date of birth reflected on his driver's license. "Thus, the People established that defendant was the person previously convicted of driving while intoxicated" (*People v Petrianni*, 24 AD3d 1224, 1225; *see People v Switzer*, 55 AD3d 1394, 1395, *lv denied* 11 NY3d 858).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1319

KA 07-00402

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE JONES, 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 (Joseph E. Fahey, J.), rendered May 31, 2006. 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 [former (2)]), defendant contends that the conviction is not supported by legally sufficient evidence. Defendant, however, failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant failed to preserve for our review his further contention that the verdict was repugnant inasmuch as he did not object to the verdict on that ground before the jury was discharged (*see People v Alfaro*, 66 NY2d 985, 987), and he also failed to preserve for our review his contention that the prosecutor made several improper statements during the course of the trial (*see* CPL 470.05 [2]; *People v Gibson*, 280 AD2d 903, *lv denied* 96 NY2d 862). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We have considered defendant’s remaining contentions and conclude

that they are without merit.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1321

KA 09-02188

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYANT C. MCCRAY, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered August 10, 2009. The judgment convicted defendant, upon his plea of guilty, of 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 attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [1]), defendant challenges the validity of his waiver of the right to appeal. We reject that challenge (*see People v Lopez*, 6 NY3d 248, 256; *People v Montgomery*, 63 AD3d 1635, *lv denied* 13 NY3d 798). Although the contention of defendant that County Court failed to apprehend the scope of its sentencing discretion survives his valid waiver of the right to appeal, that contention is not supported by the record (*see Montgomery*, 63 AD3d at 1636; *People v Burgess*, 23 AD3d 1095, *lv denied* 6 NY3d 810; *cf. People v Stanley*, 309 AD2d 1254). Finally, the challenge by defendant to the severity of the sentence is encompassed by his waiver of the right to appeal (*see Lopez*, 6 NY3d at 256; *People v Hidalgo*, 91 NY2d 733, 737).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1322

CA 10-00318

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

ANTHONY J. IPPOLITO, MS, DDS,
PLAINTIFF-APPELLANT,

V ORDER

GAETANO J. POLIZZI, DDS, DEFENDANT-RESPONDENT.

KEENAN LAW CENTRE, P.C., HAMBURG (JOHN J. KEENAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FLAHERTY & SHEA, BUFFALO (MICHAEL J. FLAHERTY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered November 24, 2009 in a breach of contract action. The order dismissed the complaint.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1323

CA 09-01969

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

IN THE MATTER OF THE COMPULSORY ACCOUNTING OF THE LIFETIME TRUST OF JOSEPH SROZENSKI, DECEASED.

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

SUSAN PORCELLI, PETITIONER-RESPONDENT;
BARBARA SROZENSKI, RESPONDENT-RESPONDENT;
ROBERT SROZENSKI, RESPONDENT-APPELLANT.

ROBERT SROZENSKI, RESPONDENT-APPELLANT PRO SE.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (EUGENE M. O'CONNOR OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered November 18, 2008. The order settled the account of a lifetime trust.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the surcharge against respondent for attorney's fees and as modified the order is affirmed without costs.

Memorandum: Surrogate's Court properly concluded that it has subject matter jurisdiction in this proceeding seeking an accounting of the lifetime trust created for the benefit of petitioner Barbara Srozenski (beneficiary). Although the trust instrument provided that "[t]his trust instrument and any trust created hereunder shall be governed by the law of the State of New Jersey," the Surrogate has jurisdiction over the lifetime trust by virtue of the fact that Robert Srozenski (respondent), the "trustee then acting," resides in Monroe County (SCPA 207 [1]; *see generally Matter of Jensen*, 39 AD3d 1136). Contrary to respondent's contention, both the beneficiary and petitioner Susan Porcelli, the successor trustee of the lifetime trust, have standing to compel an accounting (*see* SCPA 2205 [2] [b], [g]; *Matter of Hunter*, 4 NY3d 260, 267-268). Also contrary to the contention of respondent, the New Jersey Prudent Investor Act applies to his actions as trustee occurring after June 5, 1997, despite the fact that the trust was created before its enactment (*see* NJSA 3B:20-11.12). We agree with respondent, however, that New Jersey law does not authorize the surcharge against him for attorney's fees (*see generally Matter of Vayda*, 184 NJ 115, 120-124, 875 A2d 925, 928-931), and we therefore modify the order accordingly. We have considered the remaining issues raised by respondent and conclude that none warrants

further modification of the order, nor do the remaining issues warrant reversal.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1324

CA 09-01684

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

VERIZON NEW YORK, INC., CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 112333.)

JAMES C. COSGROVE, BUFFALO, FOR CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered July 8, 2009. The interlocutory judgment apportioned liability 35% to defendant and 65% to claimant.

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

Memorandum: Claimant commenced this action alleging that defendant damaged its underground telecommunication line while performing "sidewalk/bridge" repairs in the City of Niagara Falls. After a nonjury trial on the issue of liability, the Court of Claims determined that both parties were negligent and apportioned liability 65% to claimant and 35% to defendant.

We conclude upon our review of the record that the court properly attributed a greater portion of the fault to claimant (*see Denio v State of New York*, 11 AD3d 914, 915, *rearg granted* 13 AD3d 1231, *affd* 7 NY3d 159; *Schmidt v State of New York*, 21 Misc 3d 1114[A], 2005 NY Slip Op 52377[U], *affd for reasons stated* 39 AD3d 1237; *see generally Stewart v Manhattan & Bronx Surface Tr. Operating Auth.*, 60 AD3d 445, 445-446).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1327

CA 10-01269

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

IN THE MATTER OF ROBERT CASELLA,
PETITIONER-RESPONDENT,

V ORDER

CITY OF ROCHESTER AND ROBERT J. DUFFY, MAYOR,
CITY OF ROCHESTER, RESPONDENTS-APPELLANTS.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (JEFFREY EICHNER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (RICHARD D. FURLONG OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 10, 2010 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the petition to compel compliance with a Freedom of Information Law demand.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1328

CA 10-01176

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

CYNTHIA A. BETTS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF MOUNT MORRIS, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (DAVID D. SPOTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Ann Marie Taddeo, J.), entered February 22, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Town of Mount Morris for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a head-on collision on a road owned and maintained by defendant Town of Mount Morris (Town). Supreme Court properly denied the motion of the Town for summary judgment dismissing the amended complaint against it. According to plaintiff, the Town was negligent, inter alia, in failing to design the road in a manner safe for public travel and in failing to post adequate signage and warnings. With respect to its defense of qualified immunity, we conclude that the Town failed to meet its initial burden of demonstrating that its decisions regarding design, maintenance and signage were "the product of a deliberative decision-making process, of the type afforded immunity from judicial interference" (*Appelbaum v County of Sullivan*, 222 AD2d 987, 989; *see Drake v County of Herkimer*, 15 AD3d 834, 835). The Town also failed to establish as a matter of law that its alleged negligence was not a proximate cause of the accident (*see Appelbaum*, 222 AD2d at 989-990; *cf. Howard v Tylutki*, 305 AD2d 907, 908). Finally, the court properly concluded that the requirement in Town Law § 65-a that the Town receive prior written notice of a defect does not apply to plaintiff's claims against the Town concerning the design of the road and the failure to post adequate signage and warnings (*see Banta v County of Erie*, 134 AD2d

839, 840).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1329

CA 10-01185

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

MARK LORENTI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STICKL CONSTRUCTION COMPANY, INC.,
DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (DOUGLAS P. HAMBERGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEWIS & LEWIS, P.C., BUFFALO (ALLAN M. LEWIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered August 26, 2009 in a personal injury action. The order, insofar as appealed from, granted plaintiff's motion for partial summary judgment pursuant to Labor Law § 240 (1) and denied defendant's cross motion to dismiss plaintiff's Labor Law § 240 (1) cause of action.

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 installing siding on a home under construction. Defendant was the general contractor on the construction project, and plaintiff was employed by a framing subcontractor. Plaintiff moved for partial summary judgment on liability under Labor Law § 240 (1), and defendant cross-moved for summary judgment dismissing the complaint against it. Supreme Court granted plaintiff's motion and also granted that part of defendant's cross motion with respect to Labor Law § 241 (6). Contrary to defendant's sole contention on appeal, the court properly granted plaintiff's motion. Plaintiff met his burden on the motion by establishing that "the absence of a . . . safety device was the proximate cause of his . . . injuries" (*Felker v Corning Inc.*, 90 NY2d 219, 224). Defendant failed to defeat the motion by contending in opposition thereto that the conduct of plaintiff was the sole proximate cause of his injuries, inasmuch as defendant presented no evidence to support that contention (*see Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1053). Indeed, although defendant contends that plaintiff should have utilized a ladder as a safety device, it presented no evidence that plaintiff had been instructed to use a ladder or that plaintiff knew or should have known that he should use

a ladder " 'based on his training, prior practice, and common sense' " (*id.*; *see Ewing v Brunner Intl., Inc.*, 60 AD3d 1323, 1324). Thus, defendant submitted no evidence from which a trier of fact could find that "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1330

CA 09-02343

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

PHILIP LYONS, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 113617.)

PHILIP LYONS, CLAIMANT-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MICHAEL S. BUSKUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered January 23, 2009. The order granted the motion of defendant to dismiss the claim as time-barred.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1331

CA 10-01009

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

CHRISTOPHER CARRASQUILLO AND JULIA C. CARRASQUILLO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SEB DEVELOPMENT, LLC, DEFENDANT-APPELLANT.

WATSON BENNETT COLLIGAN & SCHECHTER LLP, BUFFALO (A. NICHOLAS FALKIDES OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 9, 2009 in a real property action. The order denied the motion of defendant for partial summary judgment dismissing plaintiffs' first cause of action.

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

Memorandum: Plaintiffs own property in the City of Buffalo that adjoins property owned by defendant, and they commenced this action seeking, inter alia, to enjoin defendant from interfering with their right to use a strip of land that is five feet in width and runs along the northern border of defendant's property contiguous with their property (alley). The record establishes that, in 1996, plaintiffs had contacted defendant's predecessor in interest and requested its consent to make improvements to the alley by widening their driveway across it, and that defendant's predecessor gave plaintiffs its permission to do so. Thereafter, defendant's predecessor in interest continued to use the alley. Defendant purchased the property in June 2004 and, after experiencing water damage to the building located thereon due to water run-off from plaintiffs' driveway, defendant built a fence and informed plaintiffs that they had no right to use the alley. We agree with defendant that Supreme Court erred in denying its motion for partial summary judgment dismissing the first cause of action, alleging that plaintiffs acquired ownership of the property by adverse possession and that they have an easement over the property. With respect to adverse possession, defendant met its initial burden on the motion by establishing as a matter of law that two of the five elements of adverse possession were not present, i.e., plaintiffs' possession was not hostile nor was it exclusive (*see Taillie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1809; *see generally Walling v Przybylo*, 7 NY3d 228, 232; *West Middlebury Baptist Church v Koester*, 50 AD3d 1494, 1495). With respect to an easement,

defendant established as a matter of law that plaintiffs did not have an easement by express grant (*see Willow Tex v Dimacopoulos*, 68 NY2d 963, 965, *rearg denied* 69 NY2d 742), nor did they have a prescriptive easement (*see Beutler v Maynard*, 80 AD2d 982, 982-983, *affd* 56 NY2d 538). Plaintiffs failed to raise a triable issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1332

CA 10-00194

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

CHANELLE C. RICHEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARY LOU HAMM, DEFENDANT-RESPONDENT.

LOUIS ROSADO, BUFFALO, FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (ELIZABETH OLLINICK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 6, 2009 in a personal injury 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 on the law without costs, the motion is denied, the second complaint is reinstated and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced a personal injury action seeking damages for injuries she allegedly sustained in a motor vehicle accident. That action was dismissed based on plaintiff's failure to serve defendant with the summons and complaint in accordance with CPLR 306-b, and plaintiff commenced a second action against defendant. Defendant moved to dismiss the second action as time-barred, and we conclude that Supreme Court erred in granting that motion without first conducting a hearing on outstanding issues of fact.

Contrary to the contention of defendant, plaintiff timely commenced the first action on July 14, 2008 by filing the summons and complaint. The accident occurred on July 12, 2005 and, although the three-year statute of limitations set forth in CPLR 214 would appear to have expired on July 12, 2008, we take judicial notice of the fact that July 12, 2008 was a Saturday (*see Matter of Persing v Coughlin*, 214 AD2d 145, 149). Thus, pursuant to General Construction Law § 25-a (1), the statute of limitations did not expire until Monday, July 14, 2008.

Plaintiff contends that the court erred in granting the motion because defendant is equitably estopped from asserting the statute of limitations as a defense to the second action. We conclude that the court should have conducted a hearing on defendant's motion, inasmuch as there are issues of fact that must be resolved in order to determine the merits of the motion. Under the doctrine of equitable

estoppel, "a defendant is estopped from pleading a statute of limitations defense if the 'plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action' " (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491, quoting *Simcuski v Saeli*, 44 NY2d 442, 449; *see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553), and the plaintiff's reliance on the fraud, misrepresentations or deception was reasonable (*see Putter*, 7 NY3d at 552-553).

Here, the record contains an affirmation of plaintiff's attorney in which he asserted that he had entered into an agreement with defendant's insurance adjuster to "hold off with effecting service [in the first action] . . . in contemplation of furthering efforts to settle the claim and to allow the [insurer] an opportunity to obtain [p]laintiff's medical records." Plaintiff's attorney further asserted that the insurance adjuster "made [it] abundantly clear to [him] on a number of occasions that the case would be mutually settled and that there would be no reason to serve process upon the defendant." In reliance on those representations, plaintiff's attorney did not attempt to serve defendant. According to plaintiff's attorney, however, "[i]mmediately after" the time period within which to serve defendant in the first action expired, the claim was transferred to a second insurance adjuster who refused to pay anything on the claim, stating that he was not bound by any representations made by the first insurance adjuster. In reply, the two insurance adjusters denied the existence of any agreement with respect to service of process.

"Although there are exceptions, 'the question of whether a defendant should be equitably estopped is generally a question of fact' " (*Local No. 4, Intl. Assn. of Heat & Frost & Asbestos Workers v Buffalo Wholesale Supply Co., Inc.*, 49 AD3d 1276, 1278, quoting *Putter*, 7 NY3d at 553). In granting the motion to dismiss the second complaint, the court erred in determining that the conflicting statements of plaintiff's attorney and the insurance adjusters were irrelevant in the absence of a stipulation pursuant to CPLR 2104. All that is required for the application of the doctrine of equitable estoppel is reasonable reliance on fraud, deception or misrepresentation. Indeed the doctrine may be asserted where a defendant made "express prior representations" to extend the statute of limitations (*Baltimore & Ohio R.R. Co. v Genesee County*, 112 AD2d 725, *appeal dismissed* 66 NY2d 759; *cf. Terry v Long Is. R.R.*, 207 AD2d 881, 881-882). Moreover, if there were a signed stipulation, there would have been no need to rely on the equitable estoppel theory because the stipulation itself would have been binding on defendant.

Contrary to defendant's contention, CPLR 205 (a) may apply to extend plaintiff's time to commence the second action. CPLR 205 (a) permits a second action to be commenced within six months of the termination of the first action if the first action was not terminated based upon, inter alia, a failure to obtain personal jurisdiction over the defendant; the second action "would have been timely commenced at the time of commencement of the prior action"; and defendant is served within the six-month period. Here, it is undisputed that plaintiff

failed to obtain personal jurisdiction over defendant in the first action, but that failure may be excused by equitable estoppel. Additionally, as previously noted, the first action was timely commenced and thus the second action would have been timely commenced at the time the first action was commenced. Finally, it is undisputed that defendant was served with the second summons and complaint within the requisite time period.

We thus conclude that there are issues of fact with respect to the applicability of the doctrine of equitable estoppel, and thus the applicability of CPLR 205 (a). Those issues must be resolved by a hearing pursuant to CPLR 2218 in order to determine the merits of defendant's motion (*see Abraham v Kosinski*, 305 AD2d 1091, 1092-1093). We therefore reverse the order, deny defendant's motion, reinstate the second complaint and remit the matter to Supreme Court for a determination of defendant's motion following a hearing.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1333

TP 10-01166

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

IN THE MATTER OF SHANE M. DRAMAN, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, GLADYS CARRION, COMMISSIONER, ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, CAROL DANKERT, COMMISSIONER AND ROBERT DIESZ, DIRECTOR, RESPONDENTS.

JAMES P. RENDA, BUFFALO, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENTS NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES AND GLADYS CARRION, COMMISSIONER.

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 [Patrick H. NeMoyer, J.], entered May 17, 2010) to review a determination of respondent New York State Office of Children and Family Services. The determination denied the application of petitioner to amend an indicated report of child maltreatment.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Office of Children and Family Services denying his request to amend an indicated report of maltreatment to provide instead that the report was unfounded (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). Upon our review of the record, we conclude that there is a rational basis for the agency's determination and that it is supported by substantial evidence (*see Matter of Theresa G. v Johnson*, 26 AD3d 726; *Matter of Danielle G. v Schauseil*, 292 AD2d 853, 854).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1334

KAH 10-01002

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MIGUEL BONILLA, PETITIONER-RESPONDENT,

V ORDER

MICHAEL NASH, ACTING SUPERINTENDENT, WILLARD
DRUG TREATMENT CAMPUS, RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), dated July 24, 2009 in a habeas corpus proceeding. The judgment ordered that petitioner be released from custody.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed (*see People ex rel. Carson v Williams*, ___ AD3d ___, 2010 NY Slip Op 06927; *People ex rel. Kavazanjian v Williams*, 71 AD3d 1528; *People ex rel. Van Steenburg v Wasser*, 69 AD3d 1135, *lv denied in part and dismissed in part* 14 NY3d 883; *People ex rel. Almodovar v Berbary*, 67 AD3d 1419, *lv denied* 14 NY3d 703).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1335

KA 09-02303

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ERIC WILLIS, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered September 28, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1338

KA 09-00822

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES W. MADILL, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Jefferson County Court (Kim H. Martusewicz, J.), entered April 24, 2004 pursuant to the 2005 Drug Law Reform Act. The order, among other things, granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and imposed a new sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting those parts vacating the original sentence and imposing a new sentence and as modified the order is affirmed, the new sentence is vacated, and the matter is remitted to Jefferson County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [2]) and imposing a determinate term of imprisonment of nine years plus a five-year period of postrelease supervision. We reject defendant's contention that the new sentence imposed is harsh and excessive. The People correctly concede, however, that County Court erred in imposing the new sentence without first affording defendant the opportunity to appeal from the order specifying the new sentence that the court would impose and to withdraw his application for resentencing following our determination of that appeal (*see People v James*, 67 AD3d 1357, *lv denied* 13 NY3d 939; *People v Graves*, 66 AD3d 1513, 1514-1515, *lv denied* 13 NY3d 907). We therefore modify the order by deleting those parts vacating the original sentence and imposing a new sentence, vacate the new sentence imposed, and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (*see James*, 67

AD3d 1357; *Graves*, 66 AD3d at 1515).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1339

KA 06-03538

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON RICHARD FISHER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered November 9, 2006. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and course of sexual conduct against a child in the second degree (§ 130.80 [1] [a]). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct during summation (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849) and, in any event, that contention is without merit. "[T]he prosecutor's closing statement must be evaluated in light of the defense summation, which put into issue the complainants' character and credibility and justified the People's response" (*People v Halm*, 81 NY2d 819, 821). The majority of the prosecutor's comments on summation were within " 'the broad bounds of rhetorical comment permissible in closing argument' " (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854, quoting *People v Galloway*, 54 NY2d 396, 399), and they were a fair response to defense counsel's summation (*see People v Figgins*, 72 AD3d 1599; *People v Diggs*, 24 AD3d 1261, *lv denied* 6 NY3d 812; *People v Melendez*, 11 AD3d 983, *lv denied* 4 NY3d 888). Even assuming, arguendo, that some of the prosecutor's comments were beyond those bounds, we conclude that they were not so egregious as to deprive defendant of a fair trial (*see Figgins*, 72 AD3d 1599; *People v Sweney*, 55 AD3d 1350, 1351, *lv denied* 11 NY3d 901; *People v Crawford*, 299 AD2d 848, *lv denied* 99 NY2d 581, 653). Defendant also

failed to preserve for our review his contention that the prosecutor improperly asked him on cross-examination whether prosecution witnesses were lying (*cf. People v Paul*, 212 AD2d 1020, 1021, *lv denied* 85 NY2d 912; *People v Jarrells*, 190 AD2d 120, 125-126). In any event, we conclude that defendant was not thereby denied a fair trial (*see People v Gonzalez*, 206 AD2d 946, *lv denied* 84 NY2d 867).

Defendant further contends that the evidence is legally insufficient to support the conviction of course of sexual conduct against a child in the second degree inasmuch as the People failed to establish that the alleged sexual acts occurred "over a period of time not less than three months in duration" pursuant to Penal Law § 130.80 (1). Defendant failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19; *People v Mills*, 63 AD3d 1717, *lv denied* 13 NY3d 861) and, in any event, that 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 there is a valid line of reasoning and permissible inferences from which a rational jury could conclude that the sexual conduct occurred for the requisite duration (*see People v Paramore*, 288 AD2d 53, *lv denied* 97 NY2d 759; *see also People v Johnson*, 24 AD3d 967, 968, *lv denied* 6 NY3d 814; *see generally People v Bleakley*, 69 NY2d 490, 495). Defendant also failed to preserve for our review his contention that the evidence is legally insufficient to support the remaining counts (*see Gray*, 86 NY2d at 19) and, 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 was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). "With respect to defense counsel's failure to object to certain . . . testimony . . . [and alleged prosecutorial misconduct on summation], defendant failed to demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's alleged shortcomings" (*People v Elliott*, 73 AD3d 1444, 1445, *lv denied* 15 NY3d 773 [internal quotation marks omitted]; *see People v Taylor*, 1 NY3d 174, 176-178). Further, "[d]efense 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" (*People v Hunter*, 70 AD3d 1388, 1389, *lv denied* 15 NY3d 751; *see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Defendant's contention that defense counsel was ineffective in failing to present a proper foundation to permit the introduction of certain evidence involves matters outside the record on appeal and thus is properly raised by way of a motion pursuant to CPL article 440 (*see People v Barnes*, 56 AD3d 1171; *People v Jenkins*, 25 AD3d 444, 445-446, *lv denied* 6 NY3d 834).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1340

KA 09-01555

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARVIN DYE, JR., DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (MICHAEL DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, SPECIAL PROSECUTOR, BUFFALO (SHAWN HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered October 14, 2004. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (two counts), unlawful imprisonment in the second degree (two counts) 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, upon a jury verdict, of two counts each of rape in the first degree (Penal Law § 130.35 [1], [4]) and unlawful imprisonment in the second degree (§ 135.05), and one count of sexual abuse in the first degree (§ 130.65 [1]). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction of two counts of unlawful imprisonment (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant failed to preserve for our review his contention that the conviction of two counts of rape and one count of sexual abuse is not supported by legally sufficient evidence because he made only a general motion for a trial order of dismissal with respect to those counts (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). Furthermore, viewing the evidence in light of the elements of the crimes of which defendant was convicted, 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 contentions of defendant, we conclude that County Court did not abuse its discretion in denying his request for a missing witness charge (*see generally People v Savinon*, 100 NY2d 192, 196-197; *People v Gonzalez*, 68 NY2d 424, 427-428), and in refusing to allow defendant "to 'introduce extrinsic evidence on a

collateral matter solely to impeach credibility' " by presenting the testimony of a proposed defense witness (*People v Simmons*, 21 AD3d 1275, *lv denied* 6 NY3d 781, quoting *People v Alvino*, 71 NY2d 233, 247). The record is insufficient to enable us to review the contention of defendant that he was denied his right to counsel (*see People v Kinchen*, 60 NY2d 772, 773-774; *People v Brown*, 286 AD2d 960, 961, *lv denied* 97 NY2d 679), and thus the proper procedural vehicle for raising that contention is by way of a motion pursuant to CPL article 440 (*see People v Larrabee*, 201 AD2d 924, *lv denied* 83 NY2d 855). Defendant did not preserve for our review his contention that an instruction delivered by the court during jury selection deprived him of his rights to due process and a fair trial (*see* CPL 470.05 [2]), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1343

CA 10-00974

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

GARY A. WAHL AND BEVERLY WAHL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF WAYNE, DEFENDANT-APPELLANT.

BOYLAN, BROWN, CODE, VIGDOR & WILSON, LLP, ROCHESTER (SCOTT M. MOONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FOLEY AND FOLEY, PALMYRA (JAMES F. FOLEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered March 4, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part defendant's motion and dismissing the negligence cause of action insofar as it is based on the alleged violation of Highway Law § 139 and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Gary A. Wahl, a volunteer fireman, when he was struck by a vehicle while directing traffic at an accident scene. Defendant appeals from an order that, inter alia, denied its motion for summary judgment dismissing the complaint. Contrary to defendant's contention, Supreme Court properly determined that the complaint did not raise new legal theories outside the scope of the notice of claim (*cf. Moore v County of Rockland*, 192 AD2d 1021, 1023). We agree with defendant, however, that the court erred in denying that part of its motion seeking summary judgment dismissing the negligence cause of action insofar as it is based on the alleged violation of Highway Law § 139. Defendant owns neither of the roads that intersect in the area where plaintiff was directing traffic, and thus it cannot be said that defendant had "charge of the repair or maintenance" of those roads (Highway Law § 139 [1]). We therefore modify the order accordingly.

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court

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

1344

CA 10-00005

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

CONSUMER SOLUTIONS REO, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN A. GIGLIO, NANCY M. GIGLIO,
ALSO KNOWN AS NANCY K. GIGLIO,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

SHAPIRO, DICARO & BARAK, LLP, ROCHESTER (ELLIS M. OSTER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEGAL AID SOCIETY OF MID-NEW YORK, INC., WATERTOWN (TERRENCE J. WHELAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (Joseph D. McGuire, J.), dated May 26, 2009 in a foreclosure 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 action to foreclose on a mortgage and contends on appeal that Supreme Court erred in denying its motion for summary judgment on the complaint. We note at the outset that the order on appeal and the letter from the court that accompanied it specifically direct plaintiff's attorney to file the order. Plaintiff failed to comply with that directive, however, and waited six months before it filed the notice of appeal. The notice of appeal was filed prior to the entry of the order, thus rendering the notice of appeal premature (*see Matter of Danial R.B. v Ledyard M.*, 35 AD3d 1232; *Spano v County of Onondaga*, 170 AD2d 974, *lv denied* 77 NY2d 809, *lv dismissed* 77 NY2d 989). Nevertheless, we address the merits of the appeal in the exercise of our discretion and in the interest of judicial economy (*see* CPLR 5520 [c]; *Danial R.B.*, 35 AD3d at 1232), and we affirm for reasons stated in the decision at Supreme Court. We add only that, "[w]hen a plaintiff moves for summary judgment, it is proper for the court to look beyond the defendant[s'] answer and deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 182, *rearg denied* 57 NY2d 674). "Consistent with the rule . . . that a defense established by the papers is sufficient though unpleaded to warrant denial of a

motion for summary judgment" (*id.* at 183; *see Preferred Capital, Inc. v PBK, Inc.,* 309 AD2d 1168, 1168-1169), we agree with the court that defendants-respondents raised triable issues of fact with respect to whether plaintiff accepted payments on the mortgage after the date of the default alleged in the complaint (*see generally Citicorp Mtge. v Chen*, 237 AD2d 968), and with respect to the defenses of waiver and estoppel (*see generally Mahopac Natl. Bank v Baisley*, 244 AD2d 466, *lv dismissed* 91 NY2d 1003).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1348

CA 10-00567

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

THOMAS V. CASE, PLAINTIFF,

V MEMORANDUM AND ORDER

ANTONE R. CASE, CASE BROS., A NEW YORK PARTNERSHIP, DOING BUSINESS AS TC PACKING COMPANY, WYOMING COUNTY BANK, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

DIBBLE & MILLER, P.C., APPELLANT, DAVID A. SHULTS AND BARBARA L.S. FINCH, INTERVENORS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (GERARD F. NORTON OF COUNSEL), FOR APPELLANT PRO SE.

STEVEN D. SESSLER, GENESEO, FOR DEFENDANT-RESPONDENT ANTONE R. CASE.

SHULTS AND SHULTS, HORNELL (DAVID A. SHULTS OF COUNSEL), FOR INTERVENORS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Kenneth R. Fisher, J.), entered July 30, 2009 in an action for dissolution of a partnership. The order, insofar as appealed from, distributed plaintiff's second share to nonparty creditors in a federal action and determined that the second share is a fund independent of a lien by Dibble & Miller, P.C.

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

Memorandum: Plaintiff and his attorneys, Dibble & Miller, P.C. (appellant), appeal from, inter alia, that part of an order directing the distribution of plaintiff's share of post-accounting income in a partnership dissolution proceeding to plaintiff's nonparty creditors pursuant to an order of the United States District Court for the Western District of New York, despite the existence of an attorney's lien filed by appellant. Following the filing of a notice of appeal in this matter, however, the United States Court of Appeals for the Second Circuit reversed the order of the District Court denying appellant's motion to intervene in the federal matter, ordered that the funds at issue be held by the clerk of the District Court and remanded the matter to the District Court for further proceedings (*see*

Eastern Potato Dealers, Inc. v TNC Packing Corp., 363 Fed Appx 819, 822). We thus note that all of the necessary parties and the relevant issues are currently before the District Court. Further, this matter involves consideration of the Perishable Agricultural Commodities Act (7 USC § 499a *et seq.*), and "considerations of comity, orderly procedure, and judicial economy demand that the [f]ederal action be tried first" (*Theatre Confections v Andrea Theatres*, 126 AD2d 969, 970). We therefore conclude that the appeal must be dismissed without consideration of the merits. To the extent, if any, that the order appealed from is or may become inconsistent with a federal court order, plaintiff and appellant may seek relief from Supreme Court (*see generally* CPLR 2221 [a], [e]; 5015).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1349

CA 10-00411

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

ANNE M. ROMANELLO AND JOHN ROMANELLO,
PLAINTIFFS-RESPONDENTS,

V ORDER

KENNETH S. FINLAY, DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (VICTOR ALAN OLIVERI OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ROBERT B. NICHOLS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 21, 2009 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Frizzell v Giannetti*, 34 AD3d 1202, 1203; *House v Thornton*, 32 AD3d 1172).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1350

CA 10-01167

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

COR BROKERAGE, INC., PLAINTIFF-RESPONDENT,

V ORDER

NEW HARTFORD SHOPPING CENTER TRUST,
DEFENDANT-APPELLANT.

COHEN & COHEN LLP, UTICA (DANIEL S. COHEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MANNION & COPANI, SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 31, 2010 in an action seeking brokerage commissions on rental payments. The order denied defendant's motion for partial summary judgment on the first cause of action and granted plaintiff's cross motion for partial summary judgment on the first cause of action.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1354.1

CA 09-02448

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

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MCATEER & FITZGERALD, INC., KENYON B. FITZGERALD, JR., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

von SIMSON & CHIN LLP, BUFFALO (CHARLES von SIMSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered August 7, 2009 in a breach of contract action. The order denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the determination that plaintiff's release of defendant Michael J. McAteer without reserving any rights against the remaining defendants reduced their liability, and as modified the order is affirmed without costs.

Memorandum: Plaintiff appeals from an order denying its motion for summary judgment on the complaint in this breach of contract action. We affirm. Contrary to its contention, plaintiff failed to establish its entitlement to judgment as a matter of law with respect to defendants' alleged failure to remit to plaintiff certain premiums collected on its behalf (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Further, plaintiff failed to meet its burden of establishing that its interpretation of the reinsurance contract, i.e., that it obligates defendants to act as guarantors of any unpaid premiums owed by third parties, is the only reasonable interpretation thereof (*see Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923). Although plaintiff met its burden of establishing that defendants were obligated to repay plaintiff for excess commissions, defendants raised a triable issue of fact in opposition to the motion with respect to the amount of those excess commissions (*see generally Zuckerman*, 49 NY2d at 562). Contrary to plaintiff's further contention, defendants sufficiently pleaded the affirmative defense of

setoff (*see generally 115 Austin Ave., LLC v City of Yonkers*, 37 AD3d 684), and Supreme Court therefore properly concluded that any issue with respect thereto should be resolved at trial.

We conclude, however, that the court erred in determining that plaintiff's release of defendant Michael J. McAteer without reserving any rights against the remaining defendants reduced their liability pursuant to General Obligations Law § 15-105, and we therefore modify the order accordingly. Although only the court's decision but not the order on appeal expressly sets forth that determination, it is well established that where there is a discrepancy between the order and the decision, the decision controls (*see Matter of Edward V.*, 204 AD2d 1060, 1061). We note that defendants never moved for summary judgment on that issue, and we conclude that there are triable issues of fact with respect thereto inasmuch as the record does not establish to what extent, if any, McAteer was a co-obligor for the purposes of that statute.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1354.2

CA 09-02449

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

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V ORDER

MCATEER & FITZGERALD, INC., KENYON B. FITZGERALD, JR., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

von SIMSON & CHIN LLP, BUFFALO (CHARLES von SIMSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered October 19, 2009 in a breach of contract action. The order denied the motion of plaintiff for leave to reargue the denial of its 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).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1354

TP 10-01194

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

IN THE MATTER OF HAROLD D. SYMONDS, JR.,
PETITIONER,

V ORDER

BETH BERLIN, EXECUTIVE DEPUTY COMMISSIONER,
NEW YORK STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE, AND LAURA CEROW,
COMMISSIONER, JEFFERSON COUNTY DEPARTMENT OF
SOCIAL SERVICES, RESPONDENTS.

LEGAL AID SOCIETY OF MID-NEW YORK, INC., WATERTOWN (TERRENCE J. WHELAN OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT BETH BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

KEVIN C. CARACCIOLI, WATERTOWN, FOR RESPONDENT LAURA CEROW, COMMISSIONER, JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [Hugh A. Gilbert, J.], entered May 20, 2010) to review a determination of respondent New York State Office of Temporary and Disability Assistance. The determination imposed public assistance and food stamp sanctions.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1355

KA 10-00788

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID B. SHERMAN, DEFENDANT-APPELLANT.

JAMES R. MCGRAW, 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 (James W. McCarthy, J.), rendered September 11, 2009. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1356

KA 08-02630

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY MORRIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered October 30, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that County Court abused its discretion in denying his motion to withdraw his plea. We reject that contention (*see generally People v Howell*, 60 AD3d 1347). The plea colloquy was not rendered factually insufficient by defendant's monosyllabic responses to questioning by the court (*see People v VanDeViver*, 56 AD3d 1118, *lv denied* 11 NY3d 931, 12 NY3d 788; *People v Wilson*, 38 AD3d 1348, *lv denied* 9 NY3d 927), and we conclude that the record otherwise establishes that the plea was knowing, voluntary and intelligent (*see People v Guzman*, 70 AD3d 1332; *People v Spikes*, 28 AD3d 1101, 1102, *lv denied* 7 NY3d 818). Indeed, the contention of defendant that his plea was coerced by defense counsel is belied by the record (*see People v Montgomery*, 63 AD3d 1635, 1636, *lv denied* 13 NY3d 798; *People v Gimenez*, 59 AD3d 1088, 1089, *lv denied* 12 NY3d 816). In addition, defendant failed to submit any new evidence to substantiate his conclusory assertions of innocence in support of his motion to withdraw the plea (*see Guzman*, 70 AD3d 1332; *People v Kimmons*, 39 AD3d 1180). Thus, contrary to the contention of defendant, he made no showing of entitlement to an evidentiary hearing on his motion, and we note in any event that "[o]nly in the rare instance will a defendant be entitled to an evidentiary hearing"

(*People v Tinsley*, 35 NY2d 926, 927; *see Kimmons*, 39 AD3d at 1180).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1357

KA 09-00507

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM CHIARAPPA, 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 Onondaga County Court (William D. Walsh, J.), rendered November 19, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment that revoked the sentence of probation imposed upon his conviction of driving while intoxicated (Vehicle and Traffic Law § 1192 [3]) and sentenced him to an indeterminate term of incarceration. Defendant failed to preserve for our review his contention that he was denied the right to present a defense at his probation revocation hearing (*see People v Melendez*, 8 NY3d 886; *People v Dorn*, 71 AD3d 1523) and, in any event, we conclude that defendant was " 'afforded [the requisite] opportunity to be heard' " (*People v Perna*, 74 AD3d 1807, 1807). County Court properly refused to consider the testimony of defendant concerning matters extraneous to the issue whether he failed to report to his probation officer (*see generally People v Grace*, 60 AD3d 432, 433, *lv denied* 12 NY3d 854; *People v Lawhorn*, 21 AD3d 1289, 1291). In addition, the fact that the court briefly mentioned another charge did not deny defendant his right to present a defense with respect thereto inasmuch as the court did not sentence him based upon that charge (*see generally People v Rivers*, 262 AD2d 108, *lv denied* 94 NY2d 828). Also contrary to the contention of defendant, the court was entitled to credit the testimony of the probation officer over that of defendant (*see Perna*, 74 AD3d at 1807-1808), and we conclude that the People met their burden of proving by a preponderance of the evidence that defendant violated the conditions of his probation by failing to report to his probation officer (*see generally id.* at 1807). Finally, defendant contends that the court erred in relying on testimony

concerning his failure to report to his probation officer inasmuch as such testimony involved conduct that occurred approximately one year prior to the revocation hearing. We reject that contention (*see* CPL 410.70 [3]; *People v Johnson*, 159 AD2d 725, 725-726; *People v Cherry*, 143 AD2d 1028, 1029-1030, *lv denied* 73 NY2d 920).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1359

KA 07-01486

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK J. MORRISON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered May 29, 2007. The judgment convicted defendant, upon his plea of guilty, of reckless assault 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 his plea of guilty, of reckless assault of a child (Penal Law § 120.02). Defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea was not knowingly, intelligently and voluntarily entered (*see People v Cannon*, 59 AD3d 962, *lv denied* 12 NY3d 815). In any event, we reject that contention. The fact that County Court misinformed defendant of the minimum sentence to which he was exposed "is [a] factor which must be considered by the court, but it is not, in and of itself, dispositive" (*People v Garcia*, 92 NY2d 869, 870). Indeed, "[w]hether a plea was knowing, intelligent and voluntary is dependent upon a number of factors[,] 'including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused' " (*id.*; *see People v Johnson*, 24 AD3d 1259, *lv denied* 6 NY3d 814). We conclude on the record before us that the court's misstatement concerning the minimum possible sentence did not render the plea involuntary. Although defendant failed to preserve for our review his further contention that the court failed to apprehend the extent of its sentencing discretion, such a contention does not require preservation (*see People v Schafer*, 19 AD3d 1133). Nevertheless, the record does not support defendant's contention (*see People v Graham*, 42 AD3d 933, *lv*

denied 9 NY3d 876; *cf. Schafer*, 19 AD3d 1133).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1360

KA 08-01373

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD W. MATT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered May 30, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (three counts), robbery in the first degree (two counts) and kidnapping in the first degree (three counts).

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, inter alia, three counts of murder in the second degree (Penal Law § 125.25 [1], [3]), defendant contends that he was denied due process because he was required to wear a stun belt during trial. Defendant's contention involves matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Schrock*, 73 AD3d 1429, 1431). Defendant further contends that County Court erred in refusing to grant a mistrial after learning that jurors were aware of inflammatory newspaper headlines concerning the trial. We reject that contention. The court determined following an inquiry of the jurors that their minimal exposure to news accounts did not warrant a mistrial, and we conclude that the court thus did not abuse its discretion in denying defendant's motion (*see People v Fernandez*, 269 AD2d 167, *lv denied* 95 NY2d 796). We further note that the court's curative instructions "eliminated any likelihood of prejudice" (*People v Bolden*, 243 AD2d 268, 269). Finally, defendant failed to preserve for our review his contention that the testimony of the accomplice was not sufficiently corroborated and thus that the conviction is not supported by legally sufficient evidence (*see People v Carrasquillo*, 71 AD3d 1591, *lv denied* 15 NY3d 803). In any event, the record establishes that the People presented sufficient evidence connecting defendant to the crimes, thereby satisfying the corroboration requirement (*see* CPL

60.22 [1]; *People v Reome*, 15 NY3d 188, 191-192).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1361

KA 09-00580

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD J. MCKEON, JR., DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION, FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Robert C. Noonan, A.J.), rendered February 27, 2009. 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 [2]). Contrary to defendant's contention, the record of the plea proceeding in County Court establishes that, pursuant to the terms of the plea agreement, defendant agreed to waive the right to appeal. The record further establishes that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" and that his waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*People v Lopez*, 6 NY3d 248, 256). Contrary to defendant's contention, certain comments made by the Supreme Court Justice who sentenced defendant, despite the fact that the plea was entered in County Court, were not relevant to, nor did they invalidate, defendant's valid waiver of the right to appeal (*see generally People v Moissett*, 76 NY2d 909, 912).

Although the contention of defendant that the plea was not knowingly and voluntarily entered survives his waiver of the right to appeal, he failed to preserve that contention for our review by failing to move to withdraw his guilty plea or to vacate the judgment of conviction on that ground (*see People v Thomas*, 72 AD3d 1483). In any event, his contention is without merit. In support of that contention, defendant asserts that his actions may have been justified and that County Court mistakenly advised him that he had a duty to retreat from his home. Although we agree with defendant that the

court mistakenly advised him concerning his duty to retreat (*see* Penal Law § 35.15 [2] [a] [i]), we nevertheless conclude that the court's error did not render the plea invalid. Defendant did not indicate in his recitation of the facts underlying the crime that he reasonably believed that the victim was using or was about to use deadly physical force (*see* § 35.15 [2] [a]; *see generally People v Lopez*, 71 NY2d 662, 666; *People v McKnight*, 256 AD2d 1194, *lv denied* 93 NY2d 876).

The further contention of defendant that County Court erred in refusing to suppress his statements to the police as well as the evidence seized from his home is encompassed by his waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v Aiken*, 73 AD3d 1450, *lv denied* 15 NY3d 771). Finally, defendant failed to preserve for our review his contention that the orders of protection, which were amended following their issuance, should be vacated (*see People v Nieves*, 2 NY3d 310, 315-317; *People v Shampine*, 31 AD3d 1163, 1164), 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]).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1362

KA 07-01925

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD L. SNOW, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY 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 (John J. Ark, J.), rendered July 26, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree (three counts), grand larceny in the fourth degree and petit larceny (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the order of restitution dated October 23, 2007 and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of three counts of robbery in the third degree (Penal Law § 160.05), two counts of petit larceny (§ 155.25), and one count of grand larceny in the fourth degree (§ 155.30 [1]). Defendant contends that his plea was not knowing, voluntary, or intelligent because Supreme Court failed to inform him at the time of the plea proceeding that he would have to pay restitution. Defendant failed to preserve his contention for our review but, as the People correctly concede, there was no discussion of restitution on the record during the plea proceeding. The People thus contend that defendant "compellingly" argues that restitution was not part of the bargained-for sentence. We agree with the People's further contention, however, that any error in imposing restitution at the original sentencing was remedied when the court did not impose restitution at defendant's resentencing (*see People v Williams*, 14 NY3d 198, 217, *cert denied* ___ US ___ [Oct. 4, 2010]; *see also People v Minaya*, 54 NY2d 360, 363-364, *cert denied* 455 US 1024).

Although not addressed by defendant or the People, we note that the court, following the resentencing, issued an order imposing restitution. "Because there is no basis in the record for the restitution amount contained in the . . . order of restitution," we

modify the judgment by vacating that order (*see People v Nagel*, 60 AD3d 1485, *lv denied* 12 NY3d 918).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1363

CAF 09-02493

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

IN THE MATTER OF AKEIRA A., CARL A., AND
WILLIAM A., JR.

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

WILLIAM A., RESPONDENT-APPELLANT,
AND AMANDA A., RESPONDENT.

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

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR AKEIRA A., CARL A., AND WILLIAM A., JR.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered November 20, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent William A. neglected the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Briana R.*, 247 AD2d 940; *Matter of Cherilyn P.*, 192 AD2d 1084, *lv denied* 82 NY2d 652).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1366

CAF 09-02183

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

IN THE MATTER OF STEVEN L.

FELICIA H., PETITIONER-APPELLANT,
AND STEVEN H., PETITIONER;

ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.

BRIAN L. AND KELLY L., INTERESTED
PARTIES-RESPONDENTS.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

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

DANIEL J. HARTMAN, BUFFALO, FOR INTERESTED PARTIES-RESPONDENTS.

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered September 17, 2009. The order, among other things, adjudged that it would not be in the subject child's best interest to allow personal contact with petitioner Felicia H.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1367

CAF 10-00835

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

IN THE MATTER OF SAMANTHA LAURICELLA,
PETITIONER-RESPONDENT,

V ORDER

SALVATORE LAURICELLA, JR., RESPONDENT-APPELLANT.

SALVATORE LAURICELLA, JR., RESPONDENT-APPELLANT PRO SE.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered December 31, 2009 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to an order of the Support Magistrate dated November 20, 2009.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1368

CAF 09-02494

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

IN THE MATTER OF JENNIFER ALESSIO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HAROLD BURCH, RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered November 19, 2009 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Erie County, for a new hearing on the petition.

Memorandum: Petitioner appeals from an order dismissing her family offense petition pursuant to Family Court Act article 8 based on Family Court's determination that petitioner's testimony at the hearing on the petition was not credible. We agree with petitioner that, because the transcript of the hearing includes only one page of her direct examination, meaningful appellate review of the pivotal basis for the court's determination, i.e., that petitioner was not credible, is not possible (*see White v Fischer*, 73 AD3d 1372, 1373; *see also Matter of Cobrin [Telecom Consulting Group NE Corp.-Commissioner of Labor]*, 36 AD3d 1166, 1166-1167). We therefore are compelled to reverse the order and remit the matter for a new hearing on the petition (*see Weckstein v Breitbart*, 111 AD2d 6, 8; *see generally Matter of Jordal v Jordal*, 193 AD2d 1102).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1369

CA 10-00577

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS CO-EXECUTORS OF THE ESTATE OF ANGELINE V. SILLS, DECEASED, PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

JOAN ROYSTON, DEFENDANT-APPELLANT-RESPONDENT. (ACTION NO. 1.)

IN THE MATTER OF ROBERT SILLS AND AUDREY ELAINE SILLS, AS CO-EXECUTORS OF THE ESTATE OF ANGELINE V. SILLS, DECEASED, PETITIONERS-RESPONDENTS-APPELLANTS,

V

FLEET NATIONAL BANK, ET AL., RESPONDENTS-RESPONDENTS, AND JOAN ROYSTON, RESPONDENT-APPELLANT-RESPONDENT. (PROCEEDING NO. 1.) (APPEAL NO. 1.)

MCDONOUGH & ARTZ, P.C., BINGHAMTON (PHILIP J. ARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND RESPONDENT-APPELLANT-RESPONDENT.

GATES & ADAMS, P.C., ROCHESTER (DOUGLAS GATES OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS AND PETITIONERS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered October 7, 2009. The order, among other things, denied defendant's motion for an order dismissing action No. 1 and denied the motion made by respondents Joan Royston and Kirk Richardson to dismiss proceeding No. 1.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1370

CA 10-01098

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS CO-EXECUTORS OF THE ESTATE OF ANGELINE V. SILLS, DECEASED, PLAINTIFFS-RESPONDENTS,

V ORDER

JOAN ROYSTON, DEFENDANT-APPELLANT.
(ACTION NO. 1.)
(APPEAL NO. 2.)

MCDONOUGH & ARTZ, P.C., BINGHAMTON (PHILIP J. ARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

GATES & ADAMS, P.C., ROCHESTER (DOUGLAS GATES OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered October 7, 2009. The judgment awarded plaintiffs the sum of $157,280.17 as against defendant.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1372

CA 10-01091

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

JAMES T. WALTZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARY S. VINK, DEFENDANT-APPELLANT.

ERNEST D. SANTORO, ESQ., P.C., ROCHESTER (ERNEST D. SANTORO OF COUNSEL), FOR DEFENDANT-APPELLANT.

PRONER & PRONER, NEW YORK CITY (TOBI R. SALOTTOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered September 16, 2009 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the motorcycle he was driving collided at an intersection with a vehicle operated by defendant. Plaintiff was traveling northbound when his motorcycle was struck by defendant's southbound vehicle, as defendant was attempting to turn left. Supreme Court properly granted plaintiff's motion for partial summary judgment on liability.

Plaintiff met his initial burden by establishing as a matter of law " 'that the sole proximate cause of the accident was defendant's failure to yield the right of way' to plaintiff" (*Guadagno v Norward*, 43 AD3d 1432, 1433). According to the deposition testimony of plaintiff, he first saw defendant's vehicle turning left into his lane of travel when it was 20 feet away. Defendant testified at her deposition that she stopped her vehicle at the intersection in question and that, although she observed traffic approaching in the opposite lane, she believed that she had ample time in which to make a left-hand turn. Based on the parties' deposition testimony, we conclude that plaintiff established as a matter of law that defendant " 'was negligent in failing to see that which, under the circumstances, [she] should have seen, and in crossing in front of [plaintiff's motorcycle] when it was hazardous to do so' " (*id.*). Further, plaintiff established as a matter of law that he " 'was free from fault in the occurrence of the accident' " (*see id.*), and

defendant failed to raise an issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1373

CA 10-00578

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

MAHMOOD YOONESSI AND SHAMS YOONESSI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DEBRA L. GIVENS, DEFENDANT-RESPONDENT.

ZDARSKY SAWICKI & AGOSTINELLI, LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF EPSTEIN & HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered November 19, 2009 in a personal injury action. The order denied the motion of plaintiffs to vacate an arbitration award and affirmed the arbitration award.

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

Memorandum: Plaintiffs commenced this personal injury action and thereafter stipulated to submit the matter to binding arbitration. They now appeal from an order of Supreme Court denying their motion seeking to vacate the award of the arbitrators and confirming the award. The arbitrators awarded plaintiff husband damages for past and future pain and suffering resulting from an automobile accident. Plaintiffs contend, however, that the award was indefinite and nonfinal because the arbitrators failed to render any decision with respect to the husband's economic loss or the derivative claim of his wife. We affirm. An arbitration award may be vacated if the court finds, inter alia, that the arbitrator "exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter was not made" (CPLR 7511 [b] [1] [iii]). An award is indefinite or nonfinal within the meaning of the statute "only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy" (*Matter of Meisels v Uhr*, 79 NY2d 526, 536). Contrary to plaintiffs' contention, the arbitration award was final and definite. The arbitrators "dispose[d] of the controversy submitted" and, even if they failed to consider an award for economic loss or loss of consortium, that failure would be "a mere error of fact or law not judicially reviewable" (*Matter of Guetta [Raxon Fabrics Corp.]*, 123 AD2d 40, 45).

Plaintiffs further contend that the arbitration proceeding was tainted by fraud on the part of a defense witness because the witness was not qualified to render an expert opinion and gave false testimony. We are unable to review that contention, however, because plaintiffs failed to submit a transcript of the arbitration proceeding (*see Vick v Albert*, 34 AD3d 331, *lv denied* 8 NY3d 805; *Matter of City of Buffalo [Buffalo Police Benevolent Assn.]*, 13 AD3d 1202).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1374

CA 10-01013

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

IN THE MATTER OF MARTIN LUTHER NURSING HOME, INC., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL J. DOWLING, COMMISSIONER OF SOCIAL SERVICES OF STATE OF NEW YORK, MARK CHASSIN, M.D., COMMISSIONER OF HEALTH OF STATE OF NEW YORK AND RUDY F. RUNKO, DIRECTOR OF BUDGET OF STATE OF NEW YORK, RESPONDENTS-RESPONDENTS.

RUFFO TABORA MAINELLO & MCKAY P.C., ALBANY (RAUL A. TABORA, JR., OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered October 1, 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: Petitioner appeals from a judgment that dismissed its CPLR article 78 petition. Petitioner sought therein to adjust its Medicaid reimbursement rate for the years 1989 through 1992 based on its receipt of a rebate in 1985 resulting from an overcharge in 1983 for electrical services. We reject the contention of petitioner that respondents' actions were irrational and in violation of federal regulations and conclude that respondent Commissioner of Health of the State of New York (hereafter, DOH) did not act in an arbitrary or capricious manner in refusing to recalculate petitioner's reimbursement rate.

Medicaid regulations provide that a facility's audited costs as determined in 1983, trended by inflation, are to be used for future reimbursement calculations (*see* 10 NYCRR 86-2.10 [b] [1] [i]). Reimbursement rates are "provisional" until an audit occurs (10 NYCRR 86-2.7), and audit adjustments that result in rate revisions must apply to all rate periods that are affected by the audited costs (*see* 18 NYCRR 517.14).

Although Supreme Court determined that respondents' action in applying the 1985 refund to the 1983 rate was rational based in part on the federal Medicare reimbursement manual, we conclude that 10 NYCRR 86-2.2 (d) is controlling with respect to this issue. Pursuant to that regulation, "[i]n the event that any information or data which a residential health care facility has submitted to [DOH] on required reports, budgets or appeals for rate revisions intended for use in establishing rates[] is inaccurate or incorrect, *whether by reason of subsequent events or otherwise*, *such facility shall forthwith submit to the department a correction of such information or data which meets the same certification requirements as the document being corrected*" (emphasis added).

Here, petitioner was obligated pursuant to 10 NYCRR 86-2.2 (d) to report the overpayment to DOH, and respondents then had the authority to revise the rates based on the correction of the incorrect data underlying the overpayment. To hold otherwise would render meaningless the reporting obligation in 10 NYCRR 86-2.2 (d), as well as the specification in 10 NYCRR 86-2.7 that reimbursement rates are provisional prior to an audit (*see generally Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 587).

Petitioner's reliance on the decision of the Court of Appeals in *Matter of County of Monroe v Kaladjian* (83 NY2d 185) is misplaced, inasmuch as the relief sought by the petitioner therein was denied. In that case, the County of Monroe (County) had underestimated its electrical costs and as a result sought increased Medicaid reimbursement (*id.* at 188). The Court of Appeals concluded that the County's miscalculation was not an "error" that could be used to adjust the reimbursement rate, noting that the County had claimed in a previous appeal that its increased cost was the result of "updating and modernizing" its electrical systems, but that the County had not obtained the requisite prior authorization from DOH for such updating and modernization (*id.* at 188-190; *see also* 10 NYCRR 86-2.14 [a] [4]). In any event, that case is further distinguishable because here the discrepancy was an overpayment rather than an underpayment, and was not the result of unauthorized actions undertaken by petitioner.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1377

KA 09-01795

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAUN M. SALSBERY, DEFENDANT-APPELLANT.

AMY L. HALLENBECK, FULTON, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered July 27, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and petit larceny.

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 petit larceny (§ 155.25). We reject the contention of defendant that he received ineffective assistance of counsel and instead conclude that the "cumulative effect of defense counsel's alleged deficiencies, viewed in totality and as of the time of the representation, did not deprive defendant of effective assistance of counsel" (*People v Marcial*, 41 AD3d 1308, 1309, *lv denied* 9 NY3d 878; *see People v Brown*, 266 AD2d 838, 839, *lv denied* 94 NY2d 860; *see generally People v Baldi*, 54 NY2d 137, 147). In support of his contention, defendant asserts that defense counsel should not have called as a witness one of defendant's friends who acted in concert with defendant in committing the crimes. As the People correctly note, however, the theory of the defense was that defendant believed that his friend had permission to enter the garage from which they took the all-terrain vehicle in question and that defendant intended to purchase it for his children. Thus, defendant has failed to show that defense counsel had no strategic explanation for calling defendant's friend as a witness (*see People v Covington*, 44 AD3d 510, 511, *lv denied* 9 NY3d 1032; *see generally People v Benevento*, 91 NY2d 708, 712; *Baldi*, 54 NY2d at 147). Defendant has likewise failed to demonstrate that defense counsel had no strategy in eliciting testimony that defendant was in possession of drugs when the police questioned him, and in questioning defendant with respect to his criminal history. The possession of drugs provided an explanation for

defendant's having fled the scene of the accident as well as for defendant's cursory responses to questioning by the police (*see People v Rodriguez*, 196 AD2d 514, *lv denied* 82 NY2d 807; *see generally Baldi*, 54 NY2d at 147), and pursuant to the court's *Sandoval* ruling the prosecutor was permitted to question defendant with respect to his criminal history in any event. Although we are troubled by the fact that defense counsel did not request a *Huntley* hearing in connection with defendant's statements to the police, we note that defense counsel otherwise provided a cogent and rational defense that addressed those statements. Thus, we conclude that the failure to request a *Huntley* hearing does not rise to the level of ineffective assistance of counsel (*see People v Webster*, 56 AD3d 1242, 1242-1243, *lv denied* 11 NY3d 931; *Marcial*, 41 AD3d 1308; *People v Jurjens*, 291 AD2d 839, *lv denied* 98 NY2d 652). In addition, we conclude that defendant has failed to show that defense counsel was ineffective in failing to object to questioning by the prosecutor concerning defendant's pretrial silence (*see Brown*, 266 AD2d at 839; *People v Davis*, 111 AD2d 252). "Although a prosecutor generally may not use the pretrial silence of a defendant to impeach his or her trial testimony [and to comment on that silence on summation] . . ., that general rule does not apply where, as here, 'a defendant speaks to the police and omits exculpatory information which he [or she] presents for the first time at trial' " (*People v Harris*, 57 AD3d 1523, 1524, *lv denied* 12 NY3d 817; *see generally People v Savage*, 50 NY2d 673, 680-682, *cert denied* 449 US 1016). We therefore further conclude that defendant was not denied a fair trial based on alleged prosecutorial misconduct in connection with his pretrial silence.

Defendant failed to object to County Court's ultimate *Sandoval* ruling and thus failed to preserve for our review his contention that the court erred in allowing or, alternatively, in failing to limit cross-examination concerning his prior convictions (*see People v Anthony*, 74 AD3d 1795, *lv denied* 15 NY3d 849; *People v Miller*, 59 AD3d 1124, 1125, *lv denied* 12 NY3d 819). In any event, we conclude that the court did not abuse its discretion in precluding the prosecutor from cross-examining defendant with respect to one remote conviction in 1997 but in otherwise allowing the prosecutor to cross-examine defendant with respect to his remaining convictions. Defendant's drug-related convictions and convictions for criminal mischief and resisting arrest showed the willingness of defendant to place his own interests above those of society (*see People v Davenport*, 38 AD3d 1064, 1065; *People v Carter*, 34 AD3d 1342, *lv denied* 8 NY3d 844; *People v Mangan*, 258 AD2d 819, 820-821, *lv denied* 93 NY2d 927). Additionally, defendant's convictions for theft of services, attempted petit larceny, and criminal contempt involved acts of dishonesty and thus were probative with respect to the issue of defendant's credibility (*see People v Robles*, 38 AD3d 1294, 1295, *lv denied* 8 NY3d 990; *People v Tirado*, 19 AD3d 712, 713, *lv denied* 5 NY3d 810). Finally, the sentence is not unduly harsh or severe.

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court

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

1379

KA 09-00493

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR L. RIVERA, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered February 3, 2009. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act following a redetermination hearing.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*) following a redetermination hearing conducted in accordance with the stipulation of settlement in *Doe v Pataki* (3 F Supp 2d 456, *cert denied* 522 US 1122). Contrary to defendant's contention, Supreme Court did not abuse its discretion in refusing to grant defendant a downward departure from his presumptive risk level. Although defendant received the lowest possible point total to be classified as a level two risk and had not committed another sex offense in over 12 years, he failed to present evidence with respect to the nature of his rehabilitation or lifestyle during that time, and the record establishes that he was convicted of failing to register as a sex offender (§ 168-t). Defendant therefore "failed to present the requisite clear and convincing evidence of the existence of special circumstances warranting a downward departure" (*People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715; *see People v McGrigg*, 67 AD3d 1426, *lv denied* 14 NY3d 701; *People v Adams*, 52 AD3d 1237, *lv denied* 11 NY3d 705).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1382

KA 09-02019

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON L. RUFFINS, DEFENDANT-APPELLANT.

NELSON S. TORRE, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered January 20, 2009. The judgment convicted defendant, upon a his plea of guilty, 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, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [2] [a]). 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; *People v Streeter*, 71 AD3d 1463, *lv denied* 14 NY3d 893). The responses of defendant to County Court's questions during the plea colloquy establish that he understood the consequences of waiving the right to appeal and voluntarily waived that right (*see People v Tantao*, 41 AD3d 1274, *lv denied* 9 NY3d 882). Furthermore, there is no indication in the record that the age, experience, or background of defendant rendered his waiver of the right to appeal invalid (*see generally People v Seaberg*, 74 NY2d 1, 11). Although the contention of defendant that his plea was not knowingly, voluntarily, and intelligently entered because of an alleged misrepresentation made by the court "survives his valid waiver of the right to appeal . . ., defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve his contention for our review" (*People v Dozier*, 59 AD3d 987, 987, *lv denied* 12 NY3d 815). This case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666; *People v Brown*, 66 AD3d 1385, *lv denied* 14 NY3d 839).

Defendant further contends that the conviction was "jurisdictionally defective" because there was no "factual predicate" for the crime to which he pleaded guilty. Defendant in effect is

thereby challenging the factual sufficiency of the plea allocution, and that challenge therefore is encompassed by defendant's waiver of the right to appeal (*see People v Jamison*, 71 AD3d 1435, 1436, *lv denied* 14 NY3d 888; *Brown*, 66 AD3d at 1385). Additionally, defendant failed to preserve that challenge for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see Lopez*, 71 NY2d at 665; *Jamison*, 71 AD3d at 1436). In any event, that challenge is without merit inasmuch as "there is no requirement that defendant recite the underlying facts of the crime to which he is pleading guilty" (*People v Bailey*, 49 AD3d 1258, 1259; *see People v Seeber*, 4 NY3d 780). Lastly, the waiver by defendant of the right to appeal encompasses his contention that the sentence is unduly harsh and severe (*see Lopez*, 6 NY3d at 256).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1384

KA 08-00155

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW N. WHITED, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), rendered May 5, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and 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 following a jury trial of assault in the first degree (Penal Law § 120.10 [1]) and assault in the second degree (§ 120.05 [1]), defendant contends that the victim did not sustain a serious physical injury within the meaning of Penal Law § 10.00 (10) and thus that the conviction of both counts of assault is not supported by legally sufficient evidence. Defendant failed to preserve that contention for our review, however, inasmuch as he failed to raise it in his motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19). Although defendant further contends that preservation was not required because a successful motion to dismiss would have merely resulted in a conviction of the lesser included offense of assault in the third degree (*see generally* CPL 290.10 [1]), we nevertheless conclude that preservation was required (*see Gray*, 86 NY2d at 19; *cf. People v Ross*, 39 AD3d 1243, 1244, *lv denied* 9 NY3d 850).

In any event, we conclude that defendant's contention that the victim did not sustain a serious physical injury is without merit. According to the evidence presented by the People at trial, defendant "stomped" the victim and kicked him in the head at least 10 times and at most 25 times, causing the victim's head to strike the pavement, and the victim spent 15 days in the hospital, followed by 8 days of rehabilitation. One of the victim's treating physicians testified that the victim suffered from a contusion to the brain that could have

resulted in his death and that, in fact, the physician had previously seen patients die from contusions sustained under similar circumstances. Moreover, one of the victim's other treating physicians testified that the victim suffered from short-term memory loss and concentration problems for a period of 2½ weeks following the incident. We thus conclude that the evidence is legally sufficient to establish that the victim sustained a serious physical injury (*see People v Vigliotti*, 270 AD2d 904, 904-905, *lv denied* 95 NY2d 839, 970; *People v Cruz*, 267 AD2d 319, 319-320, *lv denied* 94 NY2d 918; *People v Borst*, 256 AD2d 1168, *lv denied* 93 NY2d 871). In light of our conclusion that defendant's contention concerning the alleged insufficiency of the evidence of serious physical injury is without merit, we further conclude that defendant was not denied effective assistance of counsel based on defense counsel's failure to preserve that contention for our review (*see People v Carrasquillo*, 71 AD3d 1591, *lv denied* 15 NY3d 803).

As defendant correctly concedes, he failed to preserve for our review his further contention that Supreme Court erred in failing to take into account his accrued jail time in setting the expiration date of the order of protection issued by the court. In any event, we conclude that defendant's contention lacks merit. We note that, in support of his contention, defendant relies upon a version of CPL 530.13 that had been superseded at the time of sentencing (*see* CPL 530.13 [former (4)]). Nevertheless, although the court did not account for 27 days during which defendant was incarcerated while awaiting sentencing, the expiration date of the order of protection is well within the requisite eight years from the expiration date of the maximum term of the determinate sentence imposed.

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1385

CAF 09-01265

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

IN THE MATTER OF JOSHUA C. MOORE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DESIREE MOORE, RESPONDENT-APPELLANT.

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

JAMES S. HINMAN, ROCHESTER, FOR PETITIONER-RESPONDENT.

JEFFREY D. OSHLAG, ATTORNEY FOR THE CHILDREN, BATAVIA, FOR NICHOLAS M. AND CLARISSA M.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 5, 2009 in a proceeding pursuant to Family Court Act article 6. The order awarded custody of the children to petitioner.

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

Memorandum: Respondent mother contends on appeal that Family Court erred in granting the petition in which petitioner father sought sole physical custody of the parties' children. We affirm. The parties had joint custody of the children with primary physical custody with the mother since October 2004 pursuant to an order entered upon the consent of the parties. It is well settled that "[a] party seeking a change in an established custody arrangement must show a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Dormio v Mahoney*, ___ AD3d ___, ___ [Oct. 8, 2010] [internal quotation marks omitted]; *see Matter of Perry v Korman*, 63 AD3d 1564, 1565; *Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224). Here, the father met that burden. It is undisputed that the mother moved four times between 2004 and 2009, as a result of which one of the children attended five different schools over that five-year period. In addition, the mother testified that she was planning another move in the near future, which would require the children to change schools yet again. The court therefore properly determined that there was a sufficient change of circumstances to warrant a review of the existing custody arrangement, and the court also properly determined that it is in the best interests of the children to modify the existing custody arrangement by granting the father sole physical custody of the children (*see*

Matter of Maher v Maher, 1 AD3d 987, 988-989; *cf. Matter of Perry v Korman*, 63 AD3d 1564, 1566-1567). "The determination of the court is entitled to great deference, and where, as here, it is based upon a sound and substantial basis in the record, it will not be disturbed" (*Matter of Lewis R.E. v Deloris A.E.*, 37 AD3d 1092, 1093).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1386

CAF 09-01634

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

IN THE MATTER OF SHARDANAE T.-L.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRYAN L., RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

KATHLEEN H. POHL, LYONS, FOR PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ATTORNEY FOR THE CHILD, ROCHESTER, FOR SHARDANAE T.-L.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered June 25, 2009 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had sexually abused the child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, found that he had sexually abused his daughter. Contrary to the contention of the father, the finding of sexual abuse is supported by the requisite preponderance of the evidence (*see* § 1046 [b] [i]; *Matter of Tammie Z.*, 66 NY2d 1, 3). "The determination of Family Court is entitled to great weight and should not be disturbed 'unless clearly unsupported by the record' " (*Matter of Stephanie B.*, 245 AD2d 1062, 1062), which is not the case here. Contrary to the further contention of the father, the court properly determined that the out-of-court statements of the daughter were sufficiently corroborated by the testimony of the sexual abuse validator (*see Matter of Nichole V.*, 71 NY2d 112, 118-119; *Matter of Christina A.M.*, 30 AD3d 1064, *lv denied* 7 NY3d 712), as well as by "the child's age-inappropriate knowledge of sexual conduct" (*Matter of Yorimar K.-M.*, 309 AD2d 1148, 1149; *see Matter of Briana A.*, 50 AD3d 1560).

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1387

CAF 09-02080

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

IN THE MATTER OF THE ADOPTION OF CODY K.

FREDERICK B., JR., PETITIONER-RESPONDENT; ORDER

STEVEN K., RESPONDENT-APPELLANT.

SANFORD A. CHURCH, ALBION, FOR RESPONDENT-APPELLANT.

STUART L. LEVISON, ROCHESTER, FOR PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ATTORNEY FOR THE CHILD, ROCHESTER, FOR CODY K.

Appeal from an order of the Family Court, Orleans County (James P. Punch, J.), entered August 20, 2009 in a proceeding pursuant to Domestic Relations Law article 7. The order adjudged that the consent of respondent to the adoption of his child by petitioner is not required.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1396

CAF 10-00980

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

IN THE MATTER OF HAROLD L. RIDER,
PETITIONER-RESPONDENT,

V ORDER

KAREN CORRIGAN, RESPONDENT-APPELLANT.

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

ONOFRIO J. PULEO, UTICA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered January 12, 2010 in a proceeding pursuant to Family Court Act article 4. The order denied and dismissed the objections of respondent to the order of the Support Magistrate.

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

Patricia L. Morgan

Entered: November 12, 2010

Clerk of the Court

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

1397

TP 10-01168

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

IN THE MATTER OF COUNTY OF ONONDAGA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN MAYOCK, RESPONDENT,
AND NEW YORK STATE DIVISION OF HUMAN
RIGHTS, RESPONDENT-PETITIONER.

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

CAROLINE J. DOWNEY, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR RESPONDENT-PETITIONER.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [John C. Cherundolo, A.J.], entered May 19, 2010) to review a determination of respondent New York State Division of Human Rights. The determination, among other things, directed petitioner to reinstate respondent Brian Mayock to a supervisory position and awarded respondent Brian Mayock the sum of $43,000 as compensatory damages for his lost wages and mental anguish.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) that it unlawfully discriminated against respondent Brian Mayock (complainant), a probation officer, based on his sexual orientation by refusing to transfer him to positions that he previously had held, supervising individuals on probation. In addition, the determination provided that complainant should be reinstated to a position supervising probationers. Based on our review of the record, we confirm the determination and grant the cross petition of SDHR seeking to enforce it inasmuch as it is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 179-180; *Matter of New Venture Gear, Inc. v New York State Div. of Human Rights,* 41 AD3d 1265, 1266-1267). “It is peculiarly within the domain of the Commissioner [of SDHR], who is presumed to have special

expertise in the matter, to assess whether the facts and the law support a finding of unlawful discrimination" (*Matter of Club Swamp Annex v White,* 167 AD2d 400, 401, *lv denied* 77 NY2d 809) and, "when a rational basis for the conclusion adopted by the Commissioner is found, the judicial function is exhausted" (*Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106). Contrary to petitioner's contention, we conclude that a rational basis exists for the determination that complainant established a prima facie case of discrimination by a preponderance of the evidence (*see generally Ferrante v American Lung Assn.*, 90 NY2d 623, 629). Furthermore, there is a rational basis for the determination that petitioner's decision "to penalize Complainant indefinitely was unreasonable and pretextual" and thus that petitioner failed to rebut the presumption of discrimination by failing to provide nondiscriminatory reasons to support its decision (*see generally Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305; *Ferrante,* 90 NY2d at 629-630).

We reject petitioner's further contention that SDHR improperly awarded complainant damages for mental anguish. An award for mental anguish must be "reasonably related to the discriminatory conduct" (*Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 217), and it must be "supported by the evidence and . . . within the range of awards previously approved by [the courts]" (*Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 421, *rearg denied* 78 NY2d 909). Here, complainant testified that, as a result of petitioner's conduct, he was unable to sleep; he lost 20 pounds; he had intestinal problems; he was not motivated to continue working; and he became isolated and withdrawn from his friends and coworkers. In addition, complainant has worked as a probation officer for 20 years, but for the last eight years was not permitted to continue his direct supervision of probationers, such that he in effect was terminated from his job by petitioner based on the material change in his job duties. We thus conclude that the award of $25,000 for mental anguish should not be disturbed (*see generally Matter of New York State Off. of Mental Health v New York State Div. of Human Rights*, 75 AD3d 1023, 1023-1024; *Matter of Kowalewski v New York State Div. of Human Rights* 26 AD3d 888, 889).

Entered: November 12, 2010 Patricia L. Morgan

Clerk of the Court

MOTION NO. (511/89) KA 09-01741. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL PITTMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND PINE, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (175/94) KA 10-01955. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KHARYE JARVIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CARNI, GREEN, AND PINE, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (850/94) KA 10-01934. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEVEN HOWINGTON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND GREEN, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (783/96) KA 10-01645. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWIN GARCIA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, SCONIERS, AND GREEN, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (905/02) KA 01-01982. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHONDELL J. PAUL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., LINDLEY, SCONIERS, GREEN, AND GORSKI, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (979/02) KA 00-02784. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V JOEL THOMAS THORN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, GREEN, AND GORSKI, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (185/04) KA 00-02366. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FREDDIE GLOVER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CARNI, SCONIERS, AND PINE, JJ. (Filed Nov. 12, 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 Nov. 12, 2010.)

MOTION NO. (1006/08) KA 07-00713. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JARVIS LASSALLE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis is held, the decision is reserved, and counsel is assigned to file and serve a brief on the issue of ineffective assistance of appellate counsel for failing to raise the issue that County Court erred in failing to advise defendant prior to the entry of his plea that his sentence would include a period of postrelease supervision. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND GORSKI, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (1209/08) KA 06-03133. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DION MAXWELL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND

GORSKI, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (293/10) KA 08-01505. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEPHEN SIMON, ALSO KNOWN AS "LUCK," DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, LINDLEY, AND GORSKI, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (676/10) CA 09-01832. -- MICHAEL HENNER AND ELIZABETH HENNER, PLAINTIFFS-APPELLANTS, V EVERDRY MARKETING AND MANAGEMENT, INC., ET AL., DEFENDANTS, AND GEMINI INSURANCE COMPANY, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (677/10) CA 09-01833. -- MICHAEL HENNER AND ELIZABETH HENNER, PLAINTIFFS-APPELLANTS-RESPONDENTS, V EVERDRY MARKETING AND MANAGEMENT, INC., ET AL., DEFENDANTS, CONTINENTAL CASUALTY COMPANY, TRANSPORTATION INSURANCE COMPANY, AND AMERICAN CASUALTY COMPANY OF READING, PA, DEFENDANTS-RESPONDENTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ. (Filed Nov. 12, 2010.)

MOTION NO. (765/10) CA 09-02135. -- IN THE MATTER OF LEGACY AT FAIRWAYS, LLC, US HOMES CO., INC., MARK IV CONSTRUCTION CO., INC., AND CHRISTOPHER A. DIMARZO, PETITIONERS-PLAINTIFFS-RESPONDENTS, V SEAN MCADOO, ALLAN J. BENEDICT, ZONING BOARD OF APPEALS OF TOWN OF VICTOR, AND TOWN OF VICTOR, RESPONDENTS-DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for leave to

appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, GREEN, AND GORSKI, JJ. (Filed Nov. 12, 2010.)

KA 09-01466. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC CARNEY, 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 Livingston County Court, Dennis S. Cohen, J. - Burglary, 3rd Degree). PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GREEN, JJ. (Filed Nov. 12, 2010.)

KA 09-01493. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH G. CHASE, 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 Contempt, 1st Degree). PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GREEN, JJ. (Filed Nov. 12, 2010.)

KA 09-01501. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALPHONSO ROLLEY, 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, Michael F. Pietruszka, J. - Criminal Contempt, 1st Degree). PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GREEN, JJ. (Filed Nov. 12, 2010.)

KA 09-01626. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JESSEE WELDON, 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 Oneida County Court, Michael J. Dwyer, J. - Attempted Criminal Possession of a Weapon, 3rd Degree).

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GREEN, JJ. (Filed Nov. 12, 2010.)