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

1431/10

KA 08-00029

PRESENT: SMITH, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE HOLMES, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered September 25, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree. The judgment was affirmed by order of this Court entered December 30, 2010 in a memorandum decision (79 AD3d 1681), and defendant on May 25, 2011 was granted leave to appeal to the Court of Appeals from the order of this Court (16 NY3d 895), and the Court of Appeals on September 8, 2011 reversed the order and remitted the case to this Court for consideration of issues raised but not determined on the appeal to this Court in an opinion (17 NY3d 824),

Now, upon remittitur from the Court of Appeals and having considered the issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those parts of the second omnibus motion seeking to suppress the weapon and defendant's statements to the police are granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: On a prior appeal in *People v Holmes* (79 AD3d 1681), we affirmed the judgment convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (3)]). The police found the weapon in a duffel bag located in the bedroom closet of defendant's girlfriend during a search of the house co-leased by defendant's girlfriend and her mother. We concluded that defendant failed to establish a legitimate expectation of privacy in the duffel bag or its contents, and we therefore considered the propriety of the search of the bedroom only

(*Holmes*, 79 AD3d at 1681-1682). We further concluded that the warrantless search of the bedroom was valid, and we therefore rejected defendant's contention that Supreme Court erred in refusing to suppress the weapon and his statements to the police as fruit of the poisonous tree (*id.* at 1682). The Court of Appeals reversed our order and remitted the case to this Court for consideration of the propriety of the search of the duffel bag (*People v Holmes*, 17 NY3d 824).

Upon remittitur, we agree with defendant that the weapon and his statements to the police must be suppressed. The mother of defendant's girlfriend did not have actual or apparent authority to consent to the search of the duffel bag (*see generally People v Gonzalez*, 88 NY2d 289, 293). The People presented no evidence that the mother "shared 'common authority' over defendant's duffel bag, based upon mutual use or joint access and control" (*id.* at 294). The warrantless seizure of the weapon therefore was improper (*see People v Coston*, 271 AD2d 694, *lv denied* 95 NY2d 833, 962; *cf. People v Kelly*, 58 AD3d 868, *lv denied* 12 NY3d 818). We further agree with defendant that his statements to the police must be suppressed as fruit of the poisonous tree (*see People v Christianson*, 57 AD3d 1385, 1388; *People v James*, 27 AD3d 1089, 1090-1091, *lv denied* 6 NY3d 895). "[I]nasmuch as the erroneous suppression ruling may have affected defendant's decision to plead guilty . . ., the plea must be vacated" (*People v Ayers*, 85 AD3d 1583, 1585 [internal quotation marks omitted]).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

663

KA 07-02496

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERARD IPPOLITO, ALSO KNOWN AS GERALD IPPOLITO,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered October 31, 2007. The judgment convicted defendant, upon a jury verdict, of grand larceny in the second degree and criminal possession of a forged instrument in the second degree (43 counts).

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing those parts convicting defendant of criminal possession of a forged instrument in the second degree under counts 2 through 15, 17 through 26 and 28 through 43 of the indictment and dismissing those counts, and by vacating the amount of restitution ordered and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for a hearing to determine the amount of restitution.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of grand larceny in the second degree (Penal Law § 155.40 [1]) and 43 counts of criminal possession of a forged instrument in the second degree (§ 170.25). We agree with defendant that his conviction of criminal possession of a forged instrument in the second degree under 40 counts of the indictment is not supported by legally sufficient evidence, and we therefore modify the judgment accordingly. Those 40 counts involve the checks on which defendant signed the victim's name while he was her attorney-in-fact pursuant to the power of attorney executed by the victim in June 2003. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the ostensible maker of the checks, i.e., the victim, authorized the actual maker of the checks, i.e., defendant, to make the checks, "which purport[] to be [the] authentic creation[s]" of the victim (§ 170.00 [4]). Thus, it cannot be said that the checks in question were falsely made (*see*

id.; § 170.10 [1]; § 170.25), although "recitals in the instrument may be false" or defendant may have exceeded the scope of authority delegated to him by the victim (Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 170.00, at 326; *see also People v Cunningham*, 2 NY3d 593, 598-599; *People v Cannarozza*, 62 AD2d 503, 504-505, *affd* 48 NY2d 687). We therefore conclude that there is no valid line of reasoning or permissible inferences to support the conclusion reached by the jury with respect to the counts of criminal possession of a forged instrument in the second degree based on those checks (*see generally People v Bleakley*, 69 NY2d 490, 495). In light of our decision, we need not address defendant's further contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Lawhorn*, 21 AD3d 1289, 1291).

We also agree with defendant that he was entitled to a hearing on the amount of restitution. Pursuant to Penal Law § 60.27 (2), County Court was required to conduct a hearing upon the request of the defendant, " 'irrespective of the level of evidence in the record' " (*People v Gazivoda*, 68 AD3d 1346, 1347, *lv denied* 14 NY3d 840, quoting *People v Consalvo*, 89 NY2d 140, 146). We therefore further modify the judgment by vacating the amount of restitution ordered, and we remit the matter to County Court for a hearing to determine the amount of restitution. The remaining contention of defendant in his main brief is not preserved for our review (*see generally People v Reed*, 277 AD2d 1043, *lv denied* 96 NY2d 805) and, in any event, that contention is without merit.

All concur except CARNI, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully disagree with the conclusion of my colleagues that defendant's signing of the name of the victim on the checks at issue did not constitute the " 'false[ ] mak[ing]' " of an instrument within the meaning of Penal Law § 170.00 (4). I conclude, as a matter of law, that the power of attorney executed by the victim did not authorize defendant to sign the victim's name to the subject checks and to purport such instruments and the signatures thereupon to be authentic creations of the victim (*see id.*). Therefore, I dissent in part.

Defendant concedes that he signed the victim's name to each check at issue. The victim testified at trial that she did not give defendant permission to sign her name on the checks. Therefore, "the People established in the first instance that [the checks were] forged instrument[s]. The burden of explanation then fell upon the defendant . . . to explain [that] the instrument[s] . . . had been executed by authority" (*People v Shanley*, 132 App Div 821, 829, *affd* 196 NY 574).

Initially, I conclude as a matter of law that the power of attorney did not authorize defendant to make and present the checks at issue as authentic or genuine (*see id.* at 830). Therefore, the instruments were forgeries inasmuch as they "purported to be what [they were] not, [i.e.], the personal act[s] of [the victim]" in signing each check (*id.*). The checks at issue bore no indication that defendant was acting in a representative capacity or under the

authority of a power of attorney. Indeed, by signing the victim's name to the checks without any such indication and presenting the checks to third-party banking institutions, defendant denied those institutions the right and opportunity to inquire into the validity of his authority or the instrument under which he claimed such authority (*see People v Cunningham*, 2 NY3d 593, 598 n 4; 4 Blackstone, Commentaries on the Laws of England, at 245 [defining forgery as " 'the fraudulent making or alteration of a writing to the prejudice of another (person's) right' "]). Upon the drawing and presentment of each check that defendant falsely purported to be authentically signed by the victim, defendant " 'made and uttered a false instrument [that] was an imitation and not what it purported to be' " (*Shanley*, 132 App Div at 831). I therefore conclude that defendant's conviction of criminal possession of a forged instrument in the second degree under the 40 counts of the indictment challenged by defendant is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Further, "[i]t was a question of fact, under the circumstances of this case, whether the defendant did act under [the] power of attorney, irrespective of the question whether as [a] matter of law it conferred upon him authority to do what he did do" (*Shanley*, 132 App Div at 830). The jury obviously concluded that defendant did not act under the power of attorney—regardless of any authority that it may have conferred upon him. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), I conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

I agree with my colleagues that defendant's remaining contention in his main brief, i.e., that County Court erred in answering a juror question prior to deliberations without first consulting the parties, is not preserved for our review (*see* CPL 470.05 [2]) and that, in any event, defendant's contention is without merit (*see* CPL 310.30; *People v Contrero*, 232 AD2d 213, *lv denied* 89 NY2d 1090). I also agree that defendant was entitled to a hearing on the amount of restitution (*see People v Gazivoda*, 68 AD3d 1346, 1347, *lv denied* 14 NY3d 840). Therefore, I would modify the judgment by vacating the amount of restitution ordered and, as modified, I would affirm the judgment and remit the matter to County Court for a hearing to determine the amount of restitution.

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

875

CA 11-00338

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

STEVEN M. TUDISCO AND GENESEE VALLEY LEASING, INC., PLAINTIFFS-APPELLANTS,

V ORDER

CARL DUERR AND CAROL DUERR, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WILLIAM S. RUBY, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered April 27, 2010. The order granted defendants a money judgment upon a nonjury verdict.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

876

CA 11-00339

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

STEVEN M. TUDISCO AND GENESEE VALLEY LEASING, INC., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CARL DUERR AND CAROL DUERR, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WILLIAM S. RUBY, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered July 26, 2010. The order, inter alia, granted defendants' motion to "modify and/or resettle" an order entered April 27, 2010 pursuant to CPLR 2221 (a) and awarded defendants attorneys' fees of $24,940.29.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of $41,000 awarded on the first counterclaim and substituting therefor the amount of $35,100, vacating the award of attorneys' fees, reinstating the fourth and fifth causes of action in accordance with our decision herein concerning the amount paid on the promissory note and granting plaintiffs judgment on liability for those causes of action, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, the alleged conversion by defendants of several pieces of construction equipment, including an excavator with two buckets and a grapple attachment, two backhoes and a bulldozer. Defendants asserted counterclaims for, inter alia, a money judgment for the balance owed on a promissory note. Following a nonjury trial, Supreme Court dismissed the complaint and granted judgment in favor of defendants on the first counterclaim, i.e., for the balance owed on the promissory note, and awarded them reasonable attorneys' fees with respect to the first counterclaim. Defendants thereafter moved to "modify and/or resettle" that order pursuant to CPLR 2221 (a), alleging that the court erred in stating that ownership of the excavator had been transferred to defendants. Plaintiffs cross-moved to "modify[ ]" the order pursuant to CPLR 2221 (a) on the ground that the corrected statement of fact sought by defendants would

establish that defendants' actions in taking possession of the excavator constituted conversion. Plaintiffs appeal from an order that granted the motion, denied the cross motion and awarded attorneys' fees to defendants.

Viewing the evidence in the light most favorable to defendants, we conclude that there is no fair interpretation of the evidence supporting the court's determinations that defendants did not convert the equipment in question, i.e., the excavator and three attachments, the two backhoes and the bulldozer, and that the promissory note did not constitute a security agreement (*see generally Palermo v Taccone*, 79 AD3d 1616, 1618-1620).

" '[T]o establish a cause of action in conversion, the plaintiff[s] must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant[s] exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff[s'] rights' " (*id.* at 1619-1620). " 'A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession . . . Two key elements of conversion are (1) [the] plaintiff[s'] possessory right or interest in the property . . . and (2) [the] defendant[s'] dominion over the property or interference with it, in derogation of [the] plaintiff[s'] rights' " (*id*. at 1620, quoting *Colavito v New York Organ Donor Network, Inc*., 8 NY3d 43, 49-50).

With respect to the excavator, it is undisputed that Genesee Valley Leasing, Inc. (Genesee Valley) owned the equipment and that plaintiff Steven M. Tudisco was using the equipment to perform work on property owned by defendant Carl Duerr in October 2004. It is also undisputed that the excavator was thereafter moved by Carl Duerr to other property owned by him and remained there until it was returned to plaintiffs approximately four years later, during the pendency of the instant action, in a severely damaged condition. At trial, plaintiffs submitted photographs of the excavator taken when it was refurbished at a cost of $44,000, i.e., three months before it was removed by Carl Duerr to his property. Plaintiffs also presented the testimony of Henry Wells, who inspected the excavator on behalf of the non-party company from which plaintiffs leased the excavator before purchasing it. Wells testified that he was familiar with how Tudisco maintained equipment and that he had not observed other pieces of equipment owned or used by plaintiffs in the condition that the excavator was in when it was returned to plaintiffs, i.e., inoperable, with broken windows and evidence of a fire in the engine compartment where the hydraulics are located. The court admitted in evidence the estimate to make the necessary repairs to the excavator in the amount of $85,049. Defendants merely presented the testimony of Carl Duerr that the excavator was damaged when he received it and the testimony of a former employee of Genesee Valley that the company's employees were "hard" on equipment. With respect to the three attachments for the excavator, Tudisco testified that they also were located on defendants' property when defendants removed the excavator. Although

Carl Duerr denied that he had the attachments in his possession, a photograph taken on April 1, 2009 established that the 46-inch bucket was located on defendants' property. We therefore conclude that plaintiffs established by a preponderance of the evidence that they had a possessory right to the excavator and attachments and that defendants interfered with that right in derogation of plaintiffs' rights (*see Palermo*, 79 AD3d at 1620).

With respect to the two backhoes and the bulldozer, it is undisputed that defendant Carol Duerr is the titled owner of that equipment. Plaintiffs had leased the equipment from the aforementioned non-party company, and Tudisco asked defendants for assistance in purchasing it. The record establishes that, in order to execute the transfer of the equipment to Carol Duerr, she paid Syracuse Supply Company $100,000, plaintiffs paid Syracuse Supply Company $16,000 and plaintiffs transferred the credit in the equipment in the amount of $250,000 to Carol Duerr. The handwritten promissory note, drafted in part by Carol Duerr, states in relevant part that Tudisco would "borrow $100,000 and agree to pay it back by January 1, 2003. It is up to Carl . . . Duerr to keep the machinery or sue for the money that is owed . . . Tudisco shall pay all legal fees incurred in this transaction. Genesee Valley . . . is also liable for this transaction." In his own handwriting, Tudisco added that the minimum payment per month would be $2,400, due and payable in full 18 months from March 13, 2002. We agree with plaintiffs that they and others on their behalf had paid a total of $64,900 on the promissory note when defendants took possession of the two backhoes and bulldozer in early October 2004, rather than $59,000, as the court found.

We conclude that the court's finding that defendants "loaned" plaintiffs the backhoes and bulldozer to permit Tudisco to generate enough business to pay them back $100,000 and then withdrew their permission to use the equipment " 'could not be reached under any fair interpretation of the evidence' " (*Treat v Wegmans Food Mkts.*, 46 AD3d 1403, 1404). The finding that plaintiffs had no possessory interest in that equipment " 'produce[s] a result that is absurd, commercially unreasonable [and is] contrary to the reasonable expectation of the parties' " (*Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415). Instead, we conclude that the promissory note memorialized "an agreement that creates or provides for a security interest" in the equipment (UCC 9-102 [73]), which is "a commercially reasonable and practical result" (*Greenwich Capital Fin. Prods., Inc.*, 74 AD3d at 415). Indeed, "the provisions of [article 9 of the UCC] with regard to the rights and obligations [of the parties to a security agreement] apply whether title to collateral is in the secured party or the debtor" (UCC 9-202). The promissory note provided Carl Duerr with remedies available to a secured creditor, i.e., to keep the equipment (*see generally* UCC 9-610; 9-620 [a] [1]), or to sue for the balance of the money owed (*see* UCC 9-601 [a] [1]).

Plaintiffs presented the testimony of Wells, who leased the backhoes and bulldozer to plaintiffs and thereafter sold them to Carol Duerr. Wells had 40 years experience in leasing and selling construction equipment and testified with respect to the value of

those three pieces of equipment as of September 2004. He testified that one backhoe was valued at $46,000, the other backhoe was valued at $48,000 and the bulldozer was valued at $115,000. Defendants presented the testimony of a witness whom Carl Duerr hired to retrieve one of the backhoes from plaintiffs. That witness testified that the backhoe was inoperable and in severely damaged condition. Defendant failed to present any testimony with respect to the condition of the remaining backhoe and the bulldozer, and we therefore conclude that plaintiff established by a preponderance of the evidence that the value of the backhoes and the bulldozer exceeded the $41,000 that defendants alleged was the amount owed on the promissory note.

Defendants had an obligation to enforce the security agreement in good faith (*see generally* UCC 1-203). Defendants, however, retained the backhoes and bulldozer without complying with the provisions of the UCC, either by disposing of those pieces of equipment in a commercially reasonable manner and paying any surplus to plaintiffs (*see* UCC 9-610 [a], [b]; 9-615 [d] [1]), or by obtaining plaintiffs' consent after the default to retain the equipment in satisfaction of debt (*see* UCC 9-620 [a] [1]; [c]). We therefore conclude that, because plaintiffs established that the value of the backhoes and the bulldozer exceeded the amount that they owed on the promissory note, plaintiffs had a possessory interest in that equipment and defendants' dominion over it was in derogation of the rights of plaintiffs (*see generally Colavito*, 8 NY3d at 49-50; *Five Star Bank v CNH Capital Am., LLC*, 55 AD3d 1279, 1281).

We also agree with plaintiffs that the court erred in awarding attorneys' fees to defendants beyond the scope of the indemnity provision included in the promissory note (*see generally Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491). " '[A] contract assuming th[e] obligation [to indemnify with respect to attorneys' fees] must be strictly construed to avoid reading into it a duty [that] the parties did not intend to be assumed' " (*Zanghi v Laborers' Intl. Union of N. Am., AFL-CIO*, 21 AD3d 1370, 1372, quoting *Hooper Assoc.*, 74 NY2d at 491). In particular, "the language of an indemnity agreement 'should not be extended to include damages [that] are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract' " (*id.*). Here, pursuant to the promissory note, defendants are entitled to attorneys' fees related to claims or counterclaims to enforce their rights under the note (*see Gizzi v Hall*, 309 AD2d 1140, 1142). Thus, the court erred in awarding defendants attorneys' fees unrelated to the enforcement of those rights, including attorneys' fees related to the causes of action for conversion of the construction equipment. Further, because the affidavit of defendants' attorney with respect to his fees included only one amount representing the total fees incurred, we are unable to determine the amount of attorneys' fees related to the enforcement of defendants' rights under the promissory note (*see generally RLI Ins. Co. v Smiedala*, 77 AD3d 1293, 1295).

We therefore modify the order by vacating the amount of $41,000 awarded on the first counterclaim, for the balance owed on the promissory note, and substituting therefor the amount of $35,100,

vacating the award of attorneys' fees, reinstating the fourth cause of action and the fifth cause of action with the exception of the reference to $59,000 having been paid to defendants in paragraph 33, inasmuch as this Court has determined that plaintiffs paid $64,900 on the promissory note, and granting judgment to plaintiffs on liability with respect to those causes of action. We remit the matter to Supreme Court to determine the amount of reasonable attorneys' fees incurred by defendants with respect to the enforcement of their rights under the promissory note and to determine the amount of damages with respect to the fourth and fifth causes of action, following further proceedings if necessary.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

892

CA 11-00571

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

UNIFUND CCR PARTNERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GERALD YOUNGMAN, DEFENDANT-APPELLANT.

SHEAR LAW FIRM, P.C., BUFFALO (JASON A. SHEAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LACY KATZEN LLP, ROCHESTER (JOHN M. WELLS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 18, 2010. The order granted the motion of plaintiff for summary judgment and denied the cross motion of defendant for summary judgment.

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

Memorandum: Plaintiff, as the alleged assignee of Chase Manhattan Bank (Chase), commenced this action for breach of contract and account stated seeking to recover reasonable attorneys' fees and the balance owed on a credit card issued to defendant. We conclude that Supreme Court erred in granting plaintiff's motion for summary judgment and instead should have granted defendant's cross motion for summary judgment seeking dismissal of the complaint on the ground that plaintiff lacked standing to sue defendant (*see* CPLR 3211 [a] [3]). To establish such standing, plaintiff was required to submit evidence in admissible form establishing that Chase had assigned its interest in defendant's debt to plaintiff (*see Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1330), and plaintiff failed to do so.

Here, plaintiff submitted an affidavit of its agent, a "Legal Liaison" employed by plaintiff rather than Chase, along with exhibits that included credit card statements and account balance documents from the business records of Chase. We reject plaintiff's contention that it thereby submitted the requisite business records to establish its standing. A business record is admissible if "it was made in the regular course of any business and . . . it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518 [a]). "A proper foundation for the admission of a business

record must be provided by someone with personal knowledge of the maker's business practices and procedures" (*West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950). Although plaintiff's agent averred that the credit card statements and account balance documents were made and kept in the regular course of business, the agent did not establish that he had personal knowledge of Chase's business practices or procedures, nor did he establish when, how, or by whom the credit card statements and account balance documents were made and kept (*see* CPLR 4518 [a]; *West Val. Fire Dist. No. 1*, 294 AD2d at 950). Thus, we cannot agree with plaintiff that it established a proper foundation for the admission of the credit card statements and account balance documents under the business record exception to the hearsay rule sufficient to establish standing (*see Palisades Collection, LLC*, 67 AD3d at 1330-1331; *see generally Speirs v Not Fade Away Tie Dye Co.*, 236 AD2d 531).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

960

CA 11-00079

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

FRANKLIN CORPORATION, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

JUSTIN M. PRAHLER, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MURA & STORM, PLLC, BUFFALO (ERIC T. BORON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered October 22, 2010. The order, insofar as appealed from, precluded plaintiff from presenting evidence at trial on the issue of diminished value and denied plaintiff's request for a jury charge on that issue.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs.

Opinion by MARTOCHE, J.: On this appeal, we are presented with an issue of damages, namely, whether a plaintiff whose personal property has allegedly increased in value from the time of its purchase is limited to recovering the cost of repairs to the personal property after it has been damaged or whether the plaintiff may seek to recover the diminution in value of the property. Supreme Court agreed with defendant that plaintiff was precluded from presenting evidence at trial on the issue of the alleged diminished value of the property after repairs had been made to it. That was error, and we therefore conclude that the order insofar as appealed from should be reversed.

FACTS

Plaintiff was the owner of a 2000 Ford GT (hereafter, GT). On May 28, 2005, the GT was parked on the east side of Franklin Street in the City of Buffalo. According to plaintiff, the GT "is a rare collector's sports car rapidly appreciating in value." On the day in question, Justin M. Prahler (defendant) was driving a 1997 Jeep Cherokee and had consumed several alcoholic beverages. He was legally intoxicated when he struck and damaged the GT.

Plaintiff asserted, inter alia, a cause of action for negligence

per se against defendant, and it sought $52,000 in damages. Defendants' answer is not contained in the record. They subsequently sought disclosure from plaintiff, and plaintiff responded with several documents, including a letter from State Farm Insurance (State Farm) to plaintiff's counsel advising that, until the vehicle was repaired and thereafter appraised, State Farm was unable to determine if the vehicle had diminished in value. Plaintiff also included an estimate prepared by State Farm indicating that the total cost of repairs for the vehicle was $3,484.35. Plaintiff disclosed the identity of its expert appraiser, James T. Sandoro, and it thereafter supplemented its response and identified Kenneth J. Merusi as another expert appraiser and Jeff Mucchiarelli as a fact witness.

The record also includes an excerpt from the deposition of Mark C. Croce, the president of plaintiff. Croce testified that, as of March 19, 2009, the GT had not been repaired but that it had been driven approximately 2,500 miles. Plaintiff filed a note of issue on August 14, 2009, and the matter was scheduled for trial.

Defendant made a motion in limine pursuant to CPLR 3101 and 3106 seeking to preclude plaintiff's two expert appraisers from "giving expert opinion testimony" at the damages trial[1] and to preclude Mucchiarelli from testifying. Defendant's counsel stated in his affirmation in support of the motion that the expert disclosure of Sandoro did not contain the specific information required by CPLR 3101 (d) and that, even if plaintiff had provided a "technically sufficient response" to the expert disclosure demand, Sandoro should be precluded from providing expert testimony regarding the market value of the GT before and after the accident because he lacked the requisite skill, training, education, knowledge and experience to provide a reliable market value for the vehicle. Defendant's counsel further stated that the other expert witness, Merusi, and the fact witness, Mucchiarelli, should be precluded from testifying because their identities were disclosed after plaintiff filed the note of issue and the matter was ready for trial. In addition, defendant's counsel further stated that Merusi was not qualified as an expert. Along with the motion, defendant submitted an affidavit in support of proposed post-trial jury charges, requesting that the court charge PJI 2:311, entitled "Damages—Property with Market Value." The charge states as follows:

> "If plaintiff's . . . automobile . . . was damaged by the defendant's negligence, you will award to the plaintiff as damages the difference between its market value immediately before and immediately after it was damaged, or the reasonable cost of repairs necessary to restore it to its former condition, whichever is less.
>
> Thus, if the reasonable cost of repairs

---

[1] The court granted plaintiff's motion for summary judgment on the issue of liability.

> exceeds the reduction in market value, you will award the amount by which the market value was reduced. If the reasonable cost of repairs is less than the reduction in market value, you will award to the plaintiff the reasonable cost of repairs required to restore the . . . automobile . . . to its condition immediately before it was damaged."

In opposition to the motion and in support of its cross motion in limine, plaintiff submitted the affidavit of its counsel contending that Sandoro was qualified as an expert and that defendant did not make any demand for further information or a motion to compel with regard to Sandoro, nor did he request any further information with regard to expert disclosure. Plaintiff's counsel further averred that Sandoro was a nationally and internationally recognized expert who had testified in state and federal courts throughout the country regarding the market value of automobiles. In addition, plaintiff's counsel averred that Merusi was qualified as an expert and that plaintiff voluntarily disclosed Mucchiarelli as a fact witness without any requirement that it do so. Mucchiarelli would be testifying with respect to an estimate prepared by an auto repair shop, which was provided to defendant as part of discovery, and thus defendant was not prejudiced by the information that was to be the subject of Mucchiarelli's testimony.

Plaintiff also submitted its own proposed post-trial jury instructions including, as relevant on this appeal, language based on PJI 1:60:

> "In this case the plaintiff claims that it has suffered damage to its automobile as a result of the accident caused by the defendant. Plaintiff further claims that the measure of damages is the difference between the market value of the vehicle immediately prior to the accident and the value after the accident. It is plaintiff's contention that even with repairs to return the vehicle to its pre-loss condition in terms of appearance and function, this particular vehicle is worth less after the accident simply because it was involved in an accident."

Plaintiff also submitted a proposed instruction on damages, including a charge that,

> "[w]here the repairs do not restore the property to its condition before the accident, the difference in the market value immediately before the accident and after the repairs have been made may be added to the costs of repairs,"

citing *Johnson v Scholz* (276 App Div 163, 165). Plaintiff further requested the following charge:

> "When, as in this case, the property damaged is a limited edition collector item[,] the plaintiff may recover the difference in money between the market value of the property before and after the damage. In determining the amount of such loss, you will consider the evidence presented with respect to: witnesses experienced in the trade of the specialized market, testimony as to the market for such property, the distinction in value between two similar collector items where one has been damaged and repaired and one that has never been damaged and repaired, together with all other evidence presented to establish the value of the vehicle and the extent of plaintiff's damage."

The court heard argument on the motion and cross motion immediately before jury selection. In granting the motion, the court expressed its sympathy for plaintiff's position, but it concluded that the case was controlled by the Second Department's decision in *Johnson* and that the

> "testimony of repairs is appropriate and testimony of the value of the car after the repairs are made -- if there's a diminution in the value of the car after the repairs are made -- are the proper measure of damages to be contemplated by the finder of fact and specifically not -- specifically not the difference in diminution in value of the market value of the car, basing the value of the car before the accident and immediately after the accident, simply because it was in an accident . . . ."

The court further concluded that, because its ruling in favor of defendant limited the proof and issues at trial, it would issue an order staying the trial pending consideration of this appeal.

DISCUSSION

The issue raised by this appeal is relatively straightforward: Whether plaintiff is entitled to a jury charge that will permit the jury to consider diminution in the value of the GT or whether plaintiff is limited to recovering the cost of repairs. We conclude that the court erred in limiting plaintiff's proof at trial with respect to the diminution in value of the GT and thus that plaintiff is entitled to the charges it requested on that issue.

Preliminarily, we consider an issue not raised by the parties, namely, the appealability of the order determining the motion and cross motion. "Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers[,] constitutes, at best, an advisory opinion [that] is neither appealable as of right nor by permission" (*Innovative Transmission & Engine Co., LLC v Massaro*,

63 AD3d 1506, 1507; *see Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224). "[A]n order that 'limits. . .' the scope of the issues at trial," however, is appealable (*Scalp & Blade*, 309 AD2d at 224). Thus, because the court's order "has a concretely restrictive effect on the efforts of plaintiff[] to . . . recover certain damages from [him] . . ., defendant['s] motion . . . [is] 'the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought damages . . . in excess of the damages' that defendant[] believe[s] are appropriate" (*id.*).

It is well settled that the purpose of awarding damages in a tort action is to make the plaintiff whole (*see generally Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 42). Here, the court relied heavily on the Second Department's decision in *Johnson*. In that case, the plaintiff's vehicle, which was being operated by the defendant, was damaged in an accident (*Johnson*, 276 App Div at 164). The plaintiff testified at trial that, prior to the accident, the value of the vehicle was between $1,750 and $2,000 and that, after the accident, its value was between $500 and $700. The defendant testified that, prior to the accident, the value of the vehicle was $1,600 and that, after the accident, its value was $1,000. Both parties in *Johnson* were in the used car business and presumably competent to testify concerning the value of the vehicle. The plaintiff also provided the testimony of an expert who opined that the fair and reasonable value of making the necessary repairs was $600, while the defendant's expert testified that the repairs were $419.40. Additionally, there was evidence that it would take three weeks to make the repairs, and the defendant conceded that the reasonable rental value for the use of such an automobile was $9 per day. The trial court in *Johnson* awarded the plaintiff $1,050, apparently based on the difference between the value of the automobile before and after the accident, inasmuch as the plaintiff's lowest estimate of value before the accident was $1,750 and his highest estimated value after the accident was $700.

The Second Department in *Johnson* stated that the "measure of damages for injury to property resulting from negligence is the difference in the market value immediately before and immediately after the accident, or the reasonable costs of repairs necessary to restore it to its former condition, whichever is the lesser" (*id.*).[2] The Court concluded that the difference in market value immediately before and immediately after the accident was $1,050 and that the reasonable costs of repairs to restore it to its former condition was $600 and the loss of use was $189. Thus, the recovery was limited to $789. The Court further stated that,

---

[2] That proposition ultimately became the basis for PJI 2:311 and, in support of that proposition (*Johnson*, 276 App Div at 164), the Second Department cited *Hartshorn v Chaddock* (135 NY 116), a case from 1892 involving the wrongful obstruction of a stream that led to the flooding of land and the destruction of personal property.

> "[w]here the repairs do not restore the property to its condition before the accident, the difference in market value immediately before the accident and after the repairs have been made may be added to the cost of repairs. But in [*Johnson*,] there is no claim that the automobile could not be fully restored to its former condition by the repairs contemplated in the estimate" (*id.* at 165).

Rather, the only basis for the plaintiff's claim was that "the resale value would be diminished because the car had been in an accident" (*id.*). The Court stated that "the diminution in resale value [was] not to be taken into account if the repairs would place the car in the same condition it was before the accident" (*id.*).

Although here the court believed that it was constrained by the decision in *Johnson*, we conclude that there was no evidence that the automobile in *Johnson* had appreciated in value from the time of its purchase, as plaintiff contends in this case. The automobile here is more akin to the violin in *Schalscha v Third Ave. R.R. Co.* (19 Misc 141). In that case, the plaintiff's violin was damaged by the negligence of the defendant, and the court concluded that the plaintiff could recover not only the cost to repair the violin but also its depreciation in value (*id.* at 142-143). Here, plaintiff submitted evidence that, even if the GT was fully repaired, the mere fact that it had been in an accident had diminished its market value by $40,000 because it would no longer be in its "original factory condition."

The weight of authority supports our conclusion that plaintiff is entitled to a charge that it may recover the diminution in value of the vehicle. Restatement of Torts § 928, entitled "Harm [t]o [C]hattels" and followed by the majority of jurisdictions, provides that,

> "[w]here a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for
>
> (a) the difference between the value of the chattel before the harm and the value after the harm or, at the plaintiff's election, the reasonable cost of repair or restoration where feasible, with due allowance for any difference between the original value and the value after repairs, and
>
> (b) the loss of use."

Numerous courts have followed Restatement of Torts § 928 and have concluded that a plaintiff may recover the reduction in value after repairs are made (*see e.g. American Serv. Ctr. Assoc. v Helton*, 867

A2d 235, 243-244, 244 n 12 [DC Cir]; *Brennen v Aston*, 84 P3d 99, 102 [Okla]). Other jurisdictions allow for diminution of market value or the cost of repairs, but not both (*see e.g. Meredith GMC, Inc. v Garner*, 78 Wyo 396, 404-405, 328 P2d 371, 374; *Adams v Hazel*, 48 Del. 301, 303-304, 102 A2d 919, 920).

Here, plaintiff requested that the jury consider the diminution in value only and not the cost to repair the vehicle, and we note that the vehicle apparently has not yet been repaired. The court followed the holding in *Johnson*, which, as we noted above, apparently served as the basis for PJI 2:311, the charge that defendant sought here. That charge provides that the plaintiff will be entitled to the difference between the market value of the property immediately before and immediately after the property was damaged or the reasonable cost of repairs to restore the property to its former condition, whichever is less. The other cases cited in support of the charge in the Comment to PJI 2:311 are not directly apposite. For example, the first case cited therein, *Fisher v Qualico Contr. Corp.* (98 NY2d 534, 536-537), involves losses to the plaintiff's home as a result of fire and the issue of collateral source payments and setoffs under former CPLR 4545 (c). The underlying purpose of that statute is to eliminate windfalls and duplicative recoveries (*see Fisher*, 98 NY2d at 537). Similarly, in another Court of Appeals case cited in the Comment to PJI 2:311, *Gass v Agate Ice Cream, Inc.* (264 NY 141, 143-144), the plaintiff was not allowed to recover the cost of repairs to his vehicle where the cost of repairs exceeded the value of the vehicle at the time of the accident. Again, the Court's conclusion was based upon the notion that a plaintiff is not entitled to a windfall (*see id.*).

Conversely, there can be no doubt that, under a general theory of damages, a plaintiff is entitled to be made whole. The situation presented here is somewhat unusual in that the GT has allegedly increased in value since the time of purchase, unlike most motor vehicles that would have diminished in value from the time of purchase to the time of the accident. Where a vehicle, like any other piece of personal property, has increased in value and is subsequently damaged by the negligence of the defendant, the plaintiff should be entitled to recover the cost of that diminution in value. Otherwise, the plaintiff will not be made whole. In our view, PJI 2:311 was intended to cover the situation in *Gass* (264 NY at 143-144), where personal property has depreciated from its original market value and is then damaged by the negligence of the defendant. The plaintiff in such a case will be entitled to recover the costs of repairs or the diminution in value, whichever is less.

CONCLUSION

Under the circumstances presented herein, plaintiff is entitled to the charges sought. Accordingly, we conclude that the order insofar as appealed from should be reversed.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

980

CA 11-00507

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

RONALD DWORZANSKI, INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF JUSTIN DWORZANSKI,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA-WHEATFIELD CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

MURA & STORM, PLLC, BUFFALO (ERIC T. BORON OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered June 17, 2010 in a personal injury action. The order granted in part defendant's motion for summary judgment and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by denying defendant's motion in its entirety and reinstating the third cause of action, for negligent supervision, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action, individually and on behalf of his son, a third-grade student at defendant's elementary school who was injured while walking by playground equipment known as a "slide pole" during a school recess period. The injury allegedly occurred when another student slid down the slide pole and landed on him. At the time of the injury, four third-grade classes, including the class of plaintiff's son, were using the school playground, and the classes were being supervised by the classroom teachers.

In the complaint, plaintiff alleged that defendant was negligent in failing to provide proper instruction to the students in their use of the playground equipment, specifically the fireman's pole, negligent in failing to provide adequate groundcover around the playground generally, negligent in failing to provide adequate supervision of the playground, and negligent in failing to provide a proper surface beneath the fireman's pole. Defendant moved for summary judgment dismissing the complaint, asserting that it was not negligent in its supervision of the students and that, even if it was,

any negligence on its part was not a proximate cause of the accident. Defendant further asserted that any negligence in maintaining the playground surface also was not a proximate cause of the accident. Plaintiff cross-moved for partial summary judgment on the issue of liability. Supreme Court granted defendant's motion in part, dismissing the third cause of action, for negligent supervision, and the court denied the cross motion. We conclude that the court should have denied defendant's motion in its entirety, and we therefore modify the order accordingly.

Although school districts are not insurers of the safety of their students, they have a duty to provide adequate supervision for them and will be held liable when students sustain foreseeable injuries proximately related to the school district's breach of that duty (*see Mirand v City of New York*, 84 NY2d 44, 49; *Doxtader v Middle Country Cent. School Dist. at Centereach*, 81 AD3d 685, 685-686). "In carrying out that duty, [school districts] are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances" (*Milbrand v Kenmore-Town of Tonawanda Union Free School Dist.*, 49 AD3d 1341, 1342; *see David v County of Suffolk*, 1 NY3d 525). Further, school districts " 'cannot reasonably be expected to continuously supervise and control all movements and activities of students' " (*Walker v City of New York*, 82 AD3d 966, 967, quoting *Mirand*, 84 NY2d at 49). Indeed, " '[w]here an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not [a] proximate cause of the injury' " (*Swan v Town of Brookhaven*, 32 AD3d 1012, 1013-1014).

Here, defendant met its initial burden by establishing that its supervision of the playground was adequate and that plaintiff's son was engaged in "normal play" at the time of the accident (*Walker*, 82 AD3d at 967; *see Troiani v White Plains City School Dist.*, 64 AD3d 701). In opposition, however, plaintiff raised an issue of fact whether his son was injured as a result of a game of "tag," a game that was in violation of playground rules and that nevertheless was frequently played by the students during recess despite defendant's notice thereof (*see Vonungern v Morris Cent. School*, 240 AD2d 926, 927). Persistent rule breaking may serve as a basis for liability, particularly where school personnel fail to address the students' rule-breaking behavior and that failure foreseeably leads to injury (*see generally Oliverio v Lawrence Pub. Schools*, 23 AD3d 633, 635; *Rivera v Board of Educ. of City of Yonkers*, 19 AD3d 394). Thus, contrary to plaintiff's contention on his cross appeal, the court also properly denied his cross motion for partial summary judgment on liability inasmuch as he raised an issue of fact with respect thereto.

We reject defendant's contention that the court erred in denying those parts of its motion with respect to the first and fifth causes of action inasmuch as they essentially allege negligent supervision based upon the failure to instruct students in the proper use of the playground equipment. A school district has a duty to provide adequate instructions to the students in its care and will be held

liable for foreseeable injuries proximately caused by its negligence (*see Oakes v Massena Cent. School Dist.*, 19 AD3d 981, 981-982; *Darrow v West Genesee Cent. School Dist.*, 41 AD2d 897; PJI 2:227). While defendant established that it provided students with some instruction concerning the use of the playground equipment, we cannot say on this record that defendant's instructions were reasonable as a matter of law (*see generally Ugarriza v Schmieder*, 46 NY2d 471, 475-476; *Merkley v Palmyra-Macedon Cent. School Dist.*, 130 AD2d 937, 938). Finally, although defendant contends that the condition and depth of the playground groundcover was not a proximate cause of the accident and thus that the court also erred in denying its motion with respect to those causes of action concerning the groundcover, the parties have submitted conflicting expert evidence on that issue, thus precluding summary judgment (*see Smith v Kinsey*, 50 AD3d 1456, 1458).

All concur except SMITH, J.P., who dissents in part and votes to affirm in the following Memorandum: Although I agree with the majority that defendant school district "met its initial burden by establishing that its supervision of the playground was adequate and that plaintiff's son was engaged in 'normal play' at the time of the accident," I respectfully disagree with the majority's further conclusion that plaintiff raised a triable issue of fact in opposition. Consequently, I dissent in part and would affirm the order, inasmuch as I conclude that Supreme Court properly granted that part of defendant's motion for summary judgment dismissing the third cause of action, for negligent supervision, but I otherwise agree with the remainder of the majority's decision.

In supervising students, schools are "obligated to exercise such care of their students 'as a parent of ordinary prudence would observe in comparable circumstances' " (*David v County of Suffolk*, 1 NY3d 525, 526). "Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable 'for every thoughtless or careless act by which one pupil may injure another' " (*Mirand v City of New York*, 84 NY2d 44, 49). Thus, " '[w]here an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not [a] proximate cause of the injury' " (*Swan v Town of Brookhaven*, 32 AD3d 1012, 1013-1014).

Here, a fellow student suddenly slid down a pole and struck plaintiff's son within five minutes of the beginning of the recess period. Two teachers were present on the playground, one of whom was within 10 to 15 feet of plaintiff's son when the accident occurred. Consequently, I conclude that the other student's action was a sudden and unforeseen event that no amount of supervision could have prevented (*cf. Oliverio v Lawrence Pub. Schools*, 23 AD3d 633, 635). "In order to find that a school has breached its duty to provide adequate supervision in the context of injuries caused by the acts of fellow students, the plaintiff must show that the school 'had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated' " (*Convey v City of Rye School*

Dist., 271 AD2d 154, 159, quoting *Mirand*, 84 NY2d at 49). Defendant established that it had no knowledge of any prior dangerous behavior on the part of the other student, and thus I agree with the majority's conclusion that defendant met its initial burden on the motion.

I cannot agree with the majority, however, that plaintiff raised a triable issue of fact by presenting evidence that the other student was playing tag on the playground, which was against defendant's rules. Although a child's violation of a school rule that prohibits certain conduct may raise a triable issue of fact with respect to negligent supervision (*see generally Rivera v Board of Educ. of City of Yonkers*, 19 AD3d 394), in the case before us there is no evidence that the injury sustained by plaintiff's son was the result of a violation of the rule against playing tag (*cf. Hochreiter v Diocese of Buffalo*, 309 AD2d 1216, 1217-1218).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

997

CA 09-01214

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

JESSIE J. BARNES, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 100753.)

JESSIE J. BARNES, CLAIMANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered May 28, 2009. The judgment dismissed the amended claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries he allegedly sustained during an altercation with correction officers while he was an inmate at the Collins Correctional Facility (facility). According to claimant, he also received inadequate medical treatment for his injuries from a nurse at the facility. Following a trial, the Court of Claims granted judgment in favor of defendant. We affirm.

We reject the contention of claimant that the court failed to impose an appropriate sanction for defendant's failure to preserve and produce the original videotapes of the incident, which was recorded by two surveillance cameras in the facility. Although defendant provided claimant with a single videotape that contained copies of the two original videotapes prior to trial, the court ordered defendant to produce the originals at trial so that they could be compared to the single copy. Defendant failed to do so, explaining that the original videotapes had been lost. The court therefore precluded defendant from admitting in evidence the copy of the videotapes, which was favorable to defendant. We conclude that, in the absence of evidence that defendant intentionally destroyed the original videotapes or that the copy omitted relevant portions of the incident, preclusion was an appropriate sanction (*see Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 1002), and the court's ruling did not constitute an abuse of discretion (*see generally Iannucci v Rose*, 8 AD3d 437). We reject claimant's further contention that the court should have struck

defendant's answer as a spoliation sanction. " '[S]triking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct' " (*Carroway Luxury Homes, LLC v Integra Supply Corp.*, 52 AD3d 1187, 1188), and such a sanction was not warranted here (*see Koehler v Midtown Athletic Club, LLP*, 55 AD3d 1444).

We reject claimant's further contention that the verdict is against the weight of the evidence. With respect to the medical malpractice claim, claimant failed to present evidence establishing that the medical treatment provided to him following the incident constituted a departure from accepted medical practice. With respect to the claim based upon the use of excessive force, all of the correction officers involved in the incident testified that the level of force used was appropriate to the situation, and claimant's contention to the contrary is belied by the evidence establishing that he received only minor injuries. Indeed, claimant sustained no cuts, bruises or fractured bones, and the only injuries observed by a nurse following the incident were a scrape to his cheek and marks on his wrists and ankles, in the approximate locations where claimant had been wearing arm and leg restraints. "The court's findings are entitled to great deference, [inasmuch] as the court was in a position to observe the witnesses and view the evidence firsthand" (*Garofalo v State of New York*, 17 AD3d 1109, 1110, *lv denied* 5 NY3d 707), and we conclude that the verdict is supported by a fair interpretation of the evidence (*see id.*).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1027

CA 11-00581

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

MICHAEL RISSEW AND DEBORAH RISSEW,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARK L. SMITH AND TRISHIA BARKER,
DEFENDANTS-APPELLANTS.

MURA & STORM, PLLC, BUFFALO (KRIS E. LAWRENCE 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, Monroe County (David Michael Barry, J.), entered September 30, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Michael Rissew (plaintiff) when the motor vehicle operated by plaintiff collided with a vehicle owned by defendant Trishia Barker and operated by defendant Mark L. Smith. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of the three categories alleged in the complaint, as amplified by the bill of particulars, and Supreme Court denied defendants' motion.

We agree with defendants that the court erred in denying those parts of the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. Defendants met their initial burden on the motion by submitting, inter alia, "[two] affirmed report[s] of a physician who examined plaintiff . . . and concluded that there was no objective evidence that plaintiff sustained a serious injury as a result of the accident" (*Lauffer v Macey*, 74 AD3d 1826, 1827). In opposition to the

motion, plaintiffs failed to raise a triable issue of fact whether plaintiff sustained a serious injury under those two categories (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore modify the order accordingly.

We further conclude, however, that the court properly denied the motion with respect to the 90/180-day category of serious injury. Although defendants established their entitlement to judgment as a matter of law with respect to that category (*see generally id.*), plaintiffs submitted evidence raising a triable issue of fact whether plaintiff sustained a qualifying injury or impairment thereunder (*see Nitti v Clerrico*, 98 NY2d 345, 357). Specifically, plaintiffs submitted the affidavit and records of plaintiff's chiropractor demonstrating, inter alia, that plaintiff sustained a loss of range of motion in his cervical and lumbar spine and localized edema in his cervical spine and muscle spasms, and the detection of spasms through cervical palpation constitutes medically objective evidence of plaintiff's injury (*see id.*; *Pugh v DeSantis*, 37 AD3d 1026, 1028). Plaintiffs also established that plaintiff was unable to perform substantially all of his customary and usual activities for not less than 90 days during the 180 days immediately following the accident at issue (*see generally Herbst v Marshall* [appeal No. 2], 49 AD3d 1194, 1196).

All concur except MARTOCHE, J., who dissents in part and votes to reverse the order insofar as appealed from in accordance with the following Memorandum: I respectfully dissent in part and would reverse the order insofar as appealed from, grant defendants' motion and dismiss the complaint. I agree with the majority that Supreme Court erred in denying those parts of defendants' motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. As the majority properly notes, defendants met their initial burden of establishing that there was no objective evidence that Michael Rissew (plaintiff) sustained a serious injury as a result of the accident within the meaning of those two categories (*see Lauffer v Macey*, 74 AD3d 1826, 1827). I further agree with the majority that, in opposition, plaintiffs failed to raise a triable issue of fact to defeat those parts of defendants' motion.

I cannot agree with the majority, however, that plaintiffs raised an issue of fact to defeat that part of defendants' motion with respect to the 90/180-day category of serious injury. The majority concludes, and I agree, that defendants met their initial burden by establishing their entitlement to judgment as a matter of law with respect to that category, but the majority further concludes that plaintiffs submitted evidence raising a triable issue of fact whether plaintiff sustained a qualifying injury or impairment under that category. In my view, the majority's reliance on *Nitti v Clerrico* (98 NY2d 345) is misplaced. There, the Court of Appeals concluded that, "[a]lthough medical testimony concerning observations of a spasm can constitute objective evidence in support of a serious injury, the spasm must be objectively ascertained" (*id.* at 357). I cannot agree with the majority that the spasm in this case was objectively

ascertained by plaintiff's chiropractor. Although the chiropractor indicated that he detected the spasm through "palpation," he did not identify any diagnostic technique that he used to induce the spasm (*see MacMillan v Cleveland*, 82 AD3d 1388, 1391 [Mercure, J., dissenting, in which Malone, Jr., J. concurs]; *see also Tuna v Babendererde*, 32 AD3d 574). Indeed, the dissenters in *MacMillan* (*id.* at 1392) properly note that the Court of Appeals has held "that a spasm is not considered objective evidence of an injury absent further evidence that the spasm was 'objectively ascertained,' such as evidence of the test performed to induce the spasm [internal citation omitted]." Here, the chiropractor's affidavit indicated that one MRI showed that plaintiff had disc bulges at numerous locations in the lumbar spine and that another MRI showed a " 'disc bulge osteophyte complex and disc dessication most prominent at C5-C6' " in the cervical spine, but the chiropractor did not explicitly state that plaintiff's loss of range of motion was caused by those disc bulges or by any other objective condition (*see Lauffer*, 74 AD3d at 1827), nor did he address the opinion of defendants' expert that the MRI showed that plaintiff had a degenerative disc condition unrelated to the car accident (*see Caldwell v Grant* [appeal No. 2], 31 AD3d 1154, 1155). Thus, although the chiropractor "provided numeric percentages of plaintiff's loss of range of motion as well as qualitative assessments of plaintiff's condition" (*Leahey v Fitzgerald*, 1 AD3d 924, 926), the expert "did not relate the loss of [range of motion] to the [MRI results] or any other objective finding" (*Beaton v Jones*, 50 AD3d 1500, 1502). Moreover, plaintiff's chiropractor did not explain why plaintiff's symptoms should be attributed to injuries sustained in the accident and not to the preexisting degenerative disc condition. Thus, to the extent that plaintiff's chiropractor concluded that plaintiff's symptoms were caused by the accident, that conclusion is both speculative and conclusory (*see Innocent v Mensah*, 56 AD3d 379, 380).

I further note that, to the extent the majority believes that the affidavit of plaintiff's chiropractor raised an issue of fact by providing objective evidence of a medically determined injury with respect to the 90/180-day category, then the affidavit must necessarily also have satisfied plaintiffs' burden concerning the other categories of serious injury that the majority concludes should have been dismissed as a matter of law because there was no evidence of an objective injury. Indeed, in his affidavit plaintiff's chiropractor opined to a reasonable degree of medical certainty that plaintiff sustained a serious injury under those two other categories of serious injury. Thus, in my view, the majority is choosing, in an unexplained and piecemeal manner, both to credit and reject in part the chiropractor's affidavit.

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1046

CA 10-01899

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

FREDERICK BREADY AND NANCY BREADY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

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

GOLDBERG SEGALLA LLP, BUFFALO (JOHN J. JABLONSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 13, 2010 in a personal injury action. The order denied the motion of defendant CSX Transportation, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the complaint and cross claim against defendant CSX Transportation, Inc. are dismissed.

Memorandum: The plaintiffs in each appeal commenced these actions seeking, inter alia, to recover damages pursuant to the Federal Employers' Liability Act ([FELA] 45 USC § 51 *et seq.*) for injuries sustained by Frederick Bready and Brandon Harris (collectively, plaintiffs) when the vehicle in which plaintiffs were passengers was rear-ended in a chain reaction collision involving four vehicles. The vehicle in question was operated by former defendant Elaine C. Bailey, and Bailey and plaintiffs were acting in the course of their employment with defendant CSX Transportation, Inc. (CSX) at the time of the accident. The accident occurred while the vehicle operated by Bailey (hereafter, CSX vehicle) was stopped at an intersection for a red light.

Following discovery, CSX moved in each action for summary judgment dismissing the complaint and the cross claim against it on the ground that it was not negligent, and Supreme Court denied the motions. We reverse the order in each appeal.

"Under FELA, a jury is entitled to find negligence if a party's actions 'played any part, even the slightest, in producing the

injury' " (*Hotaling v CSX Transp.*, 5 AD3d 964, 967, quoting *Rogers v Missouri Pac. R.R. Co.*, 352 US 500, 506; *see Canazzi v CSX Transp., Inc.* [appeal No. 2], 61 AD3d 1347). "[L]iability under the statute[, however,] is based on negligence and is not based solely on the fact that an employee is injured" (*McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1150).

"[W]here a vehicle is lawfully stopped, there is a duty imposed upon the operators of vehicles traveling behind it in the same direction to come to a timely halt" (*Edney v Metropolitan Suburban Bus Auth.*, 178 AD2d 398, 399). Here, it is undisputed that the CSX vehicle was lawfully stopped at the time of the accident and, even assuming, arguendo, that the traffic signal controlling the intersection had turned green immediately before the accident, Bailey had no duty to accelerate the CSX vehicle into the intersection at the precise moment that the traffic signal turned green (*see generally Ruzycki v Baker*, 301 AD2d 48, 49). Inasmuch as there is *no* evidence that Bailey's actions played *any* part in producing plaintiffs' alleged injuries (*see generally Hotaling*, 5 AD3d at 967-968), we conclude that CSX met its burden of establishing entitlement to judgment as a matter of law in each action and that plaintiffs failed to raise an issue of fact in opposition to the motions (*cf. Ramadan v Maritato*, 50 AD3d 1620; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In doing so, we reject the dissent's conclusion that evidence concerning the revocation of Bailey's driver's license prior to the accident supports the determination of the court denying the motions. Bailey's status as an unlicensed driver is irrelevant to her operation of the CSX vehicle at the time of the accident (*see Huff v Rodriguez*, ___ AD3d ___ [Oct. 7, 2011]; *Almonte v Marsha Operating Corp.*, 265 AD2d 357), and it does not create a triable issue of fact whether her actions played " 'even the slightest' " part in producing plaintiffs' alleged injuries (*Hotaling*, 5 AD3d at 967, quoting *Rogers*, 352 US at 506; *see generally Zuckerman*, 49 NY2d at 562).

All concur except SCONIERS and GREEN, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the order in each appeal denying the motion of defendant CSX Transportation, Inc. (CSX) for summary judgment dismissing the complaint and cross claim against it. As noted by the majority, Frederick Bready and Brandon Harris (plaintiffs) commenced these actions against, inter alia, CSX to recover for injuries sustained in a motor vehicle accident. Plaintiffs were passengers in a vehicle operated by former defendant Elaine C. Bailey, which was rear-ended as the result of a chain reaction accident while Bailey was stopped first in line at a traffic light. The evidence indicates that the chain reaction accident began at or shortly after the moment when the light turned green for the vehicle operated by Bailey (hereafter, CSX vehicle). Plaintiffs and Bailey were employed by CSX and were in the course of their employment when the accident occurred. Plaintiffs sued CSX pursuant to the Federal Employers' Liability Act ([FELA] 45 USC § 51 *et seq.*), which imposes duties above and beyond those established by the common law and provides a standard of proof for negligence and proximate cause that is significantly lower than the standard imposed by the common law. If this was merely a New York

automobile negligence case, there is no doubt that the complaint against CSX would have to be dismissed in each appeal. However, while New York's automobile negligence law is certainly relevant to the claims against CSX, it does not wholly define the scope of CSX's potential liability to its employees under FELA for the injuries sustained in the accident at issue.

FELA is a broad remedial statute and efforts to limit its scope by the negligence standards established by a state's tort law relating to automobiles "would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of [FELA] followed by [the United States Supreme] Court" (*Urie v Thompson*, 337 US 163, 181-182). This Court has recognized that "[t]here is a 'more lenient standard for determining negligence and causation' in a FELA action" (*Pilarski v Consolidated Rail Corp.*, 269 AD2d 821, 821, quoting *Hines v Consolidated Rail Corp.*, 926 F2d 262, 267). However, FELA is more than just a lenient version of state tort law. Recently, the United States Supreme Court reaffirmed its conclusions in *Rogers v Missouri Pac. R.R. Co.* (352 US 500) that there is a " 'relaxed . . . proximate cause requirement' in FELA cases" (*CSX Transp., Inc. v McBride*, 564 US ___, 131 S Ct 2630, 2636), and that "FELA's language on causation . . . 'is as broad as could be framed' " (*id.*, quoting *Urie*, 337 US at 181). In addition, it is undisputed that "[a] railroad has a duty to use reasonable care in furnishing its employees with a safe place to work" (*Atchison, Topeka & Santa Fe Ry. Co. v Buell*, 480 US 557, 558), and that such duty extends beyond the boundaries of the railroad's property (*see Shenker v Baltimore & Ohio R.R. Co.*, 374 US 1, 7).

CSX's obligation to protect plaintiffs from injury extends beyond those duties imposed on the driver of a motor vehicle by both the common law and the Vehicle and Traffic Law. Thus, in the context of this case, we conclude that Bailey, as the driver of the CSX vehicle, was obligated to take evasive action, if possible, to avoid a rear-end collision while stopped at a traffic light, even though New York law imposes no such obligation on the operator of a motor vehicle. On this record, we conclude that there are issues of fact whether Bailey could have avoided the accident by moving forward when the light turned green or by taking other evasive action. Moreover, the record establishes that, well before the date of the accident, Bailey's driver's license had been revoked as a result of convictions for driving while intoxicated. We respectfully submit that the majority misperceives the import of that fact when asserting that Bailey's lack of a driver's license is irrelevant to her operation of the CSX vehicle. Indeed, that fact is highly relevant to the issue whether CSX breached its duty to provide plaintiffs with a safe place to work when the person CSX employed to transport its employees did so with a revoked driver's license (*see generally* Vehicle and Traffic Law § 511). We thus conclude that triable issues of fact exist with respect to whether CSX breached its duty to provide plaintiffs with a safe place to work and, under FELA, with respect to whether CSX's breach was a proximate cause of plaintiffs' injuries (*see generally McBride*, 564 US ___, 131 S Ct at 2636-2639; *Rogers*, 352 US at 504-507).

A determination that this case presents triable issues of fact is certainly warranted given the extraordinary breadth and scope of FELA as demonstrated by the prevailing case law (*see Gallick v Baltimore & Ohio R.R. Co.*, 372 US 108 [issue of fact existed where plaintiff suffered severe complications secondary to an insect bite that he sustained near a stagnant pool of water located in the defendant railroad's right of way]; *Swartout v Consolidated Rail Corp.*, 294 AD2d 785 [issue of fact existed whether the defendant railroad knew, or should have known, that Lyme disease was a potential hazard in the area where its employees were working]; *Syverson v Consolidated Rail Corp.*, 19 F3d 824 [issue whether the defendant railroad was liable for a knife attack on an employee by a trespasser should be submitted to the jury where the defendant had knowledge that the area in question attracted vagrants]; *Gallose v Long Is. R.R. Co.*, 878 F2d 80 [the plaintiff railroad employee was entitled to have jury determine whether the owner of the dog that bit him was within the scope of her employment with the railroad when she brought the dog to work]).

Simply stated, "[b]ecause of the 'myriad of factors' involved, whether [a] railroad used reasonable care in furnishing its employees a safe place to work is normally a question for the jury" (*Gallose*, 878 F2d at 85). The right of the jury to pass on "all factual issues under . . . FELA . . . must be liberally construed . . .[, and o]nly in instances where reasonable jurors could reach only one conclusion may the court take the determination from the jury and decide the question as a matter of law" (*id.*). Thus, pursuant to the principles established by decades of FELA jurisprudence, we conclude in each appeal that Supreme Court properly denied CSX's motion for summary judgment.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1047

CA 10-01900

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

BRANDON HARRIS AND KRISTINA HARRIS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

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

GOLDBERG SEGALLA LLP, BUFFALO (JOHN JOSEPH JABLONSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 13, 2010 in a personal injury action. The order denied the motion of defendant CSX Transportation, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the complaint and cross claim against defendant CSX Transportation, Inc. are dismissed.

Same Memorandum as in *Bready v CSX Transp., Inc.* (___ AD3d ___ [Nov. 10, 2011]).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1060

TP 11-01005

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

IN THE MATTER OF KEITH COX, 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.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered May 9, 2011) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1062

TP 11-01098

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

IN THE MATTER OF JAMAAL COLESON, PETITIONER,

V ORDER

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

JAMAAL COLESON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [David A. Murad, J.], entered April 18, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1063

TP 10-02366

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

IN THE MATTER OF MICHAEL ARGENTIERI, PETITIONER,

V ORDER

SUSAN CONNELL, SUPERINTENDENT, ONEIDA CORRECTIONAL FACILITY, RESPONDENT.

MICHAEL ARGENTIERI, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Anthony F. Shaheen, J.], entered October 1, 2010) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1064

TP 10-00450

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

IN THE MATTER OF TOMMY HERRIN, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES AND D.S.A. BULSON, HEARING OFFICER, MID-STATE CORRECTIONAL FACILITY, RESPONDENTS.

TOMMY HERRIN, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Samuel D. Hester, J.], entered January 4, 2010) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1065

KA 10-02348

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES CARBONE, DEFENDANT-APPELLANT.

DANIEL M. GRIEBEL, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 10, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), an upward departure from the presumptive level two risk pursuant to the risk assessment instrument (RAI) score. Contrary to defendant's contention, Supreme Court did not abuse its discretion in refusing to grant a third adjournment to enable his attorney to obtain additional records from his inmate file. Even assuming, arguendo, that additional records would have supported defendant's contention that he should not have been assessed points for category 12 on the RAI for refusal to participate in treatment, we conclude that his score under the RAI would nevertheless have remained at a level two (*see generally People v Sherard*, 73 AD3d 537, *lv denied* 15 NY3d 707). Furthermore, the request for the third adjournment was made on the day before defendant was discharged from prison, and the court was obligated to determine his risk level prior to defendant's parole (*see* § 168-n [1]).

Contrary to defendant's further contention, the court's determinations that defendant engaged in a continuous course of conduct and that the victim was less than 10 years of age at the time of the abuse are supported by the requisite clear and convincing evidence (*see* Correction Law § 168-n [3]). That information was contained in the presentence report, which states that the 12-year-old victim reported during a child protective investigation that he was forced to perform oral sex on defendant numerous times and that the

abuse had occurred over a period of six years. Where, as here, the information in the presentence report is "produced based on information supplied by the victim . . . or some other knowledgeable witness under circumstances bearing indicia of reliability," the reliable hearsay requirement is met (*People v Mingo*, 12 NY3d 563, 575). The court's determination that defendant refused sex offender treatment also is supported by clear and convincing evidence (*see* § 168-n [3]), despite the evidence that defendant made complaints to various officials that he was "harassed" by the treatment counselor (*cf. People v Kearns*, 68 AD3d 1713, 1714). Indeed, defendant signed a document stating that he refused to return to sex offender counseling at any facility "due to legali[ties]."

Finally, although we agree with defendant that the court erred in relying in part upon the duration of the abuse and the age of the victim in departing from the presumptive level two risk, we nevertheless conclude that the court properly determined that the upward departure was warranted. Defendant's perception that oral sodomy between an adult and child was "normal" based upon his own experience is not otherwise taken into consideration by the RAI, and that perception compels the conclusion that defendant poses an increased risk to public safety (*see People v Hueber*, 81 AD3d 1466, *lv denied* 17 NY3d 701; *People v May*, 77 AD3d 1388).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1066

KA 06-01663

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN PEREZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, A.J.), rendered April 5, 2006. 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]). Defendant failed to preserve for our review his challenge to the alleged legal insufficiency of the evidence because he failed to move for a trial order of dismissal on the specific ground now raised (*see People v Carncross*, 14 NY3d 319, 324-325; *People v Gray*, 86 NY2d 10, 19). In any event, defendant's challenge lacks merit. Defendant was charged as an accessory in connection with the stabbing of two victims. One of the victims survived the assault but sustained serious injuries, and the other victim later died (hereafter, decedent). Defendant was acquitted of assault with respect to the surviving victim and was convicted as an accomplice with respect to decedent. The evidence at trial establishes, and defendant concedes, that he received a cut on his hand during the altercation. The evidence further establishes that the codefendant repeatedly stabbed decedent, and that defendant assisted the codefendant by holding decedent while the codefendant attacked him. Inasmuch as there is no evidence that defendant took any part in the attack upon the surviving victim, the jury could therefore have concluded that defendant received the cut by holding decedent while the codefendant stabbed him. Consequently, the evidence is legally sufficient to establish defendant's guilt of manslaughter in the first degree (*see People v Rutledge*, 70 AD3d 1368, *lv denied* 15 NY3d 777; *People v Borgos*, 168 AD2d 628, *lv denied* 77 NY2d 958; *see generally People v Medina*, 276 AD2d 367, *lv denied* 96 NY2d 737). Furthermore,

because there is no merit to defendant's challenge to the legal sufficiency of the evidence, there also is no merit to defendant's contention that defense counsel was ineffective in failing to raise that challenge (*see e.g. People v Dozier*, 32 AD3d 1346, 1347, *lv dismissed* 8 NY3d 880; *People v Lascelle*, 23 AD3d 1137, 1139, *lv denied* 6 NY3d 755). Viewing the evidence in light of the elements of the crime of manslaughter as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

"Because defendant failed to request an instruction [that the jury must acquit him of manslaughter if it convicted the codefendant of murder] or object to the charge as given [on that ground], defendant also failed to preserve for our review his further contention that [County Court (Sirkin, J.), who presided over the trial,] erred in failing to instruct the jury" to that effect (*People v Youngblood*, 261 AD2d 960, *lv denied* 93 NY2d 1029). 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]). Although defendant requested a charge that he must have intended that the codefendant cause serious injury to decedent and, thus, contrary to the People's contention, he preserved for our review his further contention concerning shared intent both with respect to the court's initial and supplemental charges on the issue (*see People v Edwards*, 23 AD3d 1140, 1141; *see also People v Rivera*, 77 AD3d 483), we conclude that his contention is without merit. "[D]efendant's concern that without the requested charge the jury might have found him guilty . . . under a theory of accessorial liability without finding that he shared the requisite intent to [cause serious physical injury] was obviated by the court's recitation of Penal Law § 20.00, including the statement that acting in concert liability requires acting with the mental culpability required for the commission of the crime charged" (*People v Slacks*, 90 NY2d 850, 851). Therefore, because "the court sufficiently explained the applicable legal principles to the jury, it was not bound to charge the jury as defense counsel proposed" (*People v Leach*, 293 AD2d 760, 761, *lv denied* 98 NY2d 677).

Defendant further contends that his case was improperly transferred between Supreme Court and County Court in Monroe County for various purposes because there are no transfer orders in the record (*see generally* 22 NYCRR 200.14). Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that the alleged transfer error constitutes a mode of proceedings error such that preservation is not required (*see People v Ott*, 83 AD3d 1495, *lv denied* 17 NY3d 808; *see generally People v Wilson*, 14 NY3d 895).

Contrary to the further contention of defendant, County Court (Sirkin, J.) did not violate Judiciary Law § 21 by allegedly issuing a decision on defendant's suppression motion at trial without hearing the evidence in support of the motion. The record establishes that

County Court (Lindley, A.J.) presided over the *Wade* hearing and expressly denied the suppression motion, and that Judge Sirkin at trial merely clarified for the record that the motion had been denied. Defendant failed to preserve for our review his further contention that Judge Lindley failed to comply with CPL 710.60 (6) by setting forth the reasons for his denial of the suppression motion (*see People v Battle*, 202 AD2d 1045, 1046, *lv denied* 83 NY2d 908; *People v Hunt*, 187 AD2d 981, 982, *lv denied* 81 NY2d 887), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1068

KA 09-01028

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEFFEN A. JONES, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, 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 (Joseph E. Fahey, J.), rendered April 25, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and conspiracy in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (1) (b)]) and conspiracy in the second degree (§ 105.15). We reject defendant's contention that County Court erred in refusing to sever the counts of the indictment relating to the murder of one victim from the counts relating to the murder of the second victim and from those related to the attempted murder of the third victim. The counts related to the murders were properly joined inasmuch as both murders were allegedly perpetrated as the result of a dispute between one group of men that included defendant and another group that included the victims, and proof of the offenses related to one murder was material and admissible as evidence-in-chief upon a trial of the offenses related to the other murder (*see* CPL 200.20 [2] [b]; *People v Major*, 61 AD3d 1417, *lv denied* 12 NY3d 927). Further, proof of the offenses related to both murders was material and admissible as evidence-in-chief upon a trial of the offenses relating to the attempted murder of the third victim, who gave a statement to the police implicating defendant in both murders (*see People v Kelley*, 46 AD3d 1329, 1331-1332, *lv denied* 10 NY3d 813). "[O]nce the offenses were properly joined, the court lacked the statutory authority to sever" (*People v Cornell*, 17 AD3d 1010, 1011, *lv denied* 5 NY3d 805).

Defendant contends that the evidence is legally insufficient to

support the conviction because the principal witnesses against him lacked credibility. We reject that contention (*see generally People v Smith*, 272 AD2d 713, 715-716, *lv denied* 95 NY2d 871). Defendant failed to preserve for our review his further challenges to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19; *People v Cole*, 35 AD3d 911, 912, *lv denied* 8 NY3d 944). In addition, we reject defendant's contention that he was deprived of a fair trial based upon misconduct by the prosecutor during his opening statement. Defendant preserved that contention for our review with respect to only one alleged instance of prosecutorial misconduct and, in any event, we conclude that each instance of the prosecutor's alleged misconduct during his opening statement identified by defendant was not so egregious or improper as to deny defendant a fair trial (*see generally People v Walker*, 50 AD3d 1452, 1453, *lv denied* 11 NY3d 795, 931).

The sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced to an indeterminate term of incarceration of 12 to 25 years for the conviction of conspiracy in the second degree, and it must therefore be amended to reflect that he was sentenced to an indeterminate term of incarceration of 12½ to 25 years for that conviction (*see generally People v Barnes*, 56 AD3d 1171).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1069

KA 10-01754

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALAN MURRAY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered July 12, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, the People established by clear and convincing evidence that he has not accepted responsibility for the attempted rape of which he was convicted. County Court was entitled to discredit defendant's statements accepting responsibility set forth in a letter to the Board of Examiners of Sex Offenders (*see People v Woodard*, 63 AD3d 1655, *lv denied* 13 NY3d 706; *People v Tilley*, 305 AD2d 1041, *lv denied* 100 NY2d 588). Indeed, we note that those statements were contradicted by the case summary and defendant's presentence report. Also contrary to defendant's contention, the record contains clear and convincing evidence that his record while incarcerated included "numerous citations for disciplinary violations" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 16 [2006]; *see People v Catchings*, 56 AD3d 1181, *lv denied* 12 NY3d 701). Finally, we conclude that defendant failed to establish his entitlement to a downward departure from the presumptive risk level, particularly in light of the violent nature of the crime and the absence of any aggravating or mitigating factor not otherwise taken into account by the Risk Assessment Guidelines (*see People v Cummings*, 81 AD3d 1261, *lv denied*

16 NY3d 711; *see generally People v Guaman*, 8 AD3d 545).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1072

CAF 11-00700

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

IN THE MATTER OF AUSTIN M. AND ANNA M.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-APPELLANT; MEMORANDUM AND ORDER

SARAH H., RESPONDENT-RESPONDENT.

DALE M., INTERVENOR-RESPONDENT.

NELSON LAW FIRM, MEXICO (ANNALISE M. DYKAS OF COUNSEL), FOR PETITIONER-APPELLANT.

THE FIX LAW FIRM, OSWEGO (ROBERT H. FIX OF COUNSEL), FOR INTERVENOR-RESPONDENT.

CHARLES H. CIESZESKI, ATTORNEY FOR THE CHILDREN, FULTON, FOR AUSTIN M. AND ANNA M.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 28, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject children in the custody of Dale M.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, petitioner appeals from an order that placed the children with the intervenor herein, who is the father of the children at issue. Since the entry of the order on appeal, Family Court issued another order after a lengthy permanency hearing and again placed the children with their father. This appeal must therefore be dismissed as moot (*see Matter of Stephon Elijah G.*, 63 AD3d 640; *Matter of Destiny HH.*, 63 AD3d 1230, 1231, *lv denied* 13 NY3d 706; *Matter of Julia R.*, 52 AD3d 1310, 1311, *lv denied* 11 NY3d 709).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1074

CA 11-00176

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

JUSTINE THOMPSON, PLAINTIFF-APPELLANT,

V ORDER

MICHAEL COOPER, ESQ., STEPHEN BARNES, ESQ., INDIVIDUALLY AND DOING BUSINESS AS THE BARNES FIRM AS SUCCESSORS IN INTEREST TO CELLINO & BARNES, ROSS CELLINO, INDIVIDUALLY AND AS A PARTNER IN THE LAW FIRM OF CELLINO & BARNES AND CELLINO & BARNES, DEFENDANTS-RESPONDENTS.

WILLIAMS & RUDDEROW, PLLC, SYRACUSE (MICHELLE ELLSWORTH RUDDEROW OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered October 14, 2010. The order granted the motion of defendants for summary judgment and dismissed the amended complaint.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1075

CA 11-00786

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

CARL L. FISHER, AS POWER OF ATTORNEY FOR
JOHN C. FISHER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

KENNETH FLANIGAN, ET AL., DEFENDANTS,
AND DAMON CORPORATION,
DEFENDANT-APPELLANT-RESPONDENT.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered July 13, 2010 in a personal injury action. The order, among other things, granted in part and denied in part the motion of defendant Damon Corporation for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Damon Corporation in its entirety and dismissing the amended complaint and cross claim against it and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as power of attorney for John C. Fisher (Fisher), commenced this action alleging, inter alia, that defendant Damon Corporation (Damon) is liable for the injuries sustained by Fisher when he fell while he was walking in a motor home manufactured by Damon. The motor home was in motion at the time of the fall, and was being driven by defendant Kenneth Flanigan. Damon moved for summary judgment dismissing the amended complaint and all cross claims against it. Supreme Court denied that part of the motion with respect to the strict products liability cause of action for failure to warn passengers to remain seated and granted that part of the motion with respect to the design defect cause of action. We note that, although the court did not address that part of the motion with respect to the cross claim for contribution or indemnification, the failure to rule on that part of the motion is deemed a denial thereof (*see Brown v U.S. Vanadium Corp.*, 198 AD2d 863). This appeal by Damon and cross appeal by plaintiff ensued. We agree with Damon that the court should have granted the motion in its entirety, and we therefore modify the

order accordingly.

With respect to the strict products liability cause of action for failure to warn, we conclude that Damon established its entitlement to judgment as a matter of law and that plaintiff failed to raise an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). It is well established that "[a] manufacturer . . . has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237). However, "in appropriate cases, courts could as a matter of law decide that a manufacturer's warning would have been superfluous given an injured party's actual knowledge of the specific hazard that caused the injury" (*id.* at 241). Here, Damon established that the risk of falling while moving about in a moving vehicle is open and obvious. Although the issue whether a particular risk is open and obvious is "most often a jury question[,] . . . [w]here only one conclusion can be drawn from the established facts, . . . the issue of whether the risk was open and obvious may be determined by the court as a matter of law" (*id.* at 242). Fisher testified at his deposition that he had experience traveling in a bus and subway and knew that there was a risk of falling while the bus and subway were in motion. We thus further conclude that Damon established that "a warning would have added nothing to [Fisher's] appreciation of the danger," thereby obviating the requirement of a duty to warn (*id.*). Neither Fisher's affidavit in opposition to the motion nor the expert affidavits raised an issue of fact sufficient to defeat the motion. Although Fisher stated in his opposing affidavit that he thought it was "customary and acceptable to move about" a motor home and that he would not have done so had there been a warning does not negate his acknowledgment of the open and obvious danger of standing in a moving vehicle set forth in his deposition testimony. One of plaintiff's experts does not dispute that the risk of falling in a motor vehicle is open and obvious, but he instead asserts that a warning against the open and obvious risk was necessary because the "visual cues promote a sense of safety." Plaintiff's second expert makes only a conclusory statement that Damon should have provided notices to passengers not to leave their seats if that was Damon's intention while the motor home was in motion.

With respect to the design defect cause of action, we note that, "[w]hile the focus of a design-defect claim . . . is the product's fitness for *intended* uses . . ., the focus of a failure to warn claim . . . is whether there has been a breach of the manufacturer's duty to warn consumers against using the product for unintended but foreseeable purposes" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 537 [Titone, J., dissenting in part and concurring in part]). We conclude that Damon established as a matter of law that the motor home was designed so that it was reasonably safe for its intended use. "[T]he validity of a design-defect claim should be assessed by reference to the configuration of the product 'as of the time [it] leaves the manufacturer's hands' " (*id.*; *see generally Adams v Genie Indus., Inc.*, 14 NY3d 535, 542). According to the deposition testimony of Damon's employees, certain seats were equipped with seat belts in conformance with federal regulations and the motor home

complied with all applicable regulations and industry standards when it was manufactured in 1998. Further, the owner's manual advised the owner that passengers should remain seated and restrained by a seat belt while the motor home was in motion. Damon further established that the alleged safety devices proposed by plaintiff's experts, i.e., devices to grasp when standing or walking and an auditory system warning that the vehicle is changing speed or direction, are not provided for in the regulations or industry standards and have not been used in the motor home industry from 1998 through the present time. We conclude that plaintiff failed to raise an issue of fact whether the motor home was reasonably safe for its intended use (*see generally Zuckerman*, 49 NY2d at 562). Instead, each of plaintiff's experts merely expressed the conclusory opinion that, because Damon was aware that passengers might not remain seated while the vehicle was in motion, safety devices should have been installed.

Finally, in view of our determination with respect to the amended complaint against Damon, we further conclude that Damon's motion with respect to the cross claim should have been granted as well.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1076

CA 11-00922

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

FARM FAMILY CASUALTY INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GERALD R. NASON, JR., DEFENDANT,
AND BRIGID POMMERENCK, AS ADMINISTRATRIX
OF THE ESTATE OF ERIC POMMERENCK, DECEASED,
DEFENDANT-RESPONDENT.

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

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (COURTNEY G. SCIME OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered November 18, 2010 in a declaratory judgment action. The order, insofar as appealed from, denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, plaintiff's motion is granted and judgment is granted in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that plaintiff is not obligated to defend or indemnify defendant Gerald R. Nason, Jr. in the underlying action.

Memorandum: This litigation arises from an accident allegedly occurring on farm property (subject property) owned by Gerald Nason, Sr. (Nason). Nason also owned a separate parcel of property upon which he maintained his residence and a dairy business, which was covered by an insurance policy issued by plaintiff. Pursuant to the terms of the policy, Nason's relatives were insureds only if they were residents of his "household." Eric Pommerenck (decedent) died as the result of injuries that he sustained on the subject property while examining a hay elevator that had been offered for sale by Gerald R. Nason, Jr. (defendant), Nason's son. Defendant did not reside exclusively on the subject property but in fact also resided at times with his girlfriend at another location. The administratrix of decedent's estate commenced a wrongful death action against, inter alia, Nason and defendant, and plaintiff commenced this action seeking a declaration that it owed no duty to defend or indemnify defendant in

the underlying action on the ground that he was not an insured under its policy. We agree with plaintiff that Supreme Court erred in denying its motion for summary judgment.

"The term household has been characterized as ambiguous or devoid of any fixed meaning in similar contexts . . . and, as such, its interpretation requires an inquiry into the intent of the parties . . . The interpretation must reflect the reasonable expectation and purpose of the ordinary business [person] when making an insurance contract . . . and the meaning which would be given it by the average [person] . . . Moreover, the circumstances particular to each case must be considered in construing the meaning of the term" (*General Assur. Co. v Schmitt*, 265 AD2d 299, 300 [internal quotation marks omitted]). In addition, "the term should . . . be interpreted in a manner favoring coverage, as should any ambiguous language in an insurance policy" (*Rohlin v Nationwide Mut. Ins. Co.*, 26 AD3d 749, 750).

Here, plaintiff established that Nason did not consider defendant to be a member of his household, nor would he have anticipated that defendant would be afforded coverage under his insurance policy inasmuch as defendant lived separately from Nason, either in a trailer on the subject property or with a girlfriend. The trailer was not listed in the policy as an alternate residence. Furthermore, members of the Nason family testified at their respective depositions that defendant did not reside with the other members of the family and, indeed, was not welcome in the family home. Consequently, plaintiff established as a matter of law that defendant was not a member of Nason's household within the meaning of the policy (*see Matter of Hartford Ins. Co. of Midwest v Casella*, 278 AD2d 417, 418, *lv denied* 96 NY2d 710; *Walburn v State Farm Fire & Cas. Co.*, 215 AD2d 837; *cf. Korson v Preferred Mut. Ins. Co.*, 55 AD3d 879, 880-881), and defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1077

CA 11-00326

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

MARY HERBST AND JEFFREY HERBST,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

MARK MARSHALL, DEFENDANT-APPELLANT-RESPONDENT,
AND KENNETH F. GOULDING, DEFENDANT.

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

PAUL WILLIAM BELTZ, P.C., BUFFALO (KEVIN J. GRAFF OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 18, 2010 in a personal injury action. The order granted the motion of plaintiffs to set aside the jury verdict and for a new trial.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Mary Herbst (plaintiff) when her vehicle was rear-ended by a vehicle that in turn had been rear-ended by a vehicle driven by Mark Marshall (defendant). Following a jury trial, Supreme Court granted plaintiffs' post-trial motion seeking, in the alternative, to set aside the verdict as against the weight of the evidence and for a new trial based on the jury's finding that the accident was not a substantial factor in causing an injury to plaintiff. We affirm. "A motion to set aside a jury verdict as against the weight of the evidence . . . should not be granted 'unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence' . . . That determination is addressed to the sound discretion of the trial court, but if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Here, the first question on the verdict sheet was whether the accident was "a substantial factor in causing an injury to" plaintiff. The question was not whether plaintiff sustained a "serious" injury

(*see* Insurance Law § 5102 [d]); questioning concerning whether plaintiff sustained a serious injury appeared later in the verdict sheet. While there was conflicting evidence presented at trial whether plaintiff sustained a "serious" injury, it was undisputed that she sustained "an" injury to her cervical spine (*see generally Browne v Pikula*, 256 AD2d 1139). Indeed, defendant's experts both opined that plaintiff sustained a cervical strain as a result of the accident. We therefore conclude that the evidence that the accident was a substantial factor in causing an injury to plaintiff so preponderates in favor of plaintiffs that the jury finding to the contrary could not have been reached on any fair interpretation of the evidence.

We agree with defendant, however, that the court erred to the extent it relied on a statement allegedly made by the jury foreperson in support of its decision to set aside the verdict. "[A]bsent exceptional circumstances, juror affidavits may not be used to attack a jury verdict" (*Grant v Endy*, 167 AD2d 807, 808; *see Phelinger v Krawczyk*, 37 AD3d 1153, 1153-1154). Here, there was in fact no affidavit submitted by the jury foreperson, and the statement in question upon which the court relied in part as the basis for its decision was brought to the court's attention by only hearsay statements of plaintiffs' attorney and investigator. Moreover, there was no exception to the general rule that jurors may not impeach their own verdict, i.e., there was no ministerial error in reporting the verdict or evidence of substantial juror confusion (*see Porter v Milhorat*, 26 AD3d 424; *see also Grant*, 167 AD2d at 807-808). Nevertheless, for the reasons stated above concerning whether plaintiff sustained an injury, we conclude that the court properly set aside the verdict as against the weight of the evidence.

We have considered the contentions of plaintiffs raised on their cross appeal and conclude that they are without merit.

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1079

CA 11-00351

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

DUDLEY BENEDICT, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 107784.)

GALLO & IACOVANGELO, LLP, ROCHESTER (DAVID D. SPOTO OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered June 17, 2010 in a personal injury action. The judgment dismissed the amended claim.

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

Memorandum: Claimant appeals from a judgment that, following a trial, dismissed his amended claim for damages arising from injuries he allegedly sustained when he fell on an ice patch in a parking lot of the State University of New York. Viewing the evidence in the light most favorable to sustain the judgment and giving due deference to the credibility determinations of the Court of Claims (*see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170), we reject claimant's contention that the court erred in determining that defendant did not have constructive notice of the dangerous condition, i.e., the ice patch (*see Carricato v Jefferson Val. Mall Ltd. Partnership*, 299 AD2d 444, 445; *cf. Gonzalez v American Oil Co.*, 42 AD3d 253, 255-256). We also reject claimant's contention that reversal is required based on the refusal of the court to draw a negative inference based on defendant's failure to call an engineering expert as a witness. The record does not contain the expert disclosure of the engineering expert that was purportedly reviewed by the court, and on the record before us we therefore are unable to review plaintiff's contention that a negative inference was warranted. In any event, we note that the determination whether to draw a negative inference is permissive rather than required (*see Kronenberg v Morris*, 174 AD2d 610, 611), and it cannot be said that the court's determination not to do so under the circumstances of this case constitutes reversible error (*see 318 E. 93*

v Ward, 276 AD2d 277, 278).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1080

TP 11-01010

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

IN THE MATTER OF GROVE ROOFING SERVICES, INC.,
PETITIONER-RESPONDENT,

V ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, ON THE
COMPLAINT OF LAROSA CARSON, RESPONDENT-PETITIONER,
LAROSA CARSON AND ROBERT EMBOW, INDIVIDUALLY,
RESPONDENTS.

JOHN P. PIERI, BUFFALO, FOR PETITIONER-RESPONDENT AND RESPONDENT ROBERT EMBOW, INDIVIDUALLY.

CAROLINE J. DOWNEY, BRONX (TONI ANN HOLLIFIELD 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, Erie County [Tracey A. Bannister, J.], entered April 18, 2011) to review a determination of respondent-petitioner New York State Division of Human Rights. The determination found that petitioner-respondent unlawfully discriminated against respondent LaRosa Carson on the basis of race and awarded her $50,000 for mental anguish and humiliation.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted, and petitioner-respondent is directed to pay respondent LaRosa Carson the sum of $50,000, together with interest at the rate of 9% per annum, commencing July 23, 2010.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1081

TP 11-00935

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

IN THE MATTER OF KARRI BECK-NICHOLS, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Frank A. Sedita, Jr., J.], entered July 8, 2010) to review a determination of respondents. The determination, among other things, terminated petitioner's employment with the School District of Niagara Falls.

It is hereby ORDERED that the determination so appealed from is unanimously annulled on the law without costs and the petition is granted.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating her employment as a production control manager with respondent School District of Niagara Falls (District) based on her failure to comply with the District's residency policy. Pursuant to that policy, District employees must be domiciliaries of the City of Niagara Falls. We conclude that the determination must be annulled and the petition granted.

We note at the outset that Supreme Court improperly transferred the proceeding to this Court. The transfer of a CPLR article 78 proceeding to the Appellate Division is permitted only when there is an issue whether a determination is "supported by substantial evidence" (CPLR 7803 [4]; *see* CPLR 7804 [g]). We have previously determined that the residency policy termination procedure at issue in this case "does not involve a substantial evidence issue requiring transfer to this Court" (*Matter of Krajkowski v Bianco*, 85 AD3d 1577,

1578; *see Matter of Gigliotti v Bianco*, 82 AD3d 1636, 1638). Nevertheless, we exercise our discretion to reach the merits of the petition "in the interest of judicial economy" (*Matter of Femia v Administrative Appeals Bd. of N.Y. State Dept. of Motor Vehs.*, 42 AD3d 951, 951).

As we set forth in *Krajkowski* (85 AD3d 1577) and *Gigliotti* (82 AD3d at 1637), it is well established that "domicile means living in [a] locality with intent to make it a fixed and permanent home" (*Matter of Newcomb*, 192 NY 238, 250). Further, "[a]n existing domicile . . . continues until a new one is acquired, and a party . . . alleging a change in domicile has the burden to prove the change by clear and convincing evidence" (*Matter of Hosley v Curry*, 85 NY2d 447, 451, *rearg denied* 85 NY2d 1033; *see Matter of Larkin v Herbert*, 185 AD2d 607, 608). "For a change to a new domicile to be effected, there must be a union of residence in fact and an 'absolute and fixed intention' to abandon the former and make the new locality a fixed and permanent home" (*Hosley*, 85 NY2d at 451, quoting *Newcomb*, 192 NY at 251).

Here, it is undisputed that petitioner was domiciled in Niagara Falls when she became a District employee in 1994. According to respondents, however, petitioner changed her domicile to Lewiston, New York at some point after she and her husband acquired property there in 2001. The evidence presented to respondent Niagara Falls Board of Education established that, at the time of the determination, petitioner owned properties in Niagara Falls and Lewiston. Although petitioner's husband and children lived full-time at the Lewiston home, petitioner averred that she lived at the Niagara Falls home. Respondents' surveillance indicated that petitioner split her time between Niagara Falls and Lewiston, spending the night at the Niagara Falls home on the majority of nights preceding her work days. Petitioner used her Niagara Falls address for her New York State driver's license and to register to vote, and she offered documentary proof that she pays utilities in her name at the Niagara Falls home and has a home equity line of credit on that home.

Although the surveillance established that petitioner owns multiple properties and has dual residency in Niagara Falls and Lewiston, it is well established that an individual may have dual residency without necessarily effecting a change in his or her domicile (*see Newcomb*, 192 NY at 250). In addition, petitioner was free to have a domicile different than that of her husband (*see generally* Domestic Relations Law § 61). We conclude that the evidence failed to establish that petitioner evinced "a present, definite and honest purpose to give up the old and take up the new place as [her] domicile" (*Newcomb*, 192 NY at 251; *see Hosley*, 85 NY2d at 452). Thus, respondents' determination that petitioner changed her domicile from Niagara Falls to Lewiston was arbitrary and capricious (*see Krajkowski*, 85 AD3d at 1578; *Gigliotti*, 82 AD3d at 1637-1638).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1082

TP 11-00936

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

IN THE MATTER OF ARTHUR BROWN, PETITIONER,

V ORDER

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

KAREN MURTAGH-MONKS, BUFFALO (DAVID BENTIVEGNA OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Diane Y. Devlin, J.], entered April 13, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1085

KA 11-01100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM G. WHYTE, DEFENDANT-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, SR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Craig J. Doran, J.), dated January 25, 2011. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). The Board of Examiners of Sex Offenders (Board) prepared a risk assessment instrument (RAI) that classified defendant as a level one risk. Following a hearing, however, County Court agreed with the People that additional points should be assessed under three risk factors, and thus defendant was presumptively classified as a level two risk. The court also noted that, in the event that it had not assessed the additional points, it "would [have found] that an upward departure [was] supported by the evidence."

Contrary to defendant's contention, the court "is not bound by the recommendation of the Board and, in the exercise of its discretion, may depart from that recommendation and determine the sex offender's risk level based upon the facts and circumstances that appear in the record" (*Matter of New York State Bd. of Examiners of Sex Offenders v Ransom*, 249 AD2d 891, 891-892). Defendant's further contention that the court erred in assessing additional points under risk factor five is not preserved for our review (*see generally People v Smith*, 17 AD3d 1045, *lv denied* 5 NY3d 705). We reject defendant's contention that the court erred in assessing points under the other two risk factors at issue. The court properly assessed points under risk factor three because "the record reveals that a second underage [child] was present during defendant's criminal conduct" (*People v Milton*, 55 AD3d 1073; *see also People v Ramirez*, 53 AD3d 990, *lv*

denied 11 NY3d 710). In addition, the court properly assessed points under risk factor four inasmuch as the female victim's grand jury testimony and admissions made by defendant, which were admitted in evidence at the hearing, were sufficient to establish that defendant engaged in a continuing course of sexual misconduct with that victim (*see People v Callan*, 62 AD3d 1218; *People v Rouff*, 49 AD3d 517, *lv denied* 10 NY3d 714).

We reject defendant's further contention that the court erred in failing to determine that he was entitled to a downward departure from the presumptive risk level, inasmuch as defendant failed to present clear and convincing evidence of special circumstances warranting a downward departure (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708; *People v McDaniel*, 27 AD3d 1158, *lv denied* 7 NY3d 703; *see generally People v Dexter*, 21 AD3d 403, *lv denied* 5 NY3d 716). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1086

KA 10-01394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN MONTANEZ, DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered January 28, 2008. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [2]). Contrary to defendant's contention, we conclude that he validly waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256). Although the further contention of defendant that his plea was not knowingly, intelligently or voluntarily entered survives his valid waiver of the right to appeal, "defendant failed to preserve that contention for our review because . . . he failed to move to withdraw the plea or to vacate the judgment of conviction" (*People v Connolly*, 70 AD3d 1510, 1511, *lv denied* 14 NY3d 886). In any event, defendant's contention lacks merit. During the plea colloquy, defendant denied having any mental or physical impairments, denied that his plea was induced by threats or promises and admitted that he engaged in conduct that constituted rape in the third degree pursuant to Penal Law § 130.25 (2). Based on the record of the plea colloquy, we conclude that defendant understood the nature and consequences of the plea and that it was knowingly, intelligently, and voluntarily entered (*see People v White*, 85 AD3d 1493; *People v Watkins*, 77 AD3d 1403, 1403-1404, *lv denied* 15 NY3d 956; *Connolly*, 70 AD3d at 1511).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1089

KA 10-00160

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERON BOSTIC, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered August 16, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 2006 conviction of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to CPL 440.46, the 2009 Drug Law Reform Act. The People correctly concede that Supreme Court erred in concluding that defendant is ineligible for resentencing on the ground that he had a prior conviction for an "exclusion offense" defined in CPL 440.46 (5) (a) (1). The court calculated the look-back period of 10 years set forth in that statute from the date that defendant committed the crime for which he was applying to be resentenced, rather than from the date of filing of the application for resentencing (*see People v Reeb*, 82 AD3d 1620; *People v Hill*, 82 AD3d 77, 79-80). We therefore reverse the order, and we remit the matter to Supreme Court to determine whether defendant's application was premature when filed and, if so, when the application will become ripe for adjudication. Upon remittal, the court must first ascertain the date on which defendant's prior violent felony offense occurred. The court must then ascertain the time period that defendant was incarcerated for that prior violent felony offense, which the court must exclude when calculating whether the prior violent felony offense took place within the 10-year period preceding the date on which the application for resentencing was filed (*see Reeb*, 82 AD3d 1620).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1090

KA 07-02483

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JONATHAN CAGE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 15, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1096

CA 11-00461

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

JEFFREY CIANCHETTI, DC, PLAINTIFF-RESPONDENT,

V ORDER

PHYLLIS BURGIO, DC, DEFENDANT-APPELLANT.

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

TISDALE & COYKENDALL, NIAGARA FALLS (THOMAS J. CASERTA, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered April 5, 2010 in a breach of contract action. The order, insofar as appealed from, denied the cross motion of defendant for summary judgment.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1097

CA 11-01013

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

IN THE MATTER OF THE ARBITRATION BETWEEN
BUFFALO POLICE BENEVOLENT ASSOCIATION,
PETITIONER-RESPONDENT, ORDER

AND

CITY OF BUFFALO, RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MATTHEW C. VAN VESSEM OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered September 27, 2010 in a proceeding pursuant to CPLR article 75. The order, inter alia, granted the petition to confirm the award of the arbitrator.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1101

CA 11-00317

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

BORTECH COMPANY, INC., PLAINTIFF-APPELLANT,

V ORDER

STEPHEN H. LABARGE, SUBURBAN PIPE LINE CO., INC., LABARGE BROTHERS CO., INC., LABARGE MID-ATLANTIC CORPORATION, THE KERITE COMPANY, AND SAFECO INSURANCE COMPANY OF AMERICA, DEFENDANTS-RESPONDENTS.

BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (ROBERT L. BRENNA, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS STEPHEN H. LABARGE, SUBURBAN PIPE LINE CO., INC., LABARGE BROTHERS CO., INC., AND LABARGE MID-ATLANTIC CORPORATION.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered April 20, 2010. The order, among other things, denied plaintiff's motion for 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.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1102

KA 09-01034

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WARREN P. PREVORSE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Stephen T. Miller, A.J.), rendered September 2, 2008. The judgment convicted defendant, upon his plea of guilty, of possessing a sexual performance by a child (two counts).

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1103

KA 08-02652

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MACKPASSION HUITT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered July 30, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and criminal possession of a weapon in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1104

KA 10-01040

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PATRICIA FLINT, ALSO KNOWN AS PATRICIA M. FLINT, ALSO KNOWN AS PATRICIA M. BRACAMONTE, ALSO KNOWN AS PATRICIA M. BRACAMONTE-FLINT, 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 March 23, 2010. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, as a class D felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1105

KA 10-01763

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ERIC GRAHAM, 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 23, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree (two counts).

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1106

KA 10-01413

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL A. NICOMETO, ALSO KNOWN AS MICHAEL NICOMETO, 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 February 16, 2010. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a misdemeanor, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1107

KA 10-00328

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW ALI, 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 (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 22, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]). At trial the sole issue was whether defendant's actions were justified pursuant to Penal Law § 35.20 (3), which permits a person in possession or control of a dwelling "who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling . . . [to] use deadly physical force upon such other person when he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary." Defendant contends that County Court's supplemental instruction concerning whether a vestibule and outdoor porch constituted parts of the dwelling was erroneous and confused the jury. Defendant, however, in fact requested a portion of the supplemental instruction, thereby waiving any objection thereto (*see generally People v Figgins*, 72 AD3d 1599, *lv denied* 15 NY3d 893), and he failed to object to the remainder of the instruction, thereby failing to preserve his contention for our review with respect to the remainder of the instruction (*see People v Swail*, 19 AD3d 1013, *lv denied* 6 NY3d 759, 853; *People v Pross*, 302 AD2d 895, 897, *lv denied* 99 NY2d 657). We decline to exercise our power to address defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant failed to preserve for our review his contention that the conviction is not based on legally sufficient evidence (*see People*

v Hawkins, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19) and, in any event, that contention lacks merit. As noted, in order to be justified in using deadly physical force against another person, defendant was required to believe that the person was committing or attempting to commit a burglary and that deadly physical force was necessary to prevent or terminate the burglary (*see* Penal Law § 35.20 [3]; *People v White*, 75 AD3d 109, 117, *lv denied* 15 NY3d 758). Even assuming, arguendo, that the person in fact entered the vestibule with the intent to commit a burglary, we note that defendant's own witness testified that the person had fled from the apartment at the time defendant began stabbing him. "Once [that person] fled from the apartment, defendant could not reasonably believe that force was necessary to prevent or terminate the commission of a burglary . . ., and the justification for the use of force ceased" (*People v Pine*, 82 AD3d 1498, 1501; *see White*, 75 AD3d at 117-118; *People v Lugo*, 291 AD2d 359, *lv denied* 98 NY2d 699). Also contrary to defendant's contention, viewing the evidence in light of the elements of the crime of assault as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that the prosecutor's reason for striking a particular juror was pretextual, having failed to raise before the trial court the specific claim he now raises on appeal (*see People v Jones*, 284 AD2d 46, 48, *affd* 99 NY2d 264; *People v Holloway*, 71 AD3d 1486, 1486-1487, *lv denied* 15 NY3d 774). We further conclude that defendant was not denied effective assistance of counsel based on his attorney's failure to preserve that *Batson* challenge for our review inasmuch as the prosecutor offered a legitimate race neutral reason for striking the prospective juror in question, and thus defendant's challenge would not have been successful (*see People v Cuthrell*, 284 AD2d 982, 982-983; *see also People v Ortiz*, 302 AD2d 257, *lv denied* 100 NY2d 541). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we reject defendant's further allegations of ineffective assistance of counsel and conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant further contends that he was denied a fair trial based on prosecutorial misconduct during the prosecutor's summation. Contrary to defendant's contention, however, "[t]he majority of the comments in question were within the broad bounds of rhetorical comment permissible during summations . . ., and they were either a fair response to defense counsel's summation or fair comment on the evidence . . . 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" (*People v McEathron*, 86 AD3d 915, 916 [internal quotation marks omitted]). Finally, the record establishes that, in sentencing defendant, the court took into account the mitigating factors presented by defendant,

and we conclude that the sentence is not unduly harsh or severe.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1108

KA 08-02633

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONNY P. BEATY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Francis A. Affronti, J.), rendered February 26, 2008. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, burglary in the first degree, assault in the second degree, petit larceny and 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, inter alia, rape in the first degree (Penal Law § 130.35 [1]) and burglary in the second degree (§ 140.25 [2]) stemming from two incidents involving two victims. Defendant contends that a police officer deliberately omitted a material fact from his affidavit supporting the search warrant leading to defendant's arrest for the crimes with respect to both incidents and that, based on the omission, there was no probable cause for the issuance of the warrant. In particular, defendant contends that the officer set forth in the supporting affidavit that the victim of the rape described a "puffy black coat" worn by the perpetrator and that the police obtained defendant's permission to seize a black coat in his home, which the officer described in his affidavit as "black with puffy black solid squares." Defendant contends that the officer failed to mention that the black jacket that was seized by the police officers did not match the description given by the rape victim. Supreme Court properly refused to suppress the evidence seized as a result of the search warrant inasmuch as the remaining information in the search warrant application, without regard to defendant's contention concerning the black jacket, provided probable cause to support the issuance of the search warrant (*see People v Leary*, 70 AD3d 1394, 1395, *lv denied* 14 NY3d 889; *People v Tordella*, 37 AD3d 500, *lv denied* 8 NY3d 991; *see also People v Plevy*, 52 NY2d 58, 66-67).

Defendant further contends that the photo array procedures were unduly suggestive because the witness, the neighbor of one of the victims, viewed two photo arrays on consecutive days, and of the photographs in each array only defendant's photograph appeared in both. We reject that contention. While "the inclusion of a single suspect's photograph in successive arrays is not a practice to be encouraged, it does not per se invalidate the identification procedures" (*People v Gilbert*, 295 AD2d 275, 276, *lv denied* 99 NY2d 558; *see People v Dickerson*, 66 AD3d 1371, 1372, *lv denied* 13 NY3d 859; *People v Dunlap*, 9 AD3d 434, 435, *lv denied* 3 NY3d 739). Here, "[t]he record establishes that different photographs of defendant were used . . . [and] the photographs of defendant appeared in a different location in each photo array" (*Dickerson*, 66 AD3d at 1372; *see Dunlap*, 9 AD3d at 435). Moreover, because defendant's hairstyle in the two photographs was significantly different, the fillers necessarily had to be different in accordance with the two hairstyles to avoid the risk that defendant would be singled out for identification because of his dissimilar appearance to the fillers in each of the respective photo arrays (*see generally People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833). Defendant's remaining contention regarding the photo array procedure is not preserved for our review inasmuch as he did not raise that specific contention in either his omnibus motion or at the *Wade* hearing (*see People v Bossett*, 45 AD3d 693, 694, *lv denied* 10 NY3d 860; *People v Miller*, 43 AD3d 1381, 1382, *lv denied* 9 NY3d 1036). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention that the court erred in denying his motion to sever the first four counts of the indictment that involved one victim and charged him with, inter alia, rape in the first degree, from the fifth count of the indictment charging him with burglary in the second degree with respect to the other victim. The offenses were joinable because the identity of defendant was at issue and his modus operandi was sufficiently unique to make proof of his commission of the crimes involving one victim probative of his commission of the crime involving the other victim (*see People v Davis*, 156 AD2d 969, *lv denied* 75 NY2d 867). Once the court exercised its discretion and properly joined the offenses under CPL 200.20 (2) (b), the court lacked statutory authority to sever them (*see People v Bongarzone*, 69 NY2d 892, 895; *People v Webb*, 60 AD3d 1291, 1293, *lv denied* 12 NY3d 930).

Defendant contends that the conviction of burglary in the second degree, the sole crime of which defendant was convicted with respect to one of the victims, is not supported by legally sufficient evidence because there was no evidence from which the jury could infer that he had the intent to commit a crime at the time of the unlawful entry. We reject that contention as well. "In burglary cases, the defendant's intent to commit a crime within the premises may be inferred beyond a reasonable doubt from the circumstances of the entry or attempted entry" (*People v Gates*, 170 AD2d 971, 971-972, *lv denied* 78 NY2d 922 [internal quotation marks omitted]). Here, defendant's intent may be inferred from his unexplained and unauthorized presence

at the home of the victim in question, and his ensuing actions, i.e., removing the dog from the victim's bed and lying down next to the victim in the bed, and running away from the individuals who pursued him after the victim ran from the house (*see People v Hunter*, 175 AD2d 615, *lv denied* 78 NY2d 1077; *Gates*, 170 AD2d at 972). Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Finally, defendant contends that the court erred in refusing to charge the jury with respect to one of the victims both that intoxication may negate the intent element of rape in the first degree and that attempted rape in the first degree is a lesser included offense of rape in the first degree. First, "[a]n intoxication charge is warranted if, viewing the evidence in the light most favorable to the defendant, 'there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis' " (*People v Sirico*, 17 NY3d 744, 745). "[B]are assertions by a defendant concerning his intoxication, standing alone, are insufficient" to warrant the charge (*id.*). Here, the only evidence in the record apart from defendant's statements to the police regarding his alleged intoxication on the night of the rape incident was the victim's testimony that she smelled alcohol on the perpetrator's breath. We thus conclude that defendant failed to establish his entitlement to the intoxication charge (*see People v Shaw*, 8 AD3d 1106, 1107, *lv denied* 3 NY3d 681). Second, defendant was not entitled to the lesser included charge of attempted rape because there is no "reasonable view of the evidence . . . that would support a finding that defendant committed the lesser included offense but not the greater" (*People v Heide*, 84 NY2d 943, 944; *see People v Kinnard*, 98 AD2d 845, 846-847, *affd* 62 NY2d 910).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1109

KA 08-01268

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALEEM K. ALI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 8, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, assault in the second degree, attempted robbery in the first degree, burglary in the second degree, and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of burglary in the second degree and dismissing count four of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the first degree (Penal Law § 140.30 [2]), assault in the second degree (§ 120.05 [6]), attempted robbery in the first degree (§§ 110.00, 160.15 [1]), and burglary in the second degree (§ 140.25 [2]). Contrary to defendant's contention, County Court properly refused to charge burglary in the second degree (§ 140.25 [2]) as a lesser included offense of burglary in the first degree (§ 140.30 [2]). "No reasonable view of the evidence supports a finding that defendant committed the lesser offense[] but not the greater" (*People v Lockett*, 1 AD3d 932, 933, *lv denied* 1 NY3d 630; *see generally People v Glover*, 57 NY2d 61, 63). As the People correctly concede, however, defendant's conviction under count four of the indictment, charging him with burglary in the second degree, must be reversed and that count dismissed because it is a lesser inclusory concurrent count of count one, charging defendant with burglary in the first degree, of which he was convicted (*see People v Coleman*, 82 AD3d 1593, 1595, *lv denied* 17 NY3d 793). We therefore modify the judgment accordingly.

We further conclude that there is no merit to defendant's

contention that his conviction of assault in the second degree (Penal Law § 120.05 [6]) should be reversed and that count dismissed pursuant to CPL 300.40 (3) (b) as a lesser inclusory concurrent count of burglary in the first degree (Penal Law § 140.30 [2]), of which he was convicted. The instant charge of assault requires evidence of the infliction of physical injury "in furtherance of" the commission of the underlying felony of burglary, and such evidence is not required for the burglary conviction. Thus, the assault was not a lesser included offense of the burglary (*see People v Curella*, 296 AD2d 578, 579). We note that our conclusion is consistent with the decision of the Court of Appeals in *People v Abrew* (95 NY2d 806). There, the defendant was convicted of assault in the first degree under Penal Law § 120.10 (4), which requires that the defendant or another participant cause serious physical injury to a person other than one of the participants "[i]n the course of and *in furtherance of* the commission or attempted commission of a felony or of immediate flight therefrom" (emphasis added). The defendant also was convicted of robbery in the first degree, which requires proof that a defendant or another participant in the crime cause serious physical injury to a nonparticipant "[i]n the course of the commission of the crime or of immediate flight therefrom," but does not require that the infliction of serious physical injury have been *in furtherance of* the commission of the robbery (§ 160.15 [1]; *see Abrew*, 95 NY2d at 808-809). The Court in *Abrew* thus determined that section 120.10 (4) was not an inclusory concurrent count of robbery in the first degree under Penal Law § 160.15 (1) (*id.*). To the extent that the prior decision of this Court in *People v Rodrigues* (74 AD3d 1818, *lv denied* 15 NY3d 809, *cert denied* ___ US ___, 131 S Ct 1505) suggests a rule to the contrary, we note that the decision in that case was based on an incorrect concession by the People and did not address the distinction drawn in *Abrew.* We thus conclude that *Rodrigues* and earlier cases decided without reference to *Abrew* should no longer be followed. Contrary to defendant's further contention, in the context of this case, assault in the second degree (§ 120.05 [6]) is not an inclusory concurrent count of attempted robbery in the first degree (§§ 110.00, 160.15 [1]).

Defendant failed to preserve for our review his contention that his conviction of attempted robbery in the first degree is not supported by legally sufficient evidence inasmuch as the People failed to establish the element of serious physical injury (*see People v Gray*, 86 NY2d 10, 19), and in any event that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Based on the evidence at trial, there is a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the jury, i.e., that defendant caused one of the victims of the attempted robbery to sustain a serious physical injury (*see People v Brown*, 67 AD3d 1427, 1428, *lv denied* 14 NY3d 839; *see generally Bleakley*, 69 NY2d at 495). Moreover, inasmuch as we have concluded that the evidence is legally sufficient to support the conviction of attempted robbery, there is no merit to defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to make a specific motion for a

trial order of dismissal with respect to that count (*see People v Washington*, 60 AD3d 1454, 1455, *lv denied* 12 NY3d 922).

Defendant failed to object to the alleged repugnancy of the verdict before the jury was discharged and thus failed to preserve for our review his further contention that the verdict is repugnant insofar as the jury found him guilty of attempted robbery in the first degree and acquitted him of assault in the first degree under Penal Law § 120.10 (4) (*see People v Alfaro*, 66 NY2d 985, 987; *People v Roman*, 85 AD3d 1630, 1630-1631, *lv denied* 17 NY3d 821). In any event, that contention lacks merit (*see generally People v Tucker*, 55 NY2d 1, 6-7, *rearg denied* 55 NY2d 1039), and we thus also "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" (*People v Henderson*, 78 AD3d 1506, 1507, *lv denied* 16 NY3d 743; *see Roman*, 85 AD3d at 1631). Finally, the sentence is not unduly harsh or severe.

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1112

CAF 10-01706

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

IN THE MATTER OF LESTARIYAH A.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DEMETRIOUS L., RESPONDENT-APPELLANT.

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

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (ROBIN UNWIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR LESTARIYAH A.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.), entered July 19, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting respondent's request for a hearing to determine whether he should be afforded post-termination contact with the child who is the subject of this proceeding, and the matter is remitted to Family Court, Monroe County, for that purpose and as modified the order is affirmed without costs.

Memorandum: Respondent father appeals from an order that, inter alia, revoked a suspended judgment and terminated his parental rights with respect to the child who is the subject of this proceeding. The father does not dispute that he violated the terms and conditions of the suspended judgment, but he contends that he should have been given a short extension to comply with the suspended judgment. Because the father "failed to demonstrate that 'exceptional circumstances' required extension of the suspended judgment" (*Matter of Demario J.*, 61 AD3d 1437, 1438, quoting Family Ct Act § 633 [b]; *see Matter of Lourdes O.*, 52 AD3d 203, 204), we conclude that Family Court did not abuse or improvidently exercise its discretion in refusing to extend the suspended judgment and in revoking it (*see Matter of Leala T.*, 55 AD3d 997, 998; *Matter of Brent H.*, 34 AD3d 1367, 1368, *lv denied* 8 NY3d 802; *Matter of Ricky Joseph V.*, 24 AD3d 683, 684).

We agree with the father, however, that the court should have granted his request for a hearing to determine whether post-

termination contact between the father and the child is in the best interests of the child (*see Matter of Selena C.*, 77 AD3d 659; *see e.g. Matter of Tumario B.*, 83 AD3d 1412, *lv denied* 17 NY3d 705; *Matter of Seth M.*, 66 AD3d 1448, 1449; *Matter of Thomas B.*, 35 AD3d 1289, *lv dismissed* 8 NY3d 936). We therefore modify the order accordingly, and we remit the matter to Family Court for that purpose.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1113

CAF 11-01011

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

IN THE MATTER OF DEMITRUS B.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (TIMOTHY M. LEXVOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), dated August 19, 2010 in a proceeding pursuant to Family Court Act article 3. The order, inter alia, adjudicated respondent to be a juvenile delinquent.

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

Memorandum: In appeal No. 1, respondent appeals from an order adjudicating him to be a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). In appeal No. 2, respondent appeals from an order of protection issued on August 19, 2010. We note at the outset that respondent's contention that the order of protection is invalid has been rendered moot inasmuch as the order has expired by its own terms (*see Matter of Kristine Z. v Anthony C.*, 43 AD3d 1284, *lv denied* 10 NY3d 705; *Matter of Muldrew v Mixon*, 237 AD2d 942). We therefore dismiss the appeal from the order in appeal No. 2. The remainder of our decision herein thus concerns only appeal No. 1.

Contrary to respondent's contention, Family Court properly refused to suppress the tangible evidence seized from respondent by police officers. Respondent's actions in meeting with two other individuals in a "chronic open air drug sale location" and immediately running into a store upon seeing the officers approaching provided the officers with an " 'articulable reason' " for their initial encounter with respondent (*People v Rodriguez*, 82 AD3d 1614, 1615, *lv denied* 17 NY3d 800, quoting *People v De Bour*, 40 NY2d 210, 213; *see People v Reyes*, 83 NY2d 945, 946, *cert denied* 513 US 991; *Matter of James R.*,

76 NY2d 825, 826). Immediately after the initial encounter, the officers observed a surveillance video that showed respondent in the store shoving a "clear plastic sandwich bag" down "the rear of his pants in between his buttocks." When the officers asked him what he shoved down his pants, respondent told them that he did not know what they were talking about. Based on the totality of the circumstances, including the officers' observations and their training and experience regarding the common methods of drug packaging, the officers had probable cause to search respondent, resulting in the seizure of the bags of crack cocaine and money that were in his possession (*see People v Alvarez*, 100 NY2d 549, 550; *People v Febus*, 11 AD3d 554, 556, *lv dismissed* 4 NY3d 743).

Respondent failed to preserve for our review his contention that the police improperly conducted a body cavity search without first obtaining a warrant to do so (*see generally People v Gonzalez*, 55 NY2d 887, 888; *People v Fuentes*, 52 AD3d 1297, 1298, *lv denied* 11 NY3d 736; *People v Ricks*, 49 AD3d 1265, 1266, *lv denied* 10 NY3d 869, 11 NY3d 740). In any event, that contention is without merit. After respondent refused the police officers' request to remove the plastic bag he had shoved down his pants, the officers pulled back respondent's pants and, without touching respondent or invading his anal cavity, retrieved a plastic bag protruding from his buttocks. Thus, the officers conducted a strip search rather than a body cavity search, for which a warrant would have been required in the absence of exigent circumstances (*see generally People v Hall*, 10 NY3d 303, 310-313, *cert denied* ___ US ___, 129 S Ct 159).

Respondent's contention that the testimony of a police officer regarding the surveillance video should have been precluded on the ground that petitioner was obligated to preserve the video is raised for the first time on appeal and is therefore not preserved for our review (*see* CPL 470.05 [2]). In any event, that contention is without merit because neither the police nor petitioner ever had possession or control of the video and thus petitioner had no obligation to preserve it (*see People v Acosta*, 74 AD3d 1213, 1214, *lv denied* 15 NY3d 849; *People v Charlton*, 69 AD3d 647, *lv denied* 14 NY3d 799; *see generally People v James*, 93 NY2d 620, 644).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1114

CAF 11-01015

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

IN THE MATTER OF DEMITRUS B.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (TIMOTHY M. LEXVOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), dated August 19, 2010 in a proceeding pursuant to Family Court Act article 3. The order granted an order of protection.

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

Same Memorandum as in *Matter of Demitrus B.* ([appeal No. 1] ___ AD3d ___ [Nov. 10, 2011]).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1115

CAF 11-01095

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

IN THE MATTER OF ANDREA F.P.,
RESPONDENT-APPELLANT.
---------- ORDER
MONROE COUNTY ATTORNEY, PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (TIMOTHY M. LEXVOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered November 4, 2010 in a proceeding pursuant to Family Court Act article 7. The order, among other things, adjudged that respondent is a person in need of supervision.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1116

CAF 10-01972

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

IN THE MATTER OF ROYFIK B.

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

SAMARIAN B., RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

GARY LEE BENNETT, LYONS, FOR PETITIONER-RESPONDENT.

TRACEY L. FOX, ATTORNEY FOR THE CHILD, SODUS, FOR ROYFIK B.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered August 20, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her son based on mental illness. Contrary to the mother's contention, we conclude that petitioner met its burden of establishing by clear and convincing evidence that she is "presently and for the foreseeable future unable, by reason of mental illness . . ., to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see Matter of Sean S.*, 79 AD3d 1760, *lv denied* 16 NY3d 709). Indeed, the testimony and reports of petitioner's experts, as well as the testimony of a caseworker who supervised the mother's visitation with the child, established that the mother is presently suffering from a mental illness that "is manifested by a disorder or disturbance in behavior, thinking or judgment to such an extent that if such child were placed in . . . the custody of [the mother], the child would be in danger of becoming a neglected child" (§ 384-b [6] [a]; *see Matter of Kahlil S.*, 35 AD3d 1164, 1165, *lv dismissed* 8 NY3d 977). Although a social worker who provided day treatment for the mother testified that the mother had made progress in treatment, she expressed no opinion with respect to the mother's ability to parent.

Finally, the mother's contention that petitioner failed to establish that termination of her parental rights was warranted on the

ground of mental retardation is not properly before us inasmuch as the order on appeal was based only on mental illness, not mental retardation (*see generally Matter of Genesis S.*, 70 AD3d 570).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1118

CA 11-01104

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

KATHLEEN T. D'ANGELO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN D. D'ANGELO, DEFENDANT-RESPONDENT.

GRANDMAR ASSOCIATES, LP, JOHNFRAN ASSOCIATES, LP, NICHOLAS D'ANGELO AND JOSEPHINE D'ANGELO, NONPARTY RESPONDENTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (F. MICHAEL OSTRANDER OF COUNSEL), FOR NONPARTY RESPONDENTS-APPELLANTS.

THE LEGAL AID SOCIETY OF ROCHESTER, ROCHESTER (VIVIAN M. AQUILINA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Joanne M. Winslow, J.), entered October 29, 2010 in a divorce action. The order, among other things, compelled nonparty respondents GrandMar Associates, LP, JohnFran Associates, LP, Nicholas D'Angelo and Josephine D'Angelo to submit to third-party discovery by answering certain interrogatories.

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

Memorandum: In this matrimonial action, plaintiff moved for an order directing nonparty respondents to answer interrogatories pursuant to CPLR 3130 (2). Defendant and nonparty respondents opposed the motion, contending that the information sought in the interrogatories was "irrelevant to the underlying matrimonial action" inasmuch as defendant's sole involvement in the limited partnerships that are the subject of the interrogatories was as custodian for the interests held by the parties' six children. Supreme Court granted the motion, concluding that the information sought was limited in scope and that child support would be directly affected by any tax liability of the children or any assets held by them. We affirm.

Contrary to the contention of nonparty respondents, the court's interpretation of CPLR 3130 (2) is not subject to de novo review inasmuch as the issue whether the court properly granted the relief sought by plaintiff does not involve "a question 'of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent' " (*Weingarten v Board of Trustees of N.Y. City*

Teachers' Retirement Sys., 98 NY2d 575, 580). Rather, the issue is whether plaintiff established that the information sought in the interrogatories "concern[ed] a party, and . . . [was] both reasonable and necessary in the prosecution or the defense of such matrimonial action" (CPLR 3130 [2]). Our scope of review is thus to determine whether the court abused its discretion in granting the motion (*see Moro v Moro*, 124 AD2d 792, 793; *see also Kaye v Kaye*, 102 AD2d 682, 690).

Under the circumstances of this case, we conclude that there was no abuse of discretion. The information sought in the interrogatories concerned defendant, in his role as custodian of the children's interests in certain limited partnerships, and the information was both reasonable and necessary in plaintiff's prosecution of the matrimonial action. Nonparty respondents contend for the first time in their reply brief that plaintiff could have obtained the information directly from defendant pursuant to EPTL 7-6.12 (e) and thus that contention is not properly before us (*see Ponzi v Ponzi*, 45 AD3d 1327, 1328; *Turner v Canale*, 15 AD3d 960, *lv denied* 5 NY3d 702).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1121

CA 11-00585

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

JOSHUA BROWNELL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BLUE SEAL FEEDS, INC., DOING BUSINESS AS
BLUE SEAL FEEDS MILLS AND BLUE SEAL FEEDS RETAIL
STORE, JOSEPH J. BENNETT, DEBRA KAY BENNETT
AND HERTEL STEEL, INC., DEFENDANTS-RESPONDENTS.

THE ROTHSCHILD LAW FIRM, P.C., EAST SYRACUSE (MARTIN J. ROTHSCHILD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR DEFENDANT-RESPONDENT HERTEL STEEL, INC.

SUGARMAN LAW FIRM, LLP, SYRACUSE (TIMOTHY J. PERRY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JOSEPH J. BENNETT AND DEBRA KAY BENNETT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered November 24, 2010 in a personal injury action. The order granted defendants' motions for summary judgment dismissing the second amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendant Hertel Steel, Inc. for summary judgment dismissing the common-law negligence claim against it in the first cause of action and the fourth cause of action and reinstating that claim against defendant Hertel Steel, Inc. and that cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working at premises owned by defendants Joseph J. Bennett and Debra Kay Bennett (Bennett defendants) and leased to defendants Blue Seal Feeds, Inc., doing business as Blue Seal Feeds Mills and Blue Seal Feeds Retail Store. The Bennett defendants contracted with plaintiff's employer to construct an addition on the premises, and plaintiff's employer contracted with defendant Hertel Steel, Inc. (Hertel Steel) to supply steel rebar for the project. On the date of the accident, Hertel Steel delivered steel rebar to the premises on a flatbed truck. According to plaintiff, he climbed onto a four-foot pile of rebar stacked on the truck in order to ascertain the best method for unloading the rebar. As plaintiff was in the process of

swinging his right leg over the top of the pile, the pile "shifted" or "snapped," striking his left foot. The momentum of the shifting rebar "threw [plaintiff] off the truck" and onto the ground. The Bennett defendants moved for summary judgment dismissing the second amended complaint against them, and Hertel Steel moved for summary judgment dismissing the second amended complaint and all cross claims against it. Plaintiff contends on appeal that Supreme Court erred in granting the motion of the Bennett defendants as well as that part of the motion of Hertel Steel with respect to the second amended complaint.

Addressing first the motion of the Bennett defendants, we conclude that the court properly granted that part of their motion for summary judgment dismissing the Labor Law § 240 (1) cause of action against them inasmuch as "[p]laintiff's fall . . . was not an elevation-related risk that calls for any of the protective devices of the types listed in Labor Law § 240 (1)" (*Lessard v Niagara Mohawk Power Corp.*, 277 AD2d 941, 941; *see generally Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267). It is well established that "the surface of a flatbed truck does not constitute an elevated work surface for purposes of Labor Law § 240 (1)" (*Plump v Wyoming County*, 298 AD2d 886, 886; *see Toefer v Long Is. R.R.*, 4 NY3d 399, 405; *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 712-713, *lv denied* 10 NY3d 701). Contrary to plaintiff's contention, the fact that he allegedly fell while he was "standing on [a pile of rebar] rather than standing on the bed of the truck does not move this case from one involving the ordinary dangers of a construction site to one involving the special risks protected by Labor Law § 240 (1)" (*Berg v Albany Ladder Co.*, 40 AD3d 1282, 1284-1285, *affd* 10 NY3d 902). Likewise without merit is plaintiff's alternative contention that section 240 (1) applies because the accident was caused by the force of gravity acting upon a falling object, i.e., the rebar pile. Plaintiff was not struck by a falling object; rather, plaintiff's own deposition testimony establishes that the bundle or piece of rebar that struck his leg swung outward in a horizontal direction (*see Toefer*, 4 NY3d at 408; *see also Medina v City of New York*, 87 AD3d 907). In any event, the rebar bundle did not fall "while being hoisted or secured," and thus Labor Law § 240 (1) does not apply for that reason as well (*Narducci*, 96 NY2d at 268; *cf. Mentesana v Bernard Janowitz Constr. Corp.*, 44 AD3d 721, 721-722).

We further conclude that the court properly granted that part of the motion of the Bennett defendants with respect to the Labor Law § 241 (6) cause of action against them inasmuch as the specific Industrial Code section upon which plaintiff relies on appeal does not apply to the facts of this case. 12 NYCRR 23-1.7 (f), entitled "[v]ertical passage," provides that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." The stack of rebar is not a "working level above ground requiring a stairway, ramp, or runway under that section" (*Lavore*, 40 AD3d at 713; *see Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 1169; *Farrell v Blue Circle Cement, Inc.*, 13 AD3d

1178, 1179-1180, *lv denied* 4 NY3d 708). Plaintiff on appeal has abandoned any contention with respect to the remaining alleged violations of the Industrial Code sections set forth in his second amended complaint and plaintiff's bill of particulars in response to the Bennett defendants' demand therefor, and we therefore do not address them (*see McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1583; *Ciesinski v Town of Aurora*, 202 AD2d 984). Plaintiff also has abandoned any contentions with respect to the first cause of action against the Bennett defendants, for common-law negligence and the violation of Labor Law § 200.

With respect to the motion of Hertel Steel, we further conclude that the court properly granted those parts of its motion with respect to the Labor Law causes of action against it. By the express terms of Labor Law § 240 (1) and § 241 (6), the nondelegable duties imposed by those statutes apply only to "contractors and owners and their agents." Similarly, Labor Law § 200 is a codification of "landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505). Here, "[i]n the absence of any evidence that [Hertel], which was responsible for [fabricat]ing and delivering [rebar] to the construction site, exercised any authority or control over the work site or the work giving rise to the plaintiff's injuries, the . . . [c]ourt properly concluded that [Hertel] was not a statutory agent of either an owner or general contractor" (*Brooks v Harris Structural Steel*, 242 AD2d 653).

We agree with plaintiff, however, that the court erred in granting that part of Hertel Steel's motion for summary judgment dismissing the common-law negligence claim in the first cause of action against Hertel Steel, as well as the fourth cause of action, for common-law negligence, which was asserted solely against it. We therefore modify the order accordingly. Hertel Steel's own submissions in support of its motion raise issues of fact whether its employees were negligent in the bundling, loading or securing of the rebar, and whether such negligence was a proximate cause of plaintiff's injuries (*see Farrington v Bovis Lend Lease LMB, Inc.*, 51 AD3d 624, 626; *Kelarakos v Massapequa Water Dist.*, 38 AD3d 717, 719).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1125

KA 10-01928

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHAWN M. MUNT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered September 3, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree and criminal contempt in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1126

KA 10-01041

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES S. NOTTINGHAM, SR., ALSO KNOWN AS JAMES S. NOTTINGHAM, ALSO KNOWN AS JAMES NOTTINGHAM, SR., ALSO KNOWN AS JAMES NOTTINGHAM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 7, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree, driving while intoxicated, as a misdemeanor and aggravated unlicensed operation of a motor vehicle in the third degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1127

KA 08-02213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WALTER R. FEATHERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered July 31, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1128

KA 11-01009

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS I. APONTE, DEFENDANT-APPELLANT.

O'CONNOR & KRUMAN, P.C., CORTLAND (A.L. BETH O'CONNOR 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 June 13, 2008. The judgment convicted defendant, after a nonjury trial, of criminal sexual act in the first degree, sexual abuse in the first degree, sexual abuse in the third degree, and criminal sexual act in the third degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing that part convicting defendant of sexual abuse in the first degree and dismissing the second count of the indictment, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him after a nonjury trial of, inter alia, sexual abuse in the first degree (Penal Law § 130.65 [1]), defendant contends that the conviction is not supported by legally sufficient evidence. Although defendant failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19), we exercise our power to review that contention with respect to the conviction of sexual abuse in the first degree as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We agree with defendant that the conviction of that crime is not supported by legally sufficient evidence with respect to the element of forcible compulsion (*see* Penal Law § 130.65 [1]). The victim's testimony that defendant would sometimes threaten that he was "going to ground [her] or . . . hit [her] if [she did not] open the door" was insufficient to establish that defendant "place[d the victim] in fear of immediate death or physical injury" on the specific occasion in question (§ 130.00 [8] [b]). We therefore modify the judgment by reversing that part convicting defendant of sexual abuse in the first degree and dismissing the second count of the indictment.

Viewing the evidence in light of the elements of the remaining

crimes of which defendant was convicted in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those crimes 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 indictment failed to indicate specifically when the crimes charged therein allegedly occurred (*see People v Halpin*, 261 AD2d 647, 647, *lv denied* 93 NY2d 971), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1129

KA 07-02083

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAREEM DOWDELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 25, 2007. The judgment convicted defendant, upon a jury verdict, of conspiracy in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of conspiracy in the second degree (Penal Law § 105.15). Defendant contends that the conviction is not supported by legally sufficient evidence inasmuch as the evidence merely established that he purchased cocaine and the co-conspirator's testimony was not sufficiently corroborated. That contention is not preserved for our review because defendant did not move for a trial order of dismissal on those grounds (*see People v Carncross*, 14 NY3d 319, 324-325; *People v Gray*, 86 NY2d 10, 19). Defendant's contention also was not preserved for our review by his pretrial motion to dismiss the indictment on the ground that the evidence presented to the grand jury was legally insufficient to establish a conspiracy (*see generally People v Napolitano*, 282 AD2d 49, 52, *lv denied* 96 NY2d 866), nor was it preserved for our review by his post-trial pro se motion to set aside the verdict (*see generally People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678).

In any event, we conclude that the conviction is supported by legally sufficient evidence. Although we agree with defendant that the crime of conspiracy requires an agreement to commit "some other[] substantive crime" (*People v Schwimmer*, 66 AD2d 91, 94, *affd* 47 NY2d 1004), the jury may find him guilty of conspiracy based on an agreement to purchase or possess illegal drugs (*see People v Moses*, 291 AD2d 814; *People v Gray* [appeal No. 2], 284 AD2d 1012, *lv denied* 97 NY2d 682). 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 that could lead a rational person to the conclusion that defendant conspired with one or more people to possess four ounces or more of cocaine and that the co-conspirator's testimony was sufficiently corroborated (*see generally People v Reome*, 15 NY3d 188, 191-192; *People v Bleakley*, 69 NY2d 490, 495).

Defendant's contention that he was unduly prejudiced by the theory of the prosecution is not preserved for our review (*see generally People v Iannone*, 45 NY2d 589, 600-601), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1130

KA 10-00715

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESIREE R. BAKER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (KRISTI M. AHLSTROM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 22, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Viewing the evidence in light of the elements of the crime of robbery in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to that count is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to the further contention of defendant, we conclude that County Court properly denied her challenge for cause to a prospective juror. "It is well settled that 'a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that he or she can be fair and impartial' " (*People v Odum*, 67 AD3d 1465, 1465, *lv denied* 14 NY3d 804, 15 NY3d 755, *cert denied* ___ US ___, 131 S Ct 326, quoting *People v Chambers*, 97 NY2d 417, 419; *see also People v Semper*, 276 AD2d 263, *lv denied* 96 NY2d 738). Even assuming, arguendo, that "the initial statements of the prospective juror raised a serious doubt regarding his ability to be impartial, we conclude that the prospective juror ultimately stated unequivocally that he could be fair" (*People v Brown*, 26 AD3d 885, 886, *lv denied* 6

NY3d 846; *see Chambers*, 97 NY2d at 419).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1133

KA 10-01468

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMON SESSION, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 20, 2010. The judgment convicted defendant, upon a nonjury verdict, of burglary in the second degree, petit larceny and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, County Court properly refused to suppress certain statements that defendant made to the police after he was given *Miranda* warnings (*see generally People v Madison*, 71 AD3d 1422, 1423, *lv denied* 15 NY3d 753; *People v Glover*, 195 AD2d 999, *lv denied* 82 NY2d 849). Defendant failed to preserve for our review his further contention that the conviction of burglary in the second degree is not supported by legally sufficient evidence inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495), and we therefore reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to make a motion for a trial order of dismissal specifically directed at the error raised on appeal (*see People v Caban*, 5 NY3d 143, 152; *People v Johnson*, 81 AD3d 1428, *lv denied* 16 NY3d 896). Finally, viewing the evidence in light of the elements of the crime of burglary in the second degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 348-349), we reject defendant's contention that the verdict with respect to that count is against the weight of the

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1134

CAF 10-02107

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

IN THE MATTER OF NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF MEGHAN J. HUEBER, FORMERLY KNOWN AS MEGHAN J. DOXEY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROGER L. HUEBER, RESPONDENT-APPELLANT. (APPEAL NO. 1.)

ROGER L. HUEBER, RESPONDENT-APPELLANT PRO SE.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered September 22, 2010 in a proceeding pursuant to Family Court Act article 4. The order, among other things, denied in part respondent's written objections to an order of support issued by the Support Magistrate.

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 father appeals from an order denying in part his objections to the order of the Support Magistrate that, inter alia, imputed income to him based on the minimum wage for a period of over three years and ordered that he pay child support arrears for that period in the amount of $1,870.68. It is undisputed that the father was incarcerated for all but the last 4½ months of that time period.

Contrary to the father's contention, the Support Magistrate did not abuse her discretion by imputing income to the father for the period during which he was incarcerated for the purpose of calculating his child support obligation. To the extent that the father's financial hardship is the result of his own wrongful conduct, he is not entitled to a reduction of his obligation to pay child support (*see Matter of Grettler v Grettler*, 12 AD3d 602; *Matter of Winn v Baker*, 2 AD3d 1169; *see generally Matter of Knights v Knights*, 71 NY2d 865, 866-867). The father's further contention that the child support arrears should be reduced to $500 because his income was below the federal poverty income guidelines is not preserved for our review inasmuch as it is raised for the first time on appeal (*see generally Matter of Erie County Dept. of Social Servs. v Shaw*, 81 AD3d 1328; *Matter of White v Knapp*, 66 AD3d 1358). In any event, that contention is without merit because the father's income for the purpose of

calculating his child support obligation includes imputed income (*see* Family Ct Act § 413 [1] [b] [5] [iv], [v]), and thus the father's income is above the federal poverty income guidelines (*see generally* § 413 [1] [g]; *Matter of Julianska v Majewski*, 78 AD3d 1182).

The father's contention that Family Court exceeded its authority by imposing a schedule for the payment of child support arrears is also raised for the first time on appeal and thus is not preserved for our review (*see generally Shaw*, 81 AD3d 1328; *White*, 66 AD3d 1358). In any event, that contention is without merit because neither the order of the Support Magistrate nor that of the court imposed a schedule for the repayment of arrears. The father further contends that the child support arrears should be reduced by $300 because the child's custodian did not receive public assistance for a six-month period during the relevant time frame. We reject that contention. "The greatest deference should be given to the decision of the [Support Magistrate,] who is in the best position to assess the credibility of the witnesses and the evidence proffered" (*Matter of Manocchio v Manocchio*, 16 AD3d 1126, 1128 [internal quotation marks omitted]), and the evidence in the record supports the Support Magistrate's conclusion that the child received public assistance for the entire time period in question.

Contrary to the father's contention, "he did not provide competent medical evidence of [a] disability or establish that [an] alleged disability rendered him unable to work" (*Matter of Gray v Gray*, 52 AD3d 1287, 1288, *lv denied* 11 NY3d 706). Indeed, "[t]he Support Magistrate was not obliged to accept the father's unsupported testimony that a medical condition prevented him from working" (*Matter of Michelle F.F. v Edward J.F.*, 50 AD3d 348, 349, *lv denied* 11 NY3d 708). The father's further contention that a local ordinance limiting the locations where registered sex offenders may be employed has prevented him from finding employment was not raised in his written objections to the Support Magistrate's order and thus is not preserved for our review (*see White*, 66 AD3d 1358).

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1135

CAF 10-02013

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

IN THE MATTER OF LYDIA C.

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

ALBERT C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH (MICHELLE A. COOKE OF COUNSEL), FOR PETITIONER-RESPONDENT.

BONITA STUBBLEFIELD, ATTORNEY FOR THE CHILD, PIFFARD, FOR LYDIA C.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered September 13, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused the subject child.

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

Memorandum: In appeal No. 1, respondent father appeals from an order determining, following a fact-finding hearing, that he sexually abused the child who is the subject of these proceedings. In appeal No. 2, the father appeals from an order granting petitioner mother sole custody of the child and suspending his visitation with the child. Contrary to the contention of the father in appeal No. 1, Family Court properly denied his motion to dismiss the abuse petition inasmuch as the out-of-court statements of the child were sufficiently corroborated by other evidence tending to support their reliability (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118, *rearg denied* 71 NY2d 890; *Matter of Nicholas J.R.*, 83 AD3d 1490, *lv denied* 17 NY3d 708; *Matter of Colberdee C.*, 2 AD3d 1316). Family Court has " 'considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse' " (*Nicholas J.R.*, 83 AD3d 1490; *see Colberdee C.*, 2 AD3d 1316).

Here, the out-of-court statements of the child were sufficiently corroborated by the testimony of her therapists, who both opined that the child's behavior following the alleged abuse was consistent with a

child who has been sexually abused (*see Matter of Breanna R.*, 61 AD3d 1338, 1340; *Matter of Yorimar K.-M.*, 309 AD2d 1148; *cf. Matter of Kalifa K.*, 37 AD3d 1180). Both of the child's therapists also opined that her out-of-court statements were credible (*see Nicholas J.R.*, 83 AD3d 1490; *Yorimar K.-M.*, 309 AD2d 1148; *Matter of Victoria KK.*, 233 AD2d 801, 803), and those out-of-court statements were " 'consisten[t] . . . [in] describing [the] sexual conduct' " (*Yorimar K.-M.*, 309 AD2d at 1149; *see Nicholas J.R.*, 83 AD3d 1490). Further, the child's out-of-court statements were corroborated by the unsworn testimony that she gave on cross-examination at the fact-finding hearing (*see Matter of Christina F.*, 74 NY2d 532, 535-537; *Matter of Telsa Z.*, 71 AD3d 1246, 1249-1250; *Matter of Elizabeth D.*, 139 AD2d 66, 67-70, *appeal dismissed* 73 NY2d 871).

The father further contends that the abuse petition should have been dismissed because the evidence was insufficient to identify him as the perpetrator of the alleged abuse. That contention, however, is not preserved for our review inasmuch as the father failed to move to dismiss the petition on that ground (*see Matter of Syira W.*, 78 AD3d 1552). In any event, we conclude that Family Court's finding of sexual abuse is supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Nicholas J.R.*, 83 AD3d at 1490; *see generally Matter of Tammie Z.*, 66 NY2d 1, 3).

The father contends that the court erred in allowing petitioner to present validation testimony, i.e., the testimony of the child's therapists, because those therapists were not identified as potential witnesses in the abuse petition. That contention, however, is not preserved for our review (*see generally Matter of Brayanna G.*, 66 AD3d 1375, *lv denied* 13 NY3d 714) and, inasmuch as the abuse petition was not included in the record on appeal, that contention is not properly before us (*see generally Matter of Jennifer O.*, 281 AD2d 937, *lv dismissed in part and denied in part* 98 NY2d 666). In any event, the father's contention is without merit. Family Court Act § 1031 (a) does not require petitioner to list all potential witnesses but, rather, it requires petitioner to allege only those "facts sufficient to establish that a child is an abused . . . child" (*see Matter of Roman*, 94 Misc 2d 796, 798; *cf.* CPLR 3101 [d] [1] [i]; Family Ct Act § 1038 [d]). We have reviewed the father's remaining contentions in appeal No. 1 and conclude that none warrants reversal of the order.

We reject the father's contention in appeal No. 2 that the court erred in suspending his visitation with the child. " 'Visitation decisions are generally left to Family Court's sound discretion, requiring reversal only where the decision lacks a sound and substantial basis in the record' " (*Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451, *lv denied* 17 NY3d 701; *see Fox v Fox*, 177 AD2d 209, 211-212). Here, the court determined that the father sexually abused the child (*see e.g. Matter of Kimberly CC. v Gerry CC.*, 86 AD3d 728, 729; *Matter of Kole HH.*, 84 AD3d 1518, 1519-1520), and the father refused to proceed with recommended sex offender treatment and mental health counseling (*see Matter of Telsa Z.*, 84 AD3d 1599, 1601-1602). Further, one of the child's therapists opined

that any visitation between the father and the child would be detrimental to the mental health of the child, and the child testified during the fact-finding hearing that she does not want to see the father or return to his home (*see Veronica S. v Philip R.S.*, 70 AD3d 1459, 1460; *Matter of Jeffrey L.J. v Rachel K.B.*, 42 AD3d 912, 913-914; *see generally Fox*, 177 AD2d at 210).

Contrary to the father's further contention, the court did not abuse its discretion in failing to order a child protective investigation of the mother's home pursuant to Family Court Act § 1034 (1) (b). Here, there was no indication in the petition or during the proceedings that the child was abused, neglected or mistreated in the mother's home (*see Matter of Corrigan v Orosco*, 84 AD3d 955).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1136

CAF 10-02014

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

IN THE MATTER OF MICHELLE M.L.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT A.C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR RESPONDENT-APPELLANT.

BONITA J. STUBBLEFIELD, ATTORNEY FOR THE CHILD, PIFFARD, FOR LYDIA C.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered September 13, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Same Memorandum as in *Matter of Lydia C.* (___ AD3d ___ [Nov. 10, 2011]).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1137

CAF 10-00967

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

IN THE MATTER OF NYASIA W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTINE W., RESPONDENT-APPELLANT.

IN THE MATTER OF ARIEL C.W.-H.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

CHRISTINE W., RESPONDENT-APPELLANT,
AND DAVID H., RESPONDENT.
(APPEAL NO. 1.)

EFTIHIA BOURTIS, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (PATRICIA WOEHRLEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR NYASIA W. AND ARIEL C.W.-H.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered March 22, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, required respondent Christine W. to comply with the conditions specified in the orders of protection.

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

Same Memorandum as in *Matter of Ariel C.W.-H.* (___ AD3d ___ [Nov. 10, 2011]).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1138.1

CAF 11-02108

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

IN THE MATTER OF NYASIA W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTINE W., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

EFTIHIA BOURTIS, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (PATRICIA WOEHRLEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR NYASIA W.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered October 12, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child.

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

Same Memorandum as in *Matter of Ariel C.W.-H.* (___ AD3d ___ [Nov. 10, 2011]).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1138

CAF 10-01397

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

IN THE MATTER OF ARIEL C.W.-H.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTINE W., RESPONDENT-APPELLANT,
AND DAVID H., RESPONDENT.
(APPEAL NO. 2.)

EFTIHIA BOURTIS, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (PATRICIA WOEHRLEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR ARIEL C.W.-H.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered October 12, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child.

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

Memorandum: These consolidated appeals arise from combined child protective proceedings pursuant to Family Court Act article 10. In appeal No. 1, respondent mother appeals from an order that modified prior orders of protection to include one of petitioner's caseworkers as a protected party. The order in appeal No. 1 was superseded by the orders of fact-finding and disposition with respect to each of the mother's two youngest children that were entered after the mother filed the notice of appeal. Those orders incorporated orders of protection concerning representatives of petitioner. We therefore conclude that appeal No. 1 must be dismissed (*see generally Matter of Giovanni K.*, 62 AD3d 1242, 1242, *lv denied* 12 NY3d 715). In appeal No. 2, the mother appeals from a decision adjudicating her two youngest children to be neglected. Although no appeal lies from a mere decision (*see Kuhn v Kuhn*, 129 AD2d 967), we exercise our discretion to treat the notice of appeal as valid and deem the appeal from the decision as two appeals taken from the orders of fact-finding and disposition with respect to each child (*see generally* CPLR 5520 [c]; *Matter of Morgan P.*, 60 AD3d 1362).

The mother failed to preserve for our review her contention that

Family Court lacked the authority to impose an order of protection in favor of petitioner's representatives (*see generally Matter of Pauline E. v Renelder P.*, 37 AD3d 1145, 1146; *Matter of Barker v Dorman*, 292 AD2d 806), and we decline to address that contention in the interest of justice. Contrary to the mother's further contention, the court properly granted petitioner's motion to conform the pleadings to the proof. The court has the discretion to "amend the allegations to conform to the proof" (Family Ct Act § 1051 [b]), and it is an abuse of discretion to withhold permission for such an amendment " 'unless the opposing party can allege demonstrable and real surprise or prejudice' " (*Matter of Simonds v Kirkland*, 67 AD3d 1481, 1483). Here, the mother conceded that her objection to petitioner's motion to conform the pleadings to the proof was not based upon surprise, and the record establishes that she did not suffer any demonstrable prejudice when the court conformed the pleadings to the proof and considered evidence concerning events that occurred subsequent to the filing of the neglect petitions.

We reject the mother's contention that petitioner failed to establish that she neglected the subject children. The mother's neglect of those children may be established by evidence that she previously neglected another child, coupled with "evidence that [she] failed to address the mental health issues that led to [the prior] neglect determination[]" (*Matter of Sasha M.*, 43 AD3d 1401, 1402; *see* Family Ct Act § 1046 [a] [i]; *Matter of Krystal J.*, 267 AD2d 1097). In this case, the mother's parental rights were terminated with respect to one of her older children on the ground of mental illness during the neglect proceedings concerning the subject children. These neglect proceedings were also based on a theory that the mother was unable to care for the subject children because of her untreated mental illness. Inasmuch as the record contains evidence indicating that the mother continued to experience mental health problems related to her schizophrenia and had been hospitalized twice for mental health-related issues after her parental rights with respect to the older child were terminated, we conclude that the court's neglect determination with respect to the subject children is supported by the requisite preponderance of the evidence (*see* § 1046 [b] [i]; *see generally Sasha M.*, 43 AD3d at 1402; *Krystal J.*, 267 AD2d 1097).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1139

CAF 10-01804

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

IN THE MATTER OF EMMA H. AND JADEN H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

KEITH H., RESPONDENT-RESPONDENT.

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

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

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

JEFFREY A. LAZROE, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered July 22, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, dismissed the petition to terminate the parental rights of respondent Keith H.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1140

CAF 10-01607

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

IN THE MATTER OF ANDREW D. AYEN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KIMBERLY S. SAIN AND CHRISTINA MCCONNELL,
RESPONDENTS-RESPONDENTS.

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

PALOMA A. CAPANNA, PENFIELD, FOR RESPONDENT-RESPONDENT CHRISTINA MCCONNELL.

KIMBERLY A. WOOD, ATTORNEY FOR THE CHILD, WATERTOWN, FOR MELERINA M.M.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered July 13, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied and dismissed the petition.

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 6, petitioner father appeals from an order dismissing his petition seeking visitation with his daughter at the facility where he is incarcerated. Although we note at the outset that the notice of appeal recites an incorrect entry date for the order contained in the record and from which the father purports to appeal, we nevertheless exercise our discretion to treat the notice of appeal as valid inasmuch as all of the father's contentions on appeal concern the order contained in the record (*see Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451, *lv denied* 17 NY3d 701; *see generally* CPLR 5520 [c]). The father failed to preserve for our review his contention that he was deprived of a fair hearing based on judicial misconduct (*see generally Matter of Dove v Rose*, 71 AD3d 1411, 1412; *Matter of August ZZ.*, 42 AD3d 745, 747). We reject the further contention of the father that he was denied effective assistance of counsel. "The [father] failed to demonstrate that [he] was prejudiced by the alleged deficiencies in [his] attorney's performance" (*Matter of Nagi T. v Magdia T.*, 48 AD3d 1061, 1062). Indeed, many of those alleged deficiencies were strategic decisions by the father's attorney that will not be second-guessed by this Court (*see Matter of Katherine D. v*

Lawrence D., 32 AD3d 1350, 1351-1352, *lv denied* 7 NY3d 717), and "the record reflects that [his] attorney 'provided meaningful and competent representation' " (*Nagi T.*, 48 AD3d at 1062).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1141

CAF 10-02335

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

IN THE MATTER OF NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF THERESA A. KEARNS, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROGER L. HUEBER, RESPONDENT-APPELLANT. (APPEAL NO. 2.)

ROGER L. HUEBER, RESPONDENT-APPELLANT PRO SE.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered November 10, 2010 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's written objections to an order of support issued by the Support Magistrate.

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 father appeals from an order denying his objections to the order of the Support Magistrate that, inter alia, imputed income to him based on the minimum wage for a period of approximately one year and two weeks and ordered that he pay child support arrears for that period in the amount of $659.18. It is undisputed that the father was incarcerated during the relevant time period.

Contrary to the father's contention, the Support Magistrate did not abuse her discretion by imputing income to the father for the time period in question for the purpose of calculating his child support obligation, despite the fact that he was incarcerated during that period. To the extent that the father's financial hardship is the result of his own wrongful conduct, he is not entitled to a reduction of his child support obligation (*see Matter of Grettler v Grettler*, 12 AD3d 602; *Matter of Winn v Baker*, 2 AD3d 1169; *see generally Matter of Knights v Knights*, 71 NY2d 865, 866-867). We reject the father's further contention that 50% of the child support obligation should be apportioned to the child's noncustodial mother. There is no evidence in the record that the mother had any income or was capable of earning income. Thus, the mother's pro rata share of the child support obligation is zero (*see generally* Family Ct Act § 413 [1] [c] [2]).

The father's contention that the Support Magistrate should have

calculated his support obligation using the statutory percentage for two children rather than the statutory percentage for one child is not preserved for our review inasmuch as it is raised for the first time on appeal (*see generally Matter of Erie County Dept. of Social Servs. v Shaw*, 81 AD3d 1328; *Matter of White v Knapp*, 66 AD3d 1358). In any event, that contention is without merit because the father is the parent of only one child in the household in question. "The basic child support obligation must be determined on a per household basis[,] and it is inappropriate to use a percentage [that] is based on a total number of children living in different households" (*Buck v Buck*, 195 AD2d 818, 818; *see Matter of Slocum v Robertson*, 217 AD2d 940).

Contrary to the father's further contention, petitioner was not required to produce the child's custodian (hereafter, custodian) on whose behalf the proceeding was commenced at the hearing on the petition (*see generally* Family Ct Act §§ 415, 422 [a]; *Matter of Department of Social Servs. v Richard A.*, 138 AD2d 487, *lv denied* 72 NY2d 804). Furthermore, "if [the father] wished to challenge [the custodian's] eligibility for welfare, he should have done so at the . . . hearing. [Inasmuch as] he had the opportunity to be heard at that time, he was not deprived of due process" (*Matter of Commissioner of Social Servs. of City of N.Y. v Remy K.Y.*, 298 AD2d 261, 262). In any event, petitioner presented documentary evidence that the custodian and the child received public assistance during the relevant time period, and great deference should be given to the Support Magistrate's evaluation of the proffered evidence (*see Matter of Manocchio v Manocchio*, 16 AD3d 1126, 1128).

Finally, contrary to the father's contention, Family Court properly refused to consider the exhibits submitted in support of the father's written objections because they "were not offered by the father at the . . . [hearing] before the Support Magistrate" (*Matter of Williams v Williams*, 37 AD3d 843, 844; *see also Matter of Lahrs v Lahrs*, 158 AD2d 944).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1142

CA 11-00833

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

FERNANDO VAZQUEZ, PLAINTIFF-RESPONDENT,

V ORDER

MAIN STREET USA REAL ESTATE GROUP A, LLC,
DEFENDANT-APPELLANT.

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, OSWEGO (DOUGLAS M. MCRAE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered December 21, 2010 in a personal injury action. The order granted plaintiff's motion 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.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1143

CA 11-01059

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

IN THE MATTER OF LIVINGSTON COUNTY,
PETITIONER-APPELLANT,

V ORDER

LIVINGSTON COUNTY COALITION OF PATROL SERVICES,
RESPONDENT-RESPONDENT.

OSBORN, REED & BURKE, LLP, ROCHESTER (DAVID W. LIPPITT OF COUNSEL), FOR PETITIONER-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (LAWRENCE J. ANDOLINA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (William P. Polito, J.), entered January 5, 2011 in a proceeding pursuant to CPLR article 75. The order denied the petition for a stay of arbitration.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1145

CA 11-00459

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

MICHAEL J. CAMPBELL, PLAINTIFF-RESPONDENT,

V ORDER

MITCHELL S. NUSBAUM, DEFENDANT-APPELLANT.

EGGER & LEEGANT, ROCHESTER, RIVKIN RADLER LLP, UNIONDALE (MELISSA MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

CERULLI, MASSARE & LEMBKE, ROCHESTER (MATTHEW R. LEMBKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered November 22, 2010 in a personal injury action. The judgment awarded plaintiff money damages upon a jury verdict.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1147

KA 10-01798

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EVERETT L. DOWNING, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 14, 2010. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1148

KA 09-01977

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JERRY K. SCROGER, ALSO KNOWN AS JERRY SCROGER, JR., ALSO KNOWN AS JERRY K. SCROGER, JR., 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 Supreme Court, Genesee County (Robert C. Noonan, A.J.), rendered September 3, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1150

KA 07-02439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAFAEL L. BELLIARD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Stephen R. Sirkin, A.J.), rendered September 17, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1151

KA 10-01053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR GONZALEZ, ALSO KNOWN AS “INDIO,”
DEFENDANT-APPELLANT.

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

HECTOR GONZALEZ, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael L. D’Amico, J.), rendered April 29, 2010. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a bench trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). County Court properly refused to suppress the testimony of a witness who identified defendant on the ground that the photo array presented to her was unduly suggestive. “Because ‘the subjects depicted in the photo array [were] sufficiently similar in appearance so that the viewer’s attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection,’ the photo array was not unduly suggestive” (*People v Weston*, 83 AD3d 1511, 1511, *lv denied* 17 NY3d 823). The court also properly determined that a witness who testified concerning inculpatory statements made to him by defendant while they were both incarcerated was not acting as an agent of the police when defendant made the statements (*see People v McCray*, 66 AD3d 1338, 1339, *lv denied* 13 NY3d 908, 14 NY3d 803; *see generally People v Cardona*, 41 NY2d 333, 335). 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 and, viewing the evidence in light of the elements of the crimes in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not

against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's further contention that the People failed to disclose *Brady* material in a timely manner. Even assuming, arguendo, that the witness statement at issue was exculpatory, we conclude that the alleged *Brady* violation does not require reversal because defendant received the statement " 'as part of the *Rosario* material provided to him and was given a meaningful opportunity to use the exculpatory evidence' " (*People v Green*, 74 AD3d 1899, 1901, *lv denied* 15 NY3d 852). Defendant waived his contention that he was denied his right to present a defense based upon alleged attempts by the police to intimidate a defense witness, inasmuch as the court granted the only relief sought by defendant in connection therewith and defendant did not further object (*see Delong v County of Chautauqua* [appeal No. 2], 71 AD3d 1580, 1580-1581; *see generally People v Kulakov*, 72 AD3d 1271, 1273-1274, *lv denied* 15 NY3d 775, *lv dismissed* 16 NY3d 896; *People v Miller*, 37 AD3d 1071). The sentence is not unduly harsh or severe. Finally, we have examined defendant's contentions in his pro se supplemental brief and conclude that none requires reversal or modification of the judgment.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1152

KA 08-00225

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC R. MULL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Stephen R. Sirkin, A.J.), rendered December 13, 2007. 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]). Contrary to defendant's contention, Supreme Court's *Sandoval* ruling did not constitute an abuse of discretion. Defendant's prior conviction of false personation pursuant to Penal Law § 190.23 bore directly on his credibility, inasmuch as it involved an act of individual dishonesty by him (*see People v Smikle*, 82 AD3d 1697, 1697, *lv denied* 17 NY3d 801; *see generally People v Sandoval*, 34 NY2d 371, 377; *People v Arguinzoni*, 48 AD3d 1239, 1240-1241, *lv denied* 10 NY3d 859), and the court did not abuse its discretion in allowing the prosecutor to question defendant concerning the facts underlying that conviction (*see People v Thompson*, 295 AD2d 917, 918, *lv denied* 98 NY2d 772). Although defendant contends that the court failed to balance the probative value of defendant's prior convictions against their potential for undue prejudice, we note that it is well settled that "an exercise of a trial court's *Sandoval* discretion should not be disturbed merely because the court did not provide a detailed recitation of its underlying reasoning . . ., particularly where, as here, the basis of the court's decision may be inferred from the parties' arguments" (*People v Walker*, 83 NY2d 455, 459; *see People v Carter*, 38 AD3d 1256, 1257, *lv denied* 8 NY3d 982).

Defendant further contends that the court erred in admitting in evidence testimony concerning defendant's prior aggressive behavior

toward one of the victims because it was introduced solely to demonstrate his criminal propensity and thus was inadmissible under *People v Molineux* (168 NY 264). We reject that contention. Even assuming, arguendo, that the victim's testimony constitutes *Molineux* evidence (*see generally People v Ventimiglia*, 52 NY2d 350; *Molineux*, 168 NY 264), we conclude that such testimony was properly admitted inasmuch as it was relevant to establish defendant's intent and motive, as well as to provide relevant background information, and its probative value outweighed its prejudicial effect (*see People v Alvino*, 71 NY2d 233, 241-242; *People v Nelson*, 57 AD3d 1441, 1442). In any event, any error with respect to the admission of that testimony is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

With respect to defendant's further contention that he was deprived of a fair trial by prosecutorial misconduct during summation, defendant failed to object to several of the allegedly improper comments, and thus his contention with respect to those comments is unpreserved for our review (*see People v Freeman*, 78 AD3d 1505, *lv denied* 15 NY3d 952; *People v Overlee*, 236 AD2d 133, 136, *lv denied* 91 NY2d 976). We decline to exercise our power to review his contention with respect to the allegedly improper comments that are not preserved for our review (*see* CPL 470.15 [6] [a]), and we reject defendant's contention with respect to the remaining allegedly improper comments. Those comments were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915; *see People v Figgins*, 72 AD3d 1599, 1600, *lv denied* 15 NY3d 893).

Contrary to defendant's further contention, we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in 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 have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; *see Bleakley*, 69 NY2d at 495). The jury could have reasonably inferred that defendant intended to commit a crime inside the victims' residence based on the evidence of his use of force to gain entry to the house (*see People v Bergman*, 70 AD3d 1494, *lv denied* 14 NY3d 885; *People v Gates*, 170 AD2d 971, *lv denied* 78 NY2d 922). That " 'inference is buttressed by numerous other factors' " (*Bergman*, 70 AD3d at 1494), including testimony that defendant had visited the residence a few days prior to the burglary and that, after being told to stop entering the residence, he continued to do so until one of the victims fired a gun in his direction.

Finally, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), and giving the appropriate deference to the jury's credibility determinations (*see People v Hill*, 74 AD3d 1782, *lv denied* 15 NY3d 805), we conclude that the verdict is not against the weight of the

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1156

CAF 10-00863

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

IN THE MATTER OF HAROLD L.S.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

HAROLD S., RESPONDENT-APPELLANT.

PALOMA A. CAPANNA, PENFIELD, FOR RESPONDENT-APPELLANT.

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

LISA J. MASLOW, ATTORNEY FOR THE CHILD, ROCHESTER, FOR HAROLD L.S.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.), entered March 22, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from an order terminating his parental rights on the ground of abandonment and freeing his child for adoption. The father refused to attend the fact-finding hearing and his attorney, although present, elected not to participate in the father's absence. Under those circumstances, we conclude that the father's refusal to appear constituted a default, and we therefore dismiss the appeal (*see Matter of Shawn A.*, 85 AD3d 1598).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1157

CAF 10-00086

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

IN THE MATTER OF JOHN YORK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ADRIANNA ZULLICH, RESPONDENT-RESPONDENT.

IN THE MATTER OF ADRIANNA ZULLICH,
PETITIONER-RESPONDENT,

V

JOHN YORK, RESPONDENT-APPELLANT.

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

SUSAN P. REINECKE, CLARENCE, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR EMMA Z.

Appeal from an amended order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered February 17, 2010 in a proceeding pursuant to Family Court Act article 6. The amended order, inter alia, granted sole custody of the parties' child to Adrianna Zullich.

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

Memorandum: Petitioner-respondent father appeals from an amended order that, inter alia, granted the petition of respondent-petitioner mother seeking to modify a prior custody order entered upon the consent of the parties by awarding her sole custody of the parties' child, with visitation to the father and supervised contact with the stepfather. We affirm. Contrary to the father's contention, we conclude that the mother met her burden of establishing a change in circumstances sufficient to warrant an inquiry into whether the best interests of the child warranted a change in custody (*see Matter of Maher v Maher*, 1 AD3d 987, 988). Under the prior consent order, the parties shared residential custody of the child, with the days that the child spent with each parent changing on a weekly basis. That schedule created confusion on the part of the child and school officials and was no longer practical upon the child's attainment of

school age (*see Matter of Dickerson v Robenstein*, 68 AD3d 1179, 1179-1180; *see also Matter of Claflin v Giamporcaro*, 75 AD3d 778, 779-780, *lv denied* 15 NY3d 710). In addition, the deterioration of the parties' relationship and their inability to co-parent renders the existing joint custody arrangement unworkable (*see Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561; *Matter of Francisco v Francisco*, 298 AD2d 925, *lv denied* 99 NY2d 504; *Matter of Thayer v Ennis*, 292 AD2d 824). The father does not challenge the merits of Family Court's determination that the child's best interests are served by an award of sole custody to the mother.

The father contends for the first time on appeal that the court should have dismissed both his own petition and that of the mother based on their failure to mediate and thus that contention is not preserved for our review (*see generally Matter of Moore v Shapiro*, 30 AD3d 1054). In any event, that contention is without merit. The father likewise failed to preserve for our review his contention that the court erred in precluding testimony concerning the "Abel test" administered to the stepfather or in failing to hold a *Frye* hearing with respect to the admissibility of testimony concerning that test. When the father's attorney informed the court on the date scheduled for the *Frye* hearing that he was not prepared to proceed and requested an adjournment, the court ruled that it would entertain a motion to reschedule the *Frye* hearing in the event that motion papers seeking that relief were submitted by a specified date. The record contains no such motion papers and thus the father failed to preserve for our review his contention that the court should have conducted a *Frye* hearing to determine the admissibility of evidence concerning the "Abel test" before precluding such evidence (*see generally Matter of Thillman v Mayer*, 85 AD3d 1624, 1625).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1158

CAF 10-02523

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

IN THE MATTER OF RAYMOND L. MAGARA, JR.,
PETITIONER-APPELLANT,

V ORDER

LAURIE M. RIORDAN-MAGARA, RESPONDENT-RESPONDENT.

EMILY A. VELLA, SPRINGVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered November 17, 2010 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 affirmed without costs.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1162

CA 11-00642

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

IN THE MATTER OF LIGHT WORK VISUAL STUDIES, INC.,
PLAINTIFF-PETITIONER-RESPONDENT,

V ORDER

CITY OF SYRACUSE, BOARD OF ASSESSMENT REVIEW FOR CITY OF SYRACUSE, JOHN C. GAMAGE, AS COMMISSIONER OF ASSESSMENT FOR CITY OF SYRACUSE, SYRACUSE CITY SCHOOL DISTRICT AND COUNTY OF ONONDAGA,
DEFENDANTS-RESPONDENTS-APPELLANTS.

JUANITA PEREZ WILLIAMS, CORPORATION COUNSEL, SYRACUSE (JOSEPH FRANCIS BERGH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL), FOR PLAINTIFF-PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 17, 2010 in a proceeding pursuant to RPTL article 7 and CPLR article 78 and a declaratory judgment action. The order and judgment granted the application of plaintiff-petitioner, declared that the subject property is wholly exempt from taxation for the 2010/2011 tax year, directed defendants-respondents to strike the assessment of the subject property from the taxable roll, and directed defendants-respondents to refund plaintiff-petitioner for taxes paid.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 26, 2011,

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1168

CA 11-00033

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

IN THE MATTER OF JEFFREY THRALL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CNY CENTRO, INC. AND CENTRAL NEW YORK REGIONAL
TRANSPORTATION AUTHORITY, RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

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

ROBERT LOUIS RILEY, SYRACUSE, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered November 9, 2009 in a proceeding pursuant to CPLR article 78. The order, inter alia, granted in part petitioner's motion to vacate a prior judgment, which dismissed the amended petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondents, his former employers, denying his application for disability pension benefits, and in appeal No. 1 respondents appeal from an order that, inter alia, granted in part petitioner's motion pursuant to CPLR 5015 (a) (3) seeking to vacate the judgment dismissing his amended petition. By way of background, we note that Amalgamated Transit Union Local 580 (Union), which represented petitioner, initially filed a grievance on petitioner's behalf under the collective bargaining agreement (CBA) between the Union and respondents based on the denial of the application. The grievance was submitted to a Grievance Review Board formed pursuant to section 2.07 (b) of the CBA. After respondents advised the Union that the grievance was dismissed based upon the Grievance Review Board's vote, petitioner commenced this proceeding. Supreme Court (Roy, J.) dismissed the amended petition on the merits and, on a prior appeal, this Court, inter alia, affirmed the judgment dismissing the amended petition (*Matter of Thrall v CNY Centro, Inc.*, 17 AD3d 1026).

In appeal No. 1, we conclude that Supreme Court (Murphy, J.) erred in granting in part petitioner's motion seeking to vacate the judgment pursuant to CPLR 5015 (a) (3) inasmuch as the instant motion is barred by res judicata (*see Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431, *lv denied* 14 NY3d 712). Petitioner twice moved unsuccessfully for leave to renew with respect to the dismissal of his amended petition, and in each instance his appeals from the orders denying his respective motions were deemed abandoned and dismissed based upon his failure to perfect the appeals in a timely fashion (*see* 22 NYCRR 1000.12 [b]; *Williams v Williams*, 52 AD3d 1271). The ground on which petitioner now relies in seeking vacatur was "no less apparent at the time of the making of the . . . motion[s]" seeking leave to renew than at the time of the instant motion (*Bianco v Dougherty*, 54 AD2d 681). In any event, on the merits, we conclude that petitioner failed to substantiate his allegations of fraud sufficiently to warrant vacatur of the judgment (*see Miller v Lanzisera*, 273 AD2d 866, 868, *appeal dismissed* 95 NY2d 887, *rearg denied* 96 NY2d 731). We therefore deny the motion in its entirety and dismiss the amended petition in appeal No. 1. Respondents have raised no issue with respect to that part of the order denying their cross motion, and they therefore are deemed to have abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

In appeal No. 2, respondents appeal from those parts of an order and judgment that, inter alia, annulled the determination. In view of our decision in appeal No. 1, we dismiss as moot the appeal from the order and judgment in appeal No. 2 (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). In addition, "in order to prevent [the order and] judgment which is unreviewable for mootness from spawning any legal consequences or precedent" (*id*. at 718; *see Matter of Funderburke v New York State Dept. of Civ. Serv*., 49 AD3d 809, 811), we also vacate that order and judgment (*see Funderburke*, 49 AD3d at 811).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1169.3

CAF 11-00900

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

IN THE MATTER OF DIANA M. OVSANIK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RONALD P. OVSANIK, RESPONDENT-APPELLANT.

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

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC./SOUTHERN TIER LEGAL SERVICES, BATH (DAVID B. PELS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), dated February 14, 2011 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent contends that Family Court erred in determining that he committed against petitioner the family offense of stalking in the fourth degree (Penal Law § 120.45 [2]. We agree. Petitioner failed to meet her burden of proving by a preponderance of the evidence that respondent committed acts constituting that family offense (*see* Family Ct Act §§ 812, 832; *see generally Matter of Tammy J.H. v John W.H.*, 42 AD3d 974). The record establishes that the parties were married in 1987 and that, on at least two occasions prior to the events leading up to the instant petition, the parties separated and then reconciled. In July 2009, petitioner left the marital home and began staying at a motel. Between October 2009 and September 2010, respondent visited petitioner at the motel on a daily basis, and it is undisputed that petitioner consented to those visits. In September 2010, however, petitioner informed respondent that she no longer wanted to be married to him and that he should no longer visit her. In an attempt to reconcile with petitioner, respondent left four handwritten letters and a store-bought card for her over a period of approximately one month. During that same period of time, respondent knocked on the door of petitioner's motel room at approximately 2 A.M. at least once or twice. When respondent knocked on her door, petitioner ignored him, and respondent left after a few minutes.

Because petitioner worked overnight shifts, it was not unusual for her to be awake at 2 A.M., and respondent previously had visited petitioner during the early morning hours before September 2010.

In light of the foregoing, the evidence is insufficient to establish that respondent acted with "no legitimate purpose" within the meaning of the stalking statute (Penal Law § 120.45). "[T]he phrase 'no legitimate purpose' means the absence of a reason or justification to engage someone, other than to hound, frighten, intimidate or threaten" (*People v Stuart*, 100 NY2d 412, 428). Here, the letters and the card were sent with the legitimate purpose of attempting to reconcile with petitioner (*see Di Donna v Di Donna*, 72 Misc 2d 231, 233), a purpose that was not unreasonable based upon, inter alia, the parties' lengthy marriage and history of separation and reconciliation. The evidence is also insufficient to establish that respondent knew or reasonably should have known that his conduct caused "material harm to [petitioner's] mental or emotional health" (§ 120.45 [2]). Notably, there is nothing on the face of the letters or the card that is improper or threatening (*cf. Matter of Julie G. v Yu-Jen G.*, 81 AD3d 1079, 1082; *Matter of Amy SS. v John SS.*, 68 AD3d 1262, 1263, *lv denied* 14 NY3d 704). Petitioner's testimony that respondent was physically violent during the marriage does not tend to establish that respondent's conduct in 2010 constituted stalking. Indeed, the only incident of violence that was described in any particularity occurred in the early 1990s. Although there is no statute of limitations for family offenses, and acts not "relatively contemporaneous with the date of the petition" are entitled to consideration (Family Ct Act § 812 [1]; *see Jose M. v Tatianna T.*, 30 Misc 3d 948, 949-950), petitioner's remote allegations of physical violence do not establish "a cognizable pattern of behavior" on respondent's part so as to render his behavior devoid of any legitimate purpose (*Matter of Opray v Fitzharris*, 84 AD3d 1092, 1093).

We therefore reverse the order, dismiss the petition and vacate the order of protection (*see generally Matter of Kalifa K.*, 37 AD3d 1180).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1169

CA 11-00034

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

IN THE MATTER OF JEFFREY THRALL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CNY CENTRO, INC. AND CENTRAL NEW YORK REGIONAL
TRANSPORTATION AUTHORITY, RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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

ROBERT LOUIS RILEY, SYRACUSE, FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 19, 2010 in a proceeding pursuant to CPLR article 78. The order and judgment, among other things, granted petitioner's motion for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs, and the "order and judgment" is vacated.

Same Memorandum as in *Matter of Thrall v CNY Centro, Inc.* ([appeal No. 1] ___ AD3d ___ [Nov. 10, 2011]).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1170

KA 10-00185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KELVIN POWELL, 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 December 18, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1171

KA 10-02079

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY C. MYLES, 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 October 4, 2010. 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 (*see People v Lococo*, 92 NY2d 825, 827).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1173

KA 10-01261

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ADAMA COULIBALY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered April 9, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted arson in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1175

KA 11-00904

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD L. BARTLETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 2, 2010. The judgment convicted defendant, upon a jury verdict, of forcible touching 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, following a jury trial, of forcible touching (Penal Law § 130.52) and endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction of forcible touching (*see generally People v Bleakley*, 69 NY2d 490, 495). Pursuant to Penal Law § 130.52, a person is guilty of forcible touching when he or she "intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of," inter alia, gratifying the sexual desire of the actor. The victim testified that defendant, her teacher, pressed up against her backside and rubbed her thigh approximately one inch from her vaginal area. Although County Court initially charged the jury that forcible touching "*means* squeezing, grabbing or pinching" (emphasis added), rather than charging the statutory language that forcible touching "*includes* squeezing, grabbing or pinching" (§ 130.52 [emphasis added]), the court charged the correct definition of forcible touching in response to a note from the jury during deliberations. We therefore conclude that the People were not "bound to satisfy the heavier burden in this case," i.e., that forcible touching means squeezing, grabbing or pinching (*People v Malagon*, 50 NY2d 954, 956), inasmuch as " 'the jury, hearing the whole charge, would gather from its language the correct rules that should be applied in arriving at [a] decision' " (*People v Ladd*, 89 NY2d 893, 895, quoting *People v Russell*, 266 NY 147, 153). 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 further contends that the verdict is repugnant because he was acquitted of the count charging sexual abuse in the third degree (Penal Law § 130.55) and convicted of forcible touching and endangering the welfare of the child. By failing to object to the verdict as repugnant before the jury was discharged, defendant failed to preserve his contention for our review (*see People v Alfaro*, 66 NY2d 985, 987; *People v Roman*, 85 AD3d 1630, 1630-1631, *lv denied* 17 NY3d 821), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.05 [6] [a]). We reject defendant's contention that the failure of defense counsel to object to the verdict as repugnant constitutes ineffective assistance of counsel. Defendant has failed to establish the lack of a strategic decision on the part of defense counsel inasmuch as a resubmission of the matter to the jury could have resulted in a guilty verdict on the sexual abuse count (*see People v Perry*, 27 AD3d 952, 953, *lv denied* 8 NY3d 883; *see generally Alfaro*, 66 NY2d at 987).

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

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1176

KA 07-01186

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DON PETERKIN, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, 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 (Francis A. Affronti, J.), rendered February 13, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (six counts), burglary in the first degree, kidnapping in the second degree (three counts), aggravated sexual abuse in the first degree, assault in the second degree, attempted assault in the second degree, petit larceny and unlawful imprisonment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, six counts of robbery in the first degree (Penal Law § 160.15 [4]) and one count of burglary in the first degree (§ 140.30 [4]), arising from two separate incidents. We reject defendant's contention that Supreme Court erred in refusing to suppress his statements to the police. The evidence presented at the suppression hearing supports the determination of the court that defendant's waiver of his *Miranda* rights was knowing, voluntary and intelligent. Contrary to defendant's contention, the record of the suppression hearing fails to establish that he was intoxicated at the time he waived those rights "to the degree of mania, or of being unable to understand the meaning of his statements" (*People v Schompert*, 19 NY2d 300, 305, *cert denied* 389 US 874; *see People v Lake*, 45 AD3d 1409, 1410, *lv denied* 10 NY3d 767). Contrary to defendant's further contention, "[i]t is well settled that where a person in police custody has been issued *Miranda* warnings and voluntarily and intelligently waives [his or her *Miranda*] rights, it is not necessary to repeat the warnings prior to subsequent questioning within a reasonable time thereafter, so long as the custody has remained continuous" (*People v Glinsman*, 107 AD2d 710, 710, *lv denied* 64 NY2d 889, *cert denied* 472 US 1021; *see People v Jacobson*, 60 AD3d 1326, 1327, *lv denied* 12 NY3d 916). The evidence

presented at the suppression hearing also supports the court's determination that defendant remained in custody between the reading of the *Miranda* warnings and the renewed questioning of defendant and that such a time period was not unreasonable (*see People v Cooper*, 59 AD3d 1052, 1054, *lv denied* 12 NY3d 852; *People v Hawkes*, 39 AD3d 1209, 1211, *lv denied* 9 NY3d 844, 845; *People v Leflore*, 303 AD2d 1041, 1042, *lv denied* 100 NY2d 563).

Defendant contends that the evidence is legally insufficient to support the conviction of counts 1 through 15 of the indictment because he established that he was too intoxicated to form the intent to commit the crimes charged in those counts, and thus the People failed to establish that he had the specific intent to commit those crimes. Defendant failed to move for a trial order of dismissal on that ground, however, and he therefore failed to preserve his contention for our review (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit. Although there was some evidence tending to establish that defendant had consumed alcohol prior to committing the crimes at issue, "[v]iewing the evidence in the light most favorable to the People . . ., we conclude that a rational trier of fact could find that defendant had the requisite intent to commit [those] crimes" (*People v Martinez*, 73 AD3d 1432, 1433, *lv denied* 15 NY3d 807). Defendant further contends that the verdict with respect to counts 16 and 17 of the indictment, charging defendant with robbery in the first degree (Penal Law § 160.15 [4]) and unlawful imprisonment in the first degree (§ 135.10), respectively, is against the weight of the evidence. Viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that his right of confrontation was violated by the admission in evidence of a report regarding part of the DNA analysis of a plastic bottle that defendant forcibly inserted into the vagina of the adult female victim. That contention is not preserved for our review inasmuch as defendant objected to the admission of that report solely on the ground that the People failed to establish a sufficient foundation (*see People v Bolling*, 49 AD3d 1330, 1331; *People v Robinson*, 41 AD3d 1183, *lv denied* 9 NY3d 880). In any event, that contention is without merit (*see generally People v Freycinet*, 11 NY3d 38, 41-42).

Contrary to defendant's further contention, we conclude that defense counsel was not ineffective in failing to request a charge on the affirmative defense that the weapon used in the crimes at issue "was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged" (Penal Law § 160.15 [4]; *see* § 140.30 [4]). "There can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287). Here, "[t]here is no reasonable view of the evidence that would allow the jury to conclude, without resorting to speculation, that defendant" displayed a weapon that was inoperable

or unloaded (*People v Taylor*, 83 AD3d 1505, 1506, *lv denied* 17 NY3d 822; *see People v Darden*, 57 AD3d 1522, *lv denied* 12 NY3d 815). The fact that no weapon was discovered does not warrant the submission of an instruction on the affirmative defense (*see People v Flores*, 47 AD3d 506, 507, *lv denied* 10 NY3d 840). We have considered defendant's remaining allegations of ineffective assistance of counsel and, viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1177

KA 09-01768

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PAUL JENKINS, III, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Stephen R. Sirkin, J.), rendered June 9, 2009. The judgment convicted defendant, upon a jury verdict, of gang assault in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1178

KA 10-00894

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FARLIE JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered April 16, 2010. The judgment convicted defendant, upon a nonjury verdict, of endangering the welfare of a child.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1180

CAF 11-01008

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

IN THE MATTER OF JUSTIN LINDELL,
PETITIONER-RESPONDENT,

V ORDER

LYDIA BEARFIELD, RESPONDENT-APPELLANT.

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

MICHAEL J. SULLIVAN, FREDONIA, FOR PETITIONER-RESPONDENT.

ALLISON B. MULLEN CARROW, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR ALLONA B.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered August 16, 2010 in a proceeding pursuant to Family Court Act article 6. The order awarded the parties joint custody of their child, with placement to petitioner.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1183

CA 11-01087

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

OMAR HILL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LILLIE B. MILAN, DEFENDANT-RESPONDENT.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (ANTHONY J. TANTILLO 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, Erie County (Gerald J. Whalen, J.), entered August 18, 2010 in a personal injury action. The order denied the motion of plaintiff for leave to reargue the order of the court entered March 22, 2010 and to vacate or modify the order of the court entered December 9, 2009.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he was struck by a vehicle owned by defendant. Plaintiff appeals from an order that denied his motion seeking, inter alia, leave to renew or reargue his prior motion insofar as it sought to extend his time to appear for an independent medical examination (IME). We conclude at the outset that the appeal from the order insofar as it denied that part of plaintiff's motion seeking leave to renew or reargue must be dismissed. In support of that part of the motion seeking leave to renew, plaintiff failed to offer new facts that were unavailable at the time of his prior motion. Thus, that part of plaintiff's motion purportedly seeking leave to renew was actually seeking leave to reargue, and no appeal lies from an order denying leave to reargue (*see Matter of Wayne T.I. v Latisha T.C.*, 48 AD3d 1165; *Schaner v Mercy Hosp. of Buffalo*, 16 AD3d 1095, 1096).

Contrary to the contention of plaintiff, Supreme Court properly denied that part of his motion seeking to vacate a conditional order dismissing the complaint based on his failure to appear and submit to an IME at a specified date and time (*see generally* CPLR 5015 [a] [1]; *Lauer v City of Buffalo*, 53 AD3d 213, 215-216). Plaintiff failed to establish a reasonable excuse for his failure to appear at the IME and

a potentially meritorious cause of action (*see Castle v Avanti, Ltd.*, 86 AD3d 531; *Testa v Koerner Ford of Syracuse*, 261 AD2d 866, 868).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1184

CA 11-00456

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

DAVID M. GORDON, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

LIN TV CORPORATION AND AL VAUGHTERS,
DEFENDANTS-RESPONDENTS-APPELLANTS.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HISCOCK & BARCLAY, BUFFALO (JOSEPH M. FINNERTY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered November 23, 2010 in a defamation action. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff appeals and defendants cross-appeal from an order granting defendants' motion for summary judgment dismissing the complaint in this defamation action. We conclude at the outset that defendants are not aggrieved by the order dismissing the complaint and thus their cross appeal must be dismissed (*see Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488). According to plaintiff, defendant Al Vaughters misidentified plaintiff as the president of a bankrupt investment fund during an evening news television broadcast on a station owned and operated by defendant Lin TV Corporation. We conclude that defendants met their burden of establishing their entitlement to judgment as a matter of law inasmuch as they did not act "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199). As the Court of Appeals noted in *Chapadeau*, a limited number of errors in news reporting is inevitable (*see id.* at 200), and the fact that defendants corrected the mistake within the same broadcast demonstrates that they strived for accuracy (*see Alicea v Ogden Newspapers*, 115 AD2d 233, *affd* 67 NY2d 862). Because we conclude that defendants met their burden of demonstrating that they did not act in a grossly irresponsible manner, we do not address defendants' alternative ground for affirmance, i.e., that plaintiff was a limited purpose public figure and thus that the

court should have applied the higher standard of demonstrating actual malice (*see generally New York Times Co. v Sullivan*, 376 US 254, 279-280).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1185

CA 11-01026

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

ZOLADZ CONSTRUCTION CO., INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.

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

JEREMY A. COLBY, COUNTY ATTORNEY, BUFFALO (ANTHONY G. MARECKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 27, 2010 in a breach of contract action. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for defendant's alleged breach of the agreement governing the processing and disposal of debris from trees damaged as a result of a severe snow storm that occurred in Erie County in October, 2006. The debris was transported to a site where it was processed by plaintiff. Contrary to plaintiff's contention, Supreme Court properly determined that the agreement is not ambiguous. We therefore conclude that the court properly granted defendant's motion seeking summary judgment dismissing the complaint.

Pursuant to the agreement, plaintiff was to provide three categories of services: bulk green waste/general site management at $2.00 per cubic yard, chip and grinding disposal management at $1.50 per cubic yard, and green waste debris grinding at $3.00 per cubic yard. The agreement provides that the bulk green waste, the chip and grinding material and the green waste debris were to be removed from the site within six months of the execution of the agreement and that the failure to do so would result in a charge of $10,000 per month.

" '[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms' " (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198, quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). Plaintiff

contends that the agreement is ambiguous inasmuch as it fails to identify the party responsible for the costs associated with the removal of the processed material from the site to end-users. Contrary to plaintiff's contention, an omission " 'does not constitute an ambiguity . . . [T]he question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence' " (*id.* at 199), and we conclude that no ambiguity may be ascertained from the face of the agreement.

Even assuming, arguendo, that the agreement is ambiguous because it fails to identify the party responsible for costs associated with removing the processed material from the site, we conclude that the extrinsic evidence establishes that defendant was not responsible for the removal costs in question. In support of its motion, defendant demonstrated that, before the agreement was signed, plaintiff had offered to dispose of the processed material at no cost to defendant. Indeed, defendant submitted the deposition testimony of plaintiff's in-house counsel in which he testified that he sought to amend the agreement to include additional payment for the costs associated with the disposal of the processed material because the potential end-users would not pay for the material and wanted it delivered for free. Thus, we conclude that defendant established its entitlement to judgment as a matter of law and that plaintiff failed to raise a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1186

CA 11-01109

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

RANDY J. TENNANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID TABOR AND ROBIN TABOR,
DEFENDANTS-APPELLANTS.

ROSSI AND MURNANE, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (EVA BRINDISI PEARLMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered December 22, 2010 in a personal injury action. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his vehicle collided with a horse owned by defendants. We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the amended complaint. " '[W]hen harm is caused by a domestic animal, its owner[s'] liability is determined *solely* by application of the rule articulated in *Collier* [*v Zambito*, (1 NY3d 444),]' . . . i.e., the rule of strict liability for harm caused by a domestic animal whose owner[s] know[] or should have known of the animal's vicious propensities" (*Petrone v Fernandez*, 12 NY3d 546, 550). Consequently, plaintiff's reliance on Agriculture and Markets Law § 353 is without merit. Even assuming, arguendo, that the statute requires that shelter be provided to a domestic animal (*see generally People v Mahoney*, 9 Misc 3d 101, 103, *lv denied* 5 NY3d 854), we conclude that "defendant[s'] violation of [that statute] . . . is irrelevant because such a violation is only some evidence of negligence, and negligence is no longer a basis for imposing liability for injuries sustained as the result of" the actions of a domestic animal (*Tesmer v Colonna*, 77 AD3d 1305, 1305 [internal quotation marks omitted]; *see Petrone*, 12 NY3d at 550). Plaintiff's reliance on the doctrine of res ipsa loquitor is also misplaced. Res ipsa loquitor is not a separate theory of liability. Rather, it is merely a doctrine that permits a

factfinder to infer negligence under certain circumstances (*see generally Morejon v Rais Constr. Co.*, 7 NY3d 203, 207-211). Inasmuch as negligence will not support liability under the circumstances of this case, an inference of negligence is equally insufficient. Consequently, the court erred in denying the motion with respect to the common-law negligence claims (*see Vichot v Day*, 80 AD3d 851).

In addition, the court erred in denying the motion with respect to the strict liability claim. As we noted above, it is well settled "that the owner[s] of a domestic animal who either know[] or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities . . . Vicious propensities include the 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*Collier*, 1 NY3d at 446; *see Krieger v Cogar*, 83 AD3d 1552). "In *Collier* . . ., the Court of Appeals held that 'an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit' " (*Krieger*, 83 AD3d at 1553, quoting *Collier*, 1 NY3d at 447). Here, defendants submitted affidavits and deposition testimony in support of the motion establishing that they had no knowledge that the horse at issue had ever jumped the fence surrounding its corral or attempted to do so and that they had no information tending to show that the horse had a propensity to run in the roadways or to interfere with traffic. We therefore conclude that defendants met their initial burden with respect to the strict liability claim (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude that plaintiff failed to raise a triable issue of fact whether the horse had a propensity to interfere with traffic based upon one defendant's deposition testimony that the horse became spooked and ran around inside the confines of the corral during a thunderstorm. "In view . . . of the absence of any evidence that the [horse] . . . exhibited a . . . propensity [to interfere with traffic] prior to the incident involving the . . . plaintiff, no triable issue was raised" (*Bernstein v Penny Whistle Toys, Inc.*, 40 AD3d 224, 224, *affd* 10 NY3d 787; *see Rockwood v LaBate*, 83 AD3d 1530; *Myers v MacCrea*, 61 AD3d 1385). "Further, there is no evidence in the record that the [horse's] . . . behavior was abnormal to its class, another necessary characteristic of vicious behavior for the purpose of establishing liability" (*Krieger*, 83 AD3d at 1553 [internal quotation marks omitted]; *see Bard v Jahnke*, 6 NY3d 592, 597 n 2).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1188

CA 11-01088

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

NICOLE M. KWAIZER, PLAINTIFF-RESPONDENT,

V ORDER

JOY M. SITARSKI, CARRIE L. SITARSKI,
SENECA-BABCOCK COMMUNITY ASSOCIATION, INC.,
BUFFALO PANTHER CHEERLEADERS,
DEFENDANTS-APPELLANTS,
AND SENECA STREET UNITED METHODIST CHURCH,
DEFENDANT.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FRIEDMAN & RANZENHOFER P.C., AKRON (MICHAEL H. RANZENHOFER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 25, 2010 in a personal injury action. The order denied the motion of defendants Joy M. Sitarski, Carrie L. Sitarski, Seneca-Babcock Community Association, Inc., and Buffalo Panther Cheerleaders for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on October 17 and 21, 2011,

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1191

KA 09-01256

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JALETTE R. FAIN, ALSO KNOWN AS JALETTE FAIN,
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 May 11, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1193

TP 11-00951

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

IN THE MATTER OF ARLINE C. WELLS,
BY HER ATTORNEY-IN-FACT, WINENE H.
ZIMMERMAN, PETITIONER,

V ORDER

MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES,
ALSO KNOWN AS MONROE COUNTY DIVISION OF SOCIAL
SERVICES, BY KELLY REED, COMMISSIONER, AND
RICHARD F. DAINES, M.D., COMMISSIONER,
NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (KEVIN S. COOMAN OF COUNSEL), FOR PETITIONER.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (MARK E. MAVES OF COUNSEL), FOR RESPONDENT MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, ALSO KNOWN AS MONROE COUNTY DIVISION OF SOCIAL SERVICES, BY KELLY REED, COMMISSIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Ann Marie Taddeo, J.], entered May 5, 2011) to review a determination of respondents. The determination imposed a penalty period of 33.82 months on petitioner's Medicaid application.

Now, upon reading and filing the stipulation discontinuing action signed by the attorneys for the parties on June 7, 2011,

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1194

KA 08-01691

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ZULMA DELGADO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 29, 2008. The judgment convicted defendant, upon her plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1195

KA 08-00879

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

THOMAS BOLLING, DEFENDANT-APPELLANT.

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

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

Appeal from a sentence of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered April 9, 2008. Defendant was sentenced upon his conviction of manslaughter in the second degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1196

KA 10-00283

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEFFREY WYNTERS, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered September 25, 2008. The judgment convicted defendant, upon a jury verdict, of attempted rape in the third degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1197

KA 09-00299

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EULESE N. CRUZ, ALSO KNOWN AS MARCO AGUAY,
DEFENDANT-APPELLANT.

FREDERICK P. LESTER, PITTSFORD, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered January 6, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree and 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 attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Defendant entered an *Alford* plea with respect to attempted robbery only, and he contends that County Court erred in accepting his *Alford* plea to that crime because the record lacked the requisite strong evidence of guilt to support the *Alford* plea (*see generally People v Hill*, 16 NY3d 811, 814). In addition, defendant contends that the court was unable to determine whether his *Alford* plea was the product of a voluntary and rational choice because the prosecutor failed to set forth on the record the evidence against defendant with respect to the attempted robbery. Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Hinkle*, 56 AD3d 1210; *see also People v Dash*, 74 AD3d 1859, 1860, *lv denied* 15 NY3d 892). In any event, defendant's contention is without merit. " '[T]he record before the court contains strong evidence of actual guilt' " (*Hill*, 16 NY3d at 814), and thus the court was able to determine that defendant's *Alford* plea was " 'the product of a voluntary and rational choice' " (*id.*).

Defendant failed to preserve for our review his further contention that the court erred in failing to conduct a *Darden* hearing

inasmuch as he did not request such a hearing or challenge the identity of the confidential informant (*see* CPL 470.05 [2]; *People v Darden*, 34 NY2d 177, 181, *rearg denied* 34 NY2d 995), 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 contends that the court erred in refusing to suppress the identifications made by three confidential informants from a photo array. He contends for the first time on appeal that the photo array was unduly suggestive because the photographs were obtained from the Department of Corrections, and thus he failed to preserve his present contention for our review (*see* CPL 470.05 [2]; *People v Santiago*, 83 AD3d 1471, *lv denied* 17 NY3d 800). In any event, the fact that the photo array consisted of photographs obtained from the Department of Corrections did not render it unduly suggestive inasmuch as all of the photographs were obtained therefrom and each was captioned "NYS DOCS." Thus, it cannot be said that the origin of the photographs "create[d] a substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833).

Finally, defendant also failed to preserve for our review his contention that the court erred in failing to test the reliability of the confidential informants' identifications from the photo array pursuant to the five-factor analysis set forth in *Manson v Brathwaite* (432 US 98, 114-116; *see* CPL 470.05 [2]; *Santiago*, 83 AD3d 1471), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1199

KA 10-00831

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNIE GORDON, 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 (Barry M. Donalty, J.), rendered March 15, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We reject defendant's contention that his waiver of the right to appeal is invalid. "The written waiver of the right to appeal, together with defendant's responses during the plea proceeding, establish that the waiver was voluntarily, knowingly, and intelligently entered" (*People v Griner*, 50 AD3d 1557, 1558, *lv denied* 11 NY3d 737). That valid waiver of the right to appeal encompasses defendant's challenge to the factual sufficiency of the plea allocution (*see People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789), his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737), and the alleged denial by County Court of his right to proceed pro se (*see People v Shields*, 205 AD2d 833, 834).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1200

KAH 10-00609

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
BRIAN SNELL, PETITIONER-APPELLANT,

V ORDER

ANDREA EVANS, CEO, NEW YORK STATE DIVISION OF
PAROLE, RESPONDENT-RESPONDENT.

DEL ATWELL, EAST HAMPTON, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated decision and order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered February 19, 2010 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1201

CAF 11-00305

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

IN THE MATTER OF DAVID L. PIERCE,
PETITIONER-RESPONDENT-RESPONDENT,

V ORDER

SARA WOLF, RESPONDENT-PETITIONER-APPELLANT.

PALMER, MURPHY & TRIPI, BUFFALO (THOMAS A. PALMER OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

RANDY S. MARGULIS, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT-RESPONDENT.

ELISABETH M. COLUCCI, ATTORNEY FOR THE CHILD, BUFFALO, FOR ABIGAIL P.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered May 11, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner-respondent sole custody of the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties, petitioner-respondent, respondent-petitioner, and by the Attorney for the Child on October 19, 2011,

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1202

CAF 10-01670

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

IN THE MATTER OF ALAYSHA M., CHLOE M., DAJUAN M., ELIJAH M., AND KAYLIA M.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

AGUSTIN M., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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

BARBARA L. WIDRIG, MAYVILLE, FOR PETITIONER-RESPONDENT.

RICHARD L. SOTIR, JR., ATTORNEY FOR THE CHILDREN, JAMESTOWN, FOR ALAYSHA M., CHLOE M., DAJUAN M., ELIJAH M., AND KAYLIA M.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered July 15, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had abused the subject children.

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 contends that Family Court erred in finding that he derivatively abused the children who are the subject of this proceeding, based on the finding that he had severely abused one of his other children, resulting in the child's death. We note at the outset that the father improperly appealed from an order dispensing with the requirement that reasonable efforts be made to reunite the father with the subject children rather than from the correct subsequent order of fact-finding and disposition. Nevertheless, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as properly taken from the subsequent order (*see* CPLR 5520 [c]; *Matter of Morgan P.*, 60 AD3d 1362).

Contrary to the father's contention, the finding of derivative abuse is appropriate in view of the nature and severity of the abuse of the child who died (*see* Family Ct Act § 1046 [a] [i]; *Matter of Marino S.*, 100 NY2d 361, 373-374, *cert denied* 540 US 1059; *Matter of Keara MM.*, 84 AD3d 1442, 1444; *Matter of Nicole H.*, 12 AD3d 182, 183). Inasmuch as the father has surrendered his parental rights with respect to the subject children, his further contention that the court erred in granting petitioner's motion seeking a finding pursuant to

Family Court Act § 1039-b (a) that it is no longer required to make reasonable efforts to reunite the subject children with the father is now moot (*see Matter of Randi NN.*, 80 AD3d 1086, 1087, *lv denied* 16 NY3d 712; *see also Matter of Jaime S.*, 32 AD3d 1198). The exception to the mootness doctrine does not apply under these circumstances (*see Randi NN.*, 80 AD3d at 1087; *Matter of Simeon F.*, 58 AD3d 1081, 1081-1082, *lv denied* 12 NY3d 709). We have reviewed the father's remaining contentions and conclude that none warrants reversal.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1203

CAF 10-02391

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

IN THE MATTER OF ONONDAGA COUNTY, COMMISSIONER OF SOCIAL SERVICES, ASSIGNEE ON BEHALF OF LARHONDA S. CAVER, PETITIONER-RESPONDENT,

V ORDER

MICHAEL A. COMER, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

LAL, GINGOLD & FRANKLIN, PLLC, SYRACUSE (NEIL M. GINGOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered October 28, 2010 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, found that respondent willfully violated an order of child support.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1204

CAF 10-02392

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

IN THE MATTER OF ONONDAGA COUNTY, COMMISSIONER OF SOCIAL SERVICES, ASSIGNEE ON BEHALF OF SOCORRO MIRANDA, PETITIONER-RESPONDENT,

V ORDER

MICHAEL A. COMER, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

LAL, GINGOLD & FRANKLIN, PLLC, SYRACUSE (NEIL M. GINGOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered November 10, 2010 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, found that respondent willfully violated an order of child support.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1205

CA 10-01587

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

IN THE MATTER OF JOSE A. FUENTES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

JOSE A. FUENTES, PETITIONER-APPELLANT PRO SE.

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

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

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination after a Tier III hearing that he violated certain inmate rules. We note at the outset that, as respondent correctly contends, petitioner withdrew the substantial evidence issue when he appeared in Supreme Court, and the court thus was not required to transfer the proceeding to this Court to decide that issue (*see* CPLR 7804 [g]), nor do we address it. Petitioner failed to exhaust his administrative remedies with respect to his sole remaining contention, i.e., that his due process rights were violated when he was penalized for attempting to mail certain documents to his home, having failed to raise that contention at the Tier III hearing, and this Court has no discretionary authority to reach that contention (*see Matter of Nelson v Coughlin*, 188 AD2d 1071, *appeal dismissed* 81 NY2d 834).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1206

CA 11-00870

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

LOUIS LEONE AND ROSITA LEONE,
PLAINTIFFS-RESPONDENTS,

V ORDER

KYLE J. KACZMAREK, HELENE D. KACZMAREK,
DEFENDANTS-RESPONDENTS,
AND KELLY M. LEONE, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLP, BUFFALO (JOHN R. CONDREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered July 13, 2010 in a personal injury action. The order denied the motion of defendant Kelly M. Leone for summary judgment dismissing the complaint and all cross claims against her.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1207

CA 11-00952

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

TONYA E. LILLEY, PLAINTIFF-RESPONDENT,

V ORDER

CINCINNATI FREIGHT EXPRESS, DOING BUSINESS AS
CINCINNATI FREIGHT EXPEDITORS, DEFENDANT,
AND GEORGE W. HARDY, DEFENDANT-APPELLANT.

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (STEPHEN P. BROOKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered February 25, 2011 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant George W. Hardy for summary judgment.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1208

CA 11-00509

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

NANCY S. WULBRECHT, AS ADMINISTRATRIX
OF THE ESTATE OF ROBERT M. WULBRECHT,
DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DIETRICH V. JEHLE, M.D., ET AL., DEFENDANTS,
VICTORIA BROOKS, M.D. AND HONG YU, M.D.,
DEFENDANTS-APPELLANTS.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (K. JOHN BLAND OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered July 13, 2010 in a medical malpractice and wrongful death action. The order, among other things, denied the motion of defendants Victoria Brooks, M.D. and Hong Yu, M.D. for summary judgment.

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

Memorandum: Plaintiff, as administratrix of the estate of her husband, commenced this medical malpractice and wrongful death action seeking damages for the death of her husband, a psychiatric patient who committed suicide. Defendants-appellants (hereafter, defendants) appeal from an order denying their motion for summary judgment dismissing the complaint and all cross claims against them.

We note at the outset that defendants contend that their motion should have been granted based on the theory that liability cannot attach to the exercise of professional medical judgment by a psychiatrist provided that the psychiatrist performed a competent examination and evaluation of the patient. Defendants are correct that, generally, "[t]he prevailing standard of care governing the conduct of medical professionals . . . demands that a doctor exercise 'that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where [the doctor] practices' " (*Nestorowich v Ricotta*, 97 NY2d 393, 398, quoting *Pike v Honsinger*, 155 NY 201, 209). They further correctly contend that " '[a] doctor is not liable for an error in judgment if [the

doctor] does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances' " (*id.* at 399). However, the "error in judgment" rule is applicable " 'only in a narrow category of medical malpractice cases in which there is evidence that [the] defendant physician considered and chose among several medically acceptable treatment alternatives' " (*Rospierski v Haar*, 59 AD3d 1048, 1049; *see Nestorowich*, 97 NY2d at 399-400; *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 139-141). "Where no such choice has been made, 'a doctor may be liable only if the doctor's treatment decisions do not reflect his or her own best judgment, or fall short of the generally accepted standard of care' " (*Anderson*, 44 AD3d at 140, quoting *Nestorowich*, 97 NY2d at 399).

Here, plaintiff did not allege that defendants "failed to use [their] best judgment" but, rather, "plaintiff's theory was that [defendants] failed to adhere to accepted medical standards" in diagnosing and treating the lethality of plaintiff's husband (*Anderson*, 44 AD3d at 140; *see Rospierski*, 59 AD3d at 1049). Likewise, defendants did not testify at their depositions that they "made a choice between or among medically acceptable alternatives" (*Anderson*, 44 AD3d at 140; *see Rospierski*, 59 AD3d at 1049; *cf. Topel v Long Is. Jewish Med. Ctr.*, 55 NY2d 682, 684). Moreover, the expert for defendants simply opined in a supporting affidavit that their assessment of the lethality of plaintiff's husband was "correct" and did not opine that defendants acted as reasonably prudent psychiatrists in choosing among acceptable alternatives for treating him (*see Rospierski*, 59 AD3d at 1049; *Anderson*, 44 AD3d at 140).

Contrary to defendants' alternative contention, the court properly denied their motion inasmuch as they failed to meet their "initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff[']s husband] was not injured thereby" (*James v Wormuth*, 74 AD3d 1895 [internal quotation marks omitted]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The medical expert's affidavit submitted by defendants in support of their motion was not "detailed, specific and factual in nature and . . . [merely] assert[ed] in simple conclusory form that [defendants] acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755; *see generally Amodio v Wolpert*, 52 AD3d 1078, 1079-1080). Moreover, the expert " 'fail[ed] to address each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars' " and, thus, the expert's affidavit "is insufficient to support a motion for summary judgment as a matter of law" (*James*, 74 AD3d 1895). "Consequently, defendants' motion [was properly] denied, regardless of the sufficiency of plaintiff's opposing papers" (*id.*; *see Winegrad*, 64 NY2d at 853).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1214

TP 10-00523

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

IN THE MATTER OF JESSIE J. BARNES, PETITIONER,

V ORDER

MONROE COUNTY SHERIFF, RESPONDENT.

JESSIE J. BARNES, PETITIONER PRO SE.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Thomas A. Stander, J.], entered August 5, 2009) to review determinations of respondent.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1217

KA 10-00520

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LERAE YVONNE SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered January 26, 2010. The judgment convicted defendant, upon her plea of guilty, of robbery in the first degree.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1218

KA 10-01155

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN L. DONALDSON, SR., DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, WEST VALLEY (KELIANN M. ELNISKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered March 1, 2010. The judgment convicted defendant, upon a jury verdict, of rape in the third 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 rape in the third degree (Penal Law § 130.25 [2]) and endangering the welfare of a child (§ 260.10 [1]). We reject defendant's contention that County Court erred in admitting in evidence recorded telephone conversations between defendant and the victim. The People established a sufficient foundation to admit the recordings in evidence through the testimony of the victim, who identified the voices and recalled the conversations, and the testimony of the police lieutenant who witnessed the conversation and operated the recording equipment. Both witnesses testified that the recording was accurate and unaltered, and "[t]he People thus established that the offered evidence [was] genuine and that there [had] been no tampering with it" (*People v Myers*, 87 AD3d 826, 828 [internal quotation marks omitted]; *see generally People v Ely*, 68 NY2d 520, 527-528).

Defendant further contends that the evidence is legally insufficient to support the conviction because, inter alia, the People failed to present sufficient evidence to corroborate the victim's testimony. That contention is not preserved for our review inasmuch as defendant made only a general motion for a trial order of dismissal and failed to renew that motion after presenting evidence (*see People v Kolupa*, 13 NY3d 786, 787; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's contention lacks merit

(*see generally People v Bleakley*, 69 NY2d 490, 495). There is no requirement of corroboration where, as here, the victim gave sworn testimony (*see People v Lamphier*, 302 AD2d 864, 865, *lv denied* 99 NY2d 656). Contrary to defendant's contention, he was not denied effective assistance of counsel based upon defense counsel's failure to renew that motion "because, in view of our determination that the evidence is indeed legally sufficient, defendant has not established that such a motion 'would be meritorious upon appellate review' " (*People v Carrasquillo*, 71 AD3d 1591, 1591, *lv denied* 15 NY3d 803). 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 preserved for our review his further contention with respect to only one of the allegedly improper comments made by the prosecutor during summation, and we conclude that the court dispelled any prejudice arising from that comment when it sustained defendant's objection (*see People v Rickard*, 26 AD3d 800, *lv denied* 7 NY3d 762). In any event, we conclude that defendant's contention with respect to the remaining alleged instances of prosecutorial misconduct is without merit. Finally, we reject the contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to object to those allegedly improper comments inasmuch as they did not constitute prosecutorial misconduct (*see People v Hill*, 82 AD3d 1715, 1716, *lv denied* 17 NY3d 806).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1219

KA 11-00896

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL R. BROWN, DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC DOLAN 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 (Joseph D. Valentino, J.), rendered January 4, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal sexual act in the first degree and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him, following a nonjury trial, of criminal sexual act in the first degree (Penal Law § 130.50 [3]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that Supreme Court erred in permitting a six-year-old child to give sworn testimony. Contrary to the People's contention, the contention of defendant is preserved for our review. We nevertheless conclude that it is without merit.

The presumption that a child less than nine years old is incapable of giving sworn testimony "is overcome . . . if the court is satisfied that the child 'understands the nature of the oath' " (*People v Morales*, 80 NY2d 450, 453). The court's determination of competency is "necessarily individualistic in nature" (*People v Nisoff*, 36 NY2d 560, 566), and it is subject to limited appellate review, inasmuch as the trial court has the unique "opportunity to view the witness[and] to observe manner, demeanor and presence of mind" (*People v Parks*, 41 NY2d 36, 46). Thus, we will not disturb the court's determination "absent a clear abuse of discretion" (*People v Rising*, 289 AD2d 1069, 1070, *lv denied* 97 NY2d 732; *see also People v Thompson*, 59 AD3d 1115, 1117, *lv denied* 12 NY3d 852, 860).

Here, the court did not abuse its discretion in permitting the child to give sworn testimony (*see People v McIver*, 15 AD3d 677, *lv denied* 4 NY3d 888; *People v Munroe*, 307 AD2d 588, 591, *lv denied* 100

NY2d 644; *cf. People v McGrady*, 45 AD3d 1395, *lv denied* 10 NY3d 813; *People v Davis*, 304 AD2d 421, *lv denied* 100 NY2d 619). "Although [the child] gave perfunctory answers to the court's sometimes leading questions, her testimony, as a whole, demonstrated that she understood she had a moral duty to tell the truth" (*People v Brill*, 245 AD2d 384, 385, *lv denied* 91 NY2d 889; *cf. People v Maldonado*, 199 AD2d 563). Even assuming, arguendo, that the child was improperly permitted to give sworn testimony, we conclude that the error is harmless because she would properly have been permitted to testify as an unsworn witness (*see* CPL 60.20 [2]), and her testimony was sufficiently corroborated by other evidence, including defendant's own statements (*see People v Mendoza*, 49 AD3d 559, 560, *lv denied* 10 NY3d 937; *McIver*, 15 AD3d 677; *People v Lynch*, 216 AD2d 929, *lv denied* 87 NY2d 904; *cf. Maldonado*, 199 AD2d 563).

Furthermore, even assuming, arguendo, that defendant's challenge to the sufficiency of the evidence is preserved for our review, we conclude that it lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). With respect to his statements to the police, defendant contends that the court erred in refusing to suppress those statements because the police investigator to whom he made the statements had an initial conversation with him to build a rapport before advising him of his *Miranda* rights. Defendant failed to preserve that contention for our review (*see People v Monroe*, 39 AD3d 1276, *lv denied* 9 NY3d 867; *see also People v Major*, 195 AD2d 1051), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see Monroe*, 39 AD3d 1276).

Finally, the sentence is not unduly harsh or severe.

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1224

CAF 10-01236

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

IN THE MATTER OF MARIA ORAVEC,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID A. ORAVEC,
RESPONDENT-PETITIONER-RESPONDENT.

PATRICIA M. MCGRATH, LOCKPORT, FOR PETITIONER-RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ATTORNEY FOR THE CHILDREN, KENMORE, FOR DYLAN O. AND OLIVIA O.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered April 12, 2010. The order, among other things, awarded sole custody of the subject children to respondent-petitioner David A. Oravec.

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

Memorandum: Petitioner-respondent mother contends on appeal that Family Court should have granted her petition alleging that respondent-petitioner father violated a prior order of custody with respect to the parties' children. The mother further contends that the court should have granted her petition seeking to modify the prior order by, inter alia, awarding her sole custody of the children and erred in granting the father's petition seeking to modify the prior order by, inter alia, awarding him sole custody of the children. We affirm.

The court properly dismissed the violation petition inasmuch as the mother failed to establish that the father willfully violated a clear mandate of the prior order or that his conduct " 'defeated, impaired, impeded, or prejudiced' " any right or remedy to which she was entitled (*Matter of Petkovsek v Snyder* [appeal No. 2], 251 AD2d 1085; *see Matter of Maurice H. v Charity C.*, 49 AD3d 1248). Contrary to the mother's contention concerning the custody determination, we conclude that the court properly considered, as one factor in its determination, "the support that [the father's parents] give[] to him and the children, which contributes further stability and emotional comfort to the children's lives" (*Matter of Flynn-Stallmer v Stallmer*, 167 AD2d 575, 577, *lv dismissed* 77 NY2d 939). The mother failed to preserve for our review her further contention that the court erred in

interjecting itself into the hearing by questioning her concerning matters that had not been addressed on direct or cross-examination (*see generally People v Charleston*, 56 NY2d 886, 887-888; *Matter of Aron B.*, 46 AD3d 1431; *Chocolas Assoc. Ltd. Partnership v Handelsman*, 262 AD2d 133). The mother also failed to preserve for our review her contention that the court erred in admitting in evidence the custody evaluation report on the ground that it contained hearsay (*see Matter of Timosa v Chase*, 21 AD3d 1115).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1226

CAF 11-01113

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

IN THE MATTER OF BRITTNEY N.,
RESPONDENT-APPELLANT.
---------- ORDER
NIAGARA COUNTY PROBATION DEPARTMENT,
PETITIONER-RESPONDENT.

THOMAS M. O'DONNELL, ATTORNEY FOR THE CHILD, NIAGARA FALLS, FOR RESPONDENT-APPELLANT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT (ERIN P. DELABIO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered August 5, 2010 in a proceeding pursuant to Family Court Act article 7. The order placed respondent in the custody of the Niagara County Commissioner of Social Services.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1229

CA 11-00889

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

CHASE LINCOLN FIRST BANK, N.A.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENT R. DEHAAN, DEFENDANT-APPELLANT.

LANCE J. MARK, PLLC, MEDINA (LANCE J. MARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MANFREDI LAW GROUP, PLLC, NEW YORK CITY (JOHN MANFREDI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), dated August 2, 2010. The order, inter alia, denied the cross motion of defendant to vacate a judgment entered April 4, 1990.

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

Memorandum: By order to show cause, plaintiff's assignee, Premier Capital, Inc. (Premier), sought, inter alia, an order extending and renewing a default judgment entered in 1990 against defendant. Premier correctly concedes that its order to show cause was "procedurally unsound" and that the proper course was to commence an action on the judgment. Supreme Court treated that part of the order to show cause as a motion seeking leave to commence such an action pursuant to CPLR 5014 (3) and granted Premier that relief. No prejudice to defendant resulted from the court's action inasmuch as Premier was entitled to commence an action for a renewal judgment without permission pursuant to CPLR 5014 (1) (*see generally Schiff Food Prods. Co., Inc. v M&M Import Export*, 84 AD3d 1346, 1348; *Pangburn v Klug*, 244 AD2d 394).

We reject defendant's contention that the court erred in calculating the period in which Premier was entitled to commence an action on the judgment by excluding the period that his bankruptcy proceeding was pending (*see* CPLR 204 [a]; 11 USC § 362 [c] [2]). Contrary to defendant's further contention, Premier, as assignee of the judgment, "is an 'original party' " for the purpose of renewal (*Cadle Co. v Biberaj*, 307 AD2d 889, 889). Finally, the court properly denied defendant's cross motion to vacate the judgment pursuant to CPLR 5015 (a) (3) inasmuch as the evidence establishes that defendant had knowledge of the alleged fraud before entry of the final judgment

(*see Summer v Summer*, 233 AD2d 881, *lv dismissed* 89 NY2d 981) and, in any event, the cross motion was not made within a reasonable time (*see Miller v Lanzisera*, 273 AD2d 866, 868, *appeal dismissed* 95 NY2d 887, 96 NY2d 731).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1231

CA 11-01072

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

JOAN M. DOMIN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF CHRISTIAN KATHERINE DOMIN, AN INFANT, PLAINTIFF-APPELLANT,

V ORDER

STARPOINT CENTRAL SCHOOL DISTRICT, DEFENDANT-RESPONDENT.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (LOUIS B. DINGELDEY, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 29, 2010 in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1235

KA 07-02087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESTER WEAVER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered July 2, 2007. The judgment convicted defendant, upon a jury verdict, of falsifying business records in the first degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of falsifying business records in the first degree (Penal Law § 175.10) and petit larceny (§ 155.25). We reject defendant's contention that the evidence adduced at trial is legally insufficient to support his conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), the evidence established that defendant knowingly returned unpurchased merchandise at a T.J. Maxx store in exchange for store credit in the form of a gift card. Defendant then used the fraudulently-obtained store credit to purchase several other items of merchandise before he left the store. Contrary to defendant's contention, the "indictment 'fairly apprised defendant' of the theory of the People's case . . ., and the slight variation in that theory [at trial] did not affect defendant's liability for the crimes charged" (*People v Wright*, 16 AD3d 1173, 1174, *lv denied* 5 NY3d 771; *see People v Osborne*, 63 AD3d 1707, 1708, *lv denied* 13 NY3d 748).

We agree with defendant, however, that County Court failed to comply with CPL 310.20 (1) and 310.30 in handling the fourth note from the jury received during deliberations, which requested access to a surveillance videotape that had been admitted in evidence. In response to the jury's first note seeking two specified statements and "a list of the evidence," the court sent all of the admitted evidence

to the jury with the exception of the videotape. In its third note, the jury asked "to see the video," and the court directed that the jury be returned to the courtroom, whereupon the videotape was played. The jury's fourth note read: "We request to view the video in an atmosphere where it can be discussed by jury as a group [and] we can control what sections of video we watch." The court did not read the jury note into the record, nor did it respond to the note on the record. In fact, there is no indication in the record that defendant or his attorney were even apprised of the note or its contents.

CPL 310.20 (1) provides that jurors may take with them into deliberations "[a]ny exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take . . . ." The court failed to comply with CPL 310.20 (1) in that it did not afford defendant the opportunity to be heard regarding the jurors' request to view the videotape "in an atmosphere where it can be discussed by [the] jury as a group [and] we can control what sections of video we watch" (*cf. People v Damiano*, 87 NY2d 477, 487; *People v Mitchell*, 46 AD3d 480, *lv denied* 10 NY3d 842), which requires reversal. In addition, CPL 310.30 provides that, when a deliberating jury requests information with respect to any trial evidence, "the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper." The court failed to comply with CPL 310.30 in that it did not give notice of the jury's request to counsel for defendant or give any response to the jury. "In the absence of record proof that the trial court complied with its core responsibilities under CPL 310.30, a mode of proceedings error occurred requiring reversal" (*People v Tabb*, 13 NY3d 852, 853; *see People v Kisoon*, 8 NY3d 129, 135; *see generally People v O'Rama*, 78 NY2d 270, 276-277). Under the circumstances of this case, we reject the People's contention that the court's errors in failing to comply with CPL 310.20 (1) and CPL 310.30 are harmless (*see People v Cook*, 85 NY2d 928, 930-931). In light of our conclusion that reversal is required, we need not address defendant's remaining contentions.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1236

KA 11-00285

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK HACKETT, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Cattaraugus County Court (Larry M. Himelein, J.), dated January 25, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Cattaraugus County Court for further proceedings in accordance with the following Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court miscalculated his total risk factor score in the risk assessment instrument (RAI), and thus mistakenly determined that he was presumptively a level three risk based on that score. We agree with defendant. In fact, pursuant to the correct total risk factor score in the RAI, defendant is presumptively classified as a level two risk. We note, however, that the court also sua sponte assessed additional points under risk factor 3 (Number of Victims) and risk factor 4 (Duration of Offense Conduct with Victim) in the RAI, which then rendered defendant a presumptive level three risk. We further agree with defendant that the court violated his due process rights by sua sponte assessing those additional points. The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment (*see* § 168-n [3]; *People v David W.*, 95 NY2d 130, 136-140). Here, neither risk factor was originally selected on the RAI or raised by the People at the SORA hearing, and defendant learned of the assessment of the additional points for the first time when the court issued its decision (*cf. People v Wheeler*, 59 AD3d 1007, *lv denied* 12 NY3d 711). We therefore reverse the order, vacate defendant’s risk level determination, and

remit the matter to County Court for a new risk level determination, and a new hearing if necessary, in compliance with Correction Law § 168-n (3) and defendant's due process rights.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1238

KA 10-00018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES HICKS, 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 (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 9, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]), defendant contends that his waiver of the right to appeal was invalid. We reject that contention. Despite defendant's contention to the contrary, the record establishes that he knowingly, intelligently and voluntarily waived his right to appeal as a condition of the plea bargain (*see generally People v Lopez*, 6 NY3d 248, 256). Supreme Court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]), and the record establishes that defendant " 'understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794, quoting *Lopez*, 6 NY3d at 256). The challenge by defendant to the court's suppression ruling is encompassed by his valid waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v Williams*, 49 AD3d 1281, *lv denied* 10 NY3d 940).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1239

KA 10-01961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN UBRICH, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, 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, A.J.), rendered August 10, 2010. The judgment convicted defendant, upon his plea of guilty, of gang 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 his plea of guilty, of gang assault in the second degree (Penal Law § 120.06), defendant contends that County Court erred in failing to afford him youthful offender status. As part of the plea agreement, however, defendant waived his right to appeal, and that valid waiver encompasses defendant's present contention (*see People v Capps*, 63 AD3d 1632, *lv denied* 13 NY3d 765). In any event, defendant never requested youthful offender status at the time of the plea or at sentencing and thus his contention is not preserved for our review (*see People v Ficchi*, 64 AD3d 1195, *lv denied* 13 NY3d 859).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1240

KA 10-01983

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMISON EMANUEL, DEFENDANT-APPELLANT.

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered May 20, 2010. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [7]). We reject defendant's contention that the evidence adduced at trial that the victim sustained a physical injury is legally insufficient to support the conviction. Viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), the evidence established that defendant punched the victim in the face, causing him to fall down, lose consciousness, suffer a seizure, and sustain lacerations to his face and the back of his head. The evidence also established that the victim, defendant's fellow inmate, required immediate treatment at the emergency room to clean and close his wounds and that he remained in the jail's medical unit for at least two days before returning to his housing pod. We thus conclude that the evidence is legally sufficient to establish that the victim sustained a physical injury (*see People v Terry*, 38 AD3d 1255, *lv denied* 9 NY3d 852; *People v Wooden*, 275 AD2d 935, 936, *lv denied* 96 NY2d 740). In addition, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that County Court erred in admitting in evidence certain hearsay statements in the history portion of the victim's hospital records. Defendant failed to object to the admission of the hospital records in evidence and thus failed to

preserve his contention for our review (*see* CPL 470.05 [2]; *People v Anderson*, 184 AD2d 1005, 1006, *lv denied* 80 NY2d 926). In any event, the statements in the hospital records were properly admitted both because they related to diagnosis and treatment and thus were "admissible as an exception to the hearsay rule" (*People v White*, 306 AD2d 886, *lv denied* 100 NY2d 625; *see People v Dennee*, 291 AD2d 888, 889, *lv denied* 98 NY2d 650; *see generally People v Ortega*, 15 NY3d 610, 617), and because they had the requisite indicia of reliability (*see generally People v Brensic*, 70 NY2d 9, 14, *mot to amend remittitur granted* 70 NY2d 722).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1241

KA 09-00166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUCIANO ORTIZ, DEFENDANT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered November 28, 2007. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [former (3)]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19). In addition, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We also conclude that the sentence is not unduly harsh or severe.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1242

KA 08-02363

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD RAWLEIGH, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., LIVINGSTON CONFLICT DEFENDER'S OFFICE, WARSAW (ANNA JOST OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered October 2, 2008. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony (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 of felony driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [2], [3]; § 1193 [1] [c] [former (ii)]). Contrary to defendant's contention, the evidence is legally sufficient to establish that he operated a motor vehicle while having more than .08 of one per centum by weight of alcohol in his blood (*see* § 1192 [2]; *People v McCloskey*, 78 AD3d 1077, 1078, *lv denied* 16 NY3d 861), and that he operated the vehicle while in an intoxicated condition (*see* § 1192 [3]; *People v McGraw*, 57 AD3d 1516, 1517). Police and civilian witnesses testified that defendant was unsteady on his feet, that his eyes were glassy or bloodshot, that his speech was slurred, and that he smelled of alcohol. Defendant admitted that he consumed three 40-ounce bottles of beer and one other beer of unspecified quantity, and a subsequent breath test showed defendant's blood alcohol content (BAC) to be .10. Thus, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient with respect to both counts of driving while intoxicated (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's remaining contentions concerning the legal sufficiency of the evidence are unpreserved for our review inasmuch as his trial order of dismissal was not specifically directed at the alleged deficiencies identified on appeal (*see People v Gray*, 86 NY2d 10, 19; *People v Roman*, 85 AD3d

1630, *lv denied* 17 NY3d 821). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that the People committed a *Brady* violation and that he was thereby denied a fair trial based on the People's failure to provide him with photographs taken of him on the date of his arrest. Contrary to defendant's contention, there was no *Brady* violation. "*Brady* . . . does not require prosecutors to supply a defendant with evidence when the defendant knew of, or should reasonably have known of, the evidence and its exculpatory nature" (*People v Doshi*, 93 NY2d 499, 506; *see People v Singleton*, 1 AD3d 1020, 1021, *lv denied* 1 NY3d 580). Here, the circumstances of defendant's arrest were such that he knew or should have known that he was being photographed and that the photographs were allegedly exculpatory in nature (*see People v Rivera*, 82 AD3d 1590, 1592, *lv denied* 17 NY3d 800; *People v Gilpatrick*, 63 AD3d 1636, 1637, *lv denied* 13 NY3d 835).

We also reject defendant's contention that he was denied a fair trial when the prosecutor asked him on cross-examination whether before testifying he had reviewed notes from a notepad situated next to defense counsel. Even assuming, arguendo, that the prosecutor's question was improper, we conclude that it was not so egregious as to deny defendant a fair trial (*see People v Chatman*, 281 AD2d 964, 966, *lv denied* 96 NY2d 899; *see generally People v Agostini*, 84 AD3d 1716). Defendant did not object when the prosecutor asked him whether his testimony was "the God-spoken truth." Thus, he failed to preserve for our review his contention that he was denied a fair trial by that question (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe particularly in light of his criminal history and the fact that these crimes were committed after he had completed serving a sentence of incarceration of 1⅓ to 4 years on a prior DWI conviction. Further, County Court did not err in considering defendant's arrests for aggravated unlicensed operation of a motor vehicle in sentencing him despite the fact that those charges were still pending (*see People v Khan*, 146 AD2d 806, 807, *lv denied* 73 NY2d 1021; *see also People v Garnett*, 293 AD2d 769, 770, *lv denied* 98 NY2d 651). The court suspended defendant's license during the pendency of the trial, and defendant did not deny that he drove without a license in contravention of the court's order. Finally, "the fact that the sentence imposed after trial was greater than that offered pursuant to the pretrial plea offer does not render the sentence unduly harsh" (*People v Mastowski*, 26 AD3d 744, 746, *lv denied* 6 NY3d 850, 7 NY3d 815).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1244

KA 09-01286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEL A. LEWIS, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, 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 May 22, 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 modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Oswego County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him, following his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that County Court erred in refusing to suppress physical evidence taken from him by the police as well as statements that he made to the police. We reject that contention. The evidence adduced at the suppression hearing established that the police had the authority to arrest defendant for operating a motor vehicle while his registration was suspended or revoked, a misdemeanor (Vehicle and Traffic Law § 512; *see People v Brown*, 306 AD2d 291, *lv denied* 100 NY2d 618). Thus, the police had the authority to conduct a search incident to his arrest (*see People v Troiano*, 35 NY2d 476, 478). We further note that any statements made by defendant before he was advised of his *Miranda* rights were spontaneous and were not the result of questioning or conduct reasonably likely to elicit any statements (*see People v Huffman*, 61 NY2d 795, 797). With respect to the statements following the administration of *Miranda* rights, we defer to the court's credibility determination that defendant understood his *Miranda* rights and knowingly, intelligently and voluntarily waived them before agreeing to speak to the police and to provide a written statement (*see People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795).

Defendant failed to object to the imposition of restitution at sentencing and failed to request a restitution hearing and thus has

failed to preserve for our review his contention that the court erred in ordering him to pay restitution (*see People v Lovett*, 8 AD3d 1007, *lv denied* 3 NY3d 673, 677). Nevertheless, we exercise our power to review his contention as a matter of discretion in the interest of justice, particularly because the court stated at the plea hearing that restitution was not being sought (*cf. People v Sweeney*, 79 AD3d 1789, *lv denied* 16 NY3d 900), and the record is devoid of any evidence supporting the amount of restitution that defendant was required to pay. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the sentence promised or to afford defendant the opportunity to move to withdraw his plea (*see People v Kistner*, 34 AD3d 1316; *People v DeLair*, 6 AD3d 1152).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1247

KAH 10-01119

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DEXTER MURRAY, PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 24, 2010 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1248

KAH 10-02089

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
VICTOR WOODARD, PETITIONER-APPELLANT,

V ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

VICTOR WOODARD, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated decision and order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 30, 2010 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1249

CAF 10-01243

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

IN THE MATTER OF MARY P. KELLEY,
PETITIONER-APPELLANT,

V ORDER

KATRINA LAZORE-CAMELO, NICHOLAS J. CAMELO, JR.,
AND DIANE M. KELLEY, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

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

SCOTT T. GODKIN, UTICA, FOR RESPONDENT-RESPONDENT KATRINA LAZORE-CAMELO.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA, FOR ARIAH C.

ABBIE GOLDBAS, ATTORNEY FOR THE CHILD, UTICA, FOR SANTINO C.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered April 12, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition against respondents.

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

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1250

CAF 10-01244

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

IN THE MATTER OF KATRINA CAMELO,
PETITIONER-RESPONDENT,

V ORDER

DIANE KELLEY, ET AL., RESPONDENTS,
AND MARY KELLEY, RESPONDENT-APPELLANT.

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

ABBIE GOLDBAS, ATTORNEY FOR THE CHILD
SANTINO C., APPELLANT.
(APPEAL NO. 2.)

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

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

ABBIE GOLDBAS, ATTORNEY FOR THE CHILD SANTINO C., UTICA, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered May 7, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject children to petitioner.

Now, upon reading and filing the affirmation of Abbie Goldbas, Attorney for the Child Santino C., dated August 4, 2011 withdrawing said appeal,

It is hereby ORDERED that said appeal taken by the Attorney for the Child Santino C. is unanimously dismissed and the order is otherwise affirmed without costs.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1251

CA 11-00830

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

GREGORY MEE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHELSEA L. STRADER, DEFENDANT-APPELLANT.

MICHAEL D. SCHMITT, ROCHESTER, FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered June 30, 2010. The order, among other things, determined that defendant failed to comply with the parties' Separation of Custody and Support Agreement.

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

Memorandum: Defendant appeals from an order that determined following a nonjury trial that, inter alia, she "refused" to comply with a specified provision of the parties' Separation of Custody and Support Agreement (Agreement). According to the terms of that provision, i.e., article 26 of the Agreement, every year the parties would compare tax returns and the party who would gain the largest benefit from claiming the parties' child as an exemption on his or her tax returns would be entitled to claim the child as an exemption. The Agreement further provided that the party claiming the child as an exemption would pay to the other party an amount equal to 50% of the tax benefits arising therefrom. Contrary to defendant's contention, that provision of the Agreement may be enforced because it "is lawful on its face and there is no implication that it was entered into with fraudulent design" (*Hilgendorff v Hilgendorff*, 241 AD2d 481, 482). Also contrary to defendant's contention, "[t]he [A]greement was bilateral in nature, rather than unilateral," because it contained mutual promises concerning, inter alia, custody of the child, visitation and child support payments (*Howard v BioWorks, Inc.*, 83 AD3d 1588, 1589). Defendant contends for the first time on appeal that the Agreement contemplates an illegal act, and we therefore do not address that contention (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In addition, we conclude that "defendant[] failed to present sufficient evidence establishing that plaintiff breached the [Agreement]" (*CNP Mech., Inc. v Allied Bldrs., Inc.*, 84 AD3d 1748, 1750). We have reviewed defendant's remaining contentions and

conclude that they are without merit.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1252

CA 11-00917

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

LYMAN RICE, INC., DOING BUSINESS AS RICE HOMES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALBION MOBILE HOMES, INC., DOING BUSINESS AS HERITAGE ESTATES, AND RICHARD DECARLO, DEFENDANTS-RESPONDENTS.

HILLCREST HOMES, LLC, PROPOSED INTERVENOR-APPELLANT.

CROPSEY & CROPSEY, ALBION (CONRAD F. CROPSEY OF COUNSEL), FOR PLAINTIFF-APPELLANT AND PROPOSED INTERVENOR-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JAMES W. KILEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered July 27, 2010. The order, among other things, granted defendants' cross motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action alleging, inter alia, conversion, replevin and the violation of Real Property Law § 233 after defendants refused to allow plaintiff to remove a manufactured home from defendants' manufactured home park without first paying a security deposit. Supreme Court properly granted defendants' cross motion to dismiss the complaint and for summary judgment dismissing the complaint on the ground that plaintiff lacked standing. To establish standing, a party must have an injury in fact, i.e., "an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772; *see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211-212). "A plaintiff generally has standing only to assert claims on behalf of [itself]" (*Caprer v Nussbaum*, 36 AD3d 176, 182). The record establishes that plaintiff lacks standing because Hillcrest Homes, LLC (Hillcrest) owns the manufactured home. Indeed, also before the court was a motion by Hillcrest and plaintiff seeking, inter alia, permission for Hillcrest to intervene in the action and for leave to amend the caption to include Hillcrest as a plaintiff. Contrary to plaintiff's contention, neither the proposed amended complaint nor the

affidavits submitted in support of that motion raise a triable issue whether plaintiff had standing. Those submissions merely established that plaintiff is a company related to Hillcrest, a corporation, but that they remain distinct legal entities. "[O]ne [company] will generally not have legal standing to exercise the rights of [an]other associated corporation[]" (*Alexander & Alexander of N.Y. v Fritzen*, 114 AD2d 814, 815, *affd* 68 NY2d 968).

We further conclude that the court did not abuse its discretion in denying the motion of plaintiff and Hillcrest seeking, inter alia, permission for Hillcrest to intervene in the action (*see* CPLR 1012 [a] [2]; 1013). CPLR 1012 (a) (2) allows intervention as of right "when the representation of the [corporation's] interest by the parties is or may be inadequate and the [corporation] is or may be bound by the judgment." "[W]hether [the proposed intervenor] will be bound by the judgment . . . is determined by its *res judicata* effect" (*Vantage Petroleum, Bay Isle Oil Co. v Board of Assessment Review of Town of Babylon*, 61 NY2d 695, 698), and here the dismissal of plaintiff's complaint for lack of standing has no res judicata effect on Hillcrest (*see Matter of Citizens Organized to Protect the Envt. v Planning Bd. of Town of Irondequoit*, 50 AD3d 1460, 1461; *Kaczmarek v Shoffstall*, 119 AD2d 1001, 1002).

Entered: November 10, 2011 Patricia L. Morgan
Clerk of the Court

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

1254

CA 10-01997

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

DREW A. JOZEFIK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOANNE C. JOZEFIK, DEFENDANT-RESPONDENT.

MELVIN BRESSLER, ROCHESTER, FOR PLAINTIFF-APPELLANT.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE & WELCH, LLP, ROCHESTER (LETTY L. LASKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John M. Owens, J.), entered November 19, 2009 in a divorce action. The judgment, inter alia, awarded maintenance, child support and attorney's fees to defendant.

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

Memorandum: On appeal from a judgment of divorce that, inter alia, awarded maintenance, child support and attorney's fees to defendant, plaintiff contends that he was deprived of his right to counsel of his own choosing when Supreme Court disqualified his attorney based upon an alleged conflict of interest. We reject that contention. Although "[a] party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted" (*Falk v Gallo*, 73 AD3d 685, 685-686), "[t]he right to counsel of choice is not absolute and may be overridden where necessary" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443; *see Parnes v Parnes*, 80 AD3d 948, 952; *see generally Greene v Greene*, 47 NY2d 447, 453). The decision to disqualify an attorney lies within the sound discretion of the trial court (*see Falk*, 73 AD3d at 685; *Horn v Municipal Info. Servs.*, 282 AD2d 712; *Bison Plumbing City v Benderson*, 281 AD2d 955).

We conclude that the court did not abuse its sound discretion in disqualifying plaintiff's attorney, based on rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0). Rule 3.7 (a) provides that "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact," with certain exceptions not relevant here. Although not binding upon the courts, the advocate-witness rule "provide[s] guidance . . . for the courts in determining whether a party's

attorney should be disqualified during litigation" (*Falk*, 73 AD3d at 686; *see S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 443-445). The record in this case establishes that it was likely that plaintiff's original trial attorney would be a witness on a significant issue of fact. During the first trial in this action, plaintiff testified that he requested and/or facilitated the transfer of an amount of wages ranging from $15,000 to $17,000 from his employer to his attorney's business account, and it appears from the record that the transfer was in violation of an order appointing a receiver to receive plaintiff's income. Plaintiff's attorney transferred some of the funds to plaintiff and remitted the remaining funds to plaintiff's accountant, again in apparent violation of the above-referenced order. When the court questioned plaintiff's attorney on the record about that testimony, the attorney replied that he was "taking the Fifth." The court thereupon declared a mistrial and discharged plaintiff's attorney, reasoning that a conflict of interest had developed because the attorney was "likely to be called upon as a witness in this proceeding and may become a witness in another tribunal." Thus, the record indeed establishes that plaintiff's attorney was likely to be a witness on a significant issue of fact in violation of rule 3.7 of the Rules of Professional Conduct, namely, the issue whether plaintiff violated the court's order appointing a receiver and, in so doing, diverted or otherwise obscured his income. As plaintiff conceded in correspondence to the court, his attorney "continually told [him], and apparently [his] wife's attorney did not disagree, that the only issues were the amount of child support and the amount and duration of maintenance." Thus, the extent of plaintiff's income was a significant issue of fact throughout the litigation. Notably, the record reflects that plaintiff's attorney was subpoenaed to turn over documents and to testify at trial against plaintiff. Although it appears that plaintiff's attorney did not in fact testify at the second trial, the express language of rule 3.7 provides only that it is "likely" that the attorney will be called as a witness, and we conclude on this record that it was in fact likely.

We reject plaintiff's further contention that the court erred in failing to make a "searching inquiry . . . to ascertain whether [plaintiff] understood the dangers and disadvantages of self-representation" (*Matter of Kristin R.H. v Robert E.H.*, 48 AD3d 1278, 1279). No such searching inquiry was required inasmuch as there is no right to counsel in a divorce action (*see Matter of Smiley*, 36 NY2d 433), and the court was not obligated to elicit a waiver of such right by way of a searching inquiry before permitting plaintiff to proceed pro se (*see McCaffrey v McCaffrey*, 69 AD3d 585; *cf. Kristin R.H.*, 48 AD3d at 1279). In any event, we note that plaintiff was afforded ample opportunity to secure substitute counsel, yet he either failed or refused to do so.

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court

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

MATTER OF MATTHEW JOHN SKIFF, AN ATTORNEY, RESIGNOR. -- Order entered accepting resignation and striking name from roll of attorneys. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MATTER OF JOHN A. CAPPELLINI, JR., AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE EIGHTH JUDICIAL DISTRICT, PETITIONER.

-- Order of censure entered. Per Curiam Opinion: Respondent was admitted to the practice of law by this Court on February 18, 1998, and maintains an office in the Village of Cuba. The Grievance Committee filed a petition charging respondent with acts of professional misconduct arising from a real estate transaction in which he represented both the buyer and one of the sellers. Respondent filed an answer admitting the material allegations of the petition and thereafter appeared before this Court and submitted matters in mitigation.

Respondent admitted that, in 2008, he was retained to represent one of three joint tenants in relation to the sale of certain real property. The other two joint tenants proceeded without counsel. After a potential buyer came forward in August 2008, all three joint tenants executed a deed and related tax forms, which had been prepared by respondent in anticipation of a closing. The potential buyer was thereafter unable to obtain financing and the transaction did not close. In October 2009, respondent's client agreed to sell the property to a different individual and, in addition to representing his current client as one of the sellers of the property, respondent also agreed to represent the buyer. Although respondent obtained the consent of both clients to represent their differing interests in the transaction, he did not provide them with written confirmation of their consent as required by the Rules of Professional Conduct (22 NYCRR 1200.00). In addition, without contacting the other two joint tenant owners of the property, respondent altered the documents that had been executed in 2008 and used them to effectuate the sale of the property. Respondent thereafter filed the altered documents with the County Clerk.

We conclude that respondent has violated the following Rules of Professional Conduct:

rule 1.7 (a) (1) (22 NYCRR 1200.0) - representing multiple clients with differing interests without disclosing the implications of the simultaneous representation and obtaining from each affected client informed consent to the representation, confirmed in writing;

rule 8.4 (b) (22 NYCRR 1200.0) - engaging in illegal conduct that adversely reflects on his honesty, truthfulness or fitness as a lawyer;

rule 8.4 (c) (22 NYCRR 1200.0) - engaging in conduct that involves dishonesty, fraud, deceit or misrepresentation; and,

rule 8.4 (h) (22 NYCRR 1200.0) - engaging in conduct that adversely reflects on his fitness as a lawyer.

We have considered, in determining an appropriate sanction, respondent's submissions in mitigation, including that he derived no personal benefit from the misconduct. Additionally, we have considered the statement of respondent that, when he filed the altered documents with the County Clerk, he believed they accurately reflected the intent of all parties to the transaction. Finally, we have considered respondent's expression of remorse and the numerous letters of support submitted by individuals attesting to his good character and standing in the community. Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be censured (*see Matter of Killeen*, 54 AD3d 95). PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND GREEN, JJ. (Filed Nov. 10, 2011.)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MATTER OF MICHAEL S. GAWEL, FOR REINSTATEMENT TO THE PRACTICE OF LAW IN THE STATE OF NEW YORK. -- Order entered denying application for reinstatement. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ. (Filed Oct. 27, 2011.)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MATTER OF NASSER ANTHONY ASHGRIZ, FOR REINSTATEMENT TO THE PRACTICE OF LAW IN THE STATE OF NEW YORK. -- Order entered terminating suspension and reinstating petitioner to the practice of law. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ. (Filed Oct. 26, 2011.)

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

MATTER OF DOUGLAS P. THOMPSON, FOR REINSTATEMENT TO THE PRACTICE OF LAW IN THE STATE OF NEW YORK. -- Order entered terminating suspension and reinstating petitioner to the practice of law. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ. (Filed Oct. 26, 2011.)

MOTION NO. (867/89) KA 00-00275. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL LEE JONES, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (462/00) KA 99-00873. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHANNON COOK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND GREEN, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (1369/00) KA 97-05353. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN BANKS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, SCONIERS, AND GREEN, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (670/08) KA 07-00544. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MELVIN LEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, SCONIERS, AND GREEN, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (426/09) KA 06-02999. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHAN J. REOME, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, GORSKI, AND

MARTOCHE, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (1582/09) KA 08-02126. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MATTHEW YOUNG, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, CARNI, AND SCONIERS, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (161/10) KA 06-03780. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMON HUNTER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND LINDLEY, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (199/10) KA 06-03648. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DEGLOYDE POLES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND GREEN, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (940/10) KA 08-02540. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GEORGE HARRIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (103/11) KA 07-00779. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENJAMIN RIVERA, DEFENDANT-APPELLANT. (APPEAL NO. 1.) --

Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (104/11) KA 08-00201. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENJAMIN RIVERA, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (316/11) CA 10-00102. -- BOY SCOUTS OF AMERICA, PLAINTIFF-RESPONDENT-APPELLANT, V CAYUGA COUNTY COUNCIL NO. 366, BOY SCOUTS OF AMERICA, CAYUGA YOUTH TRUST, MICHAEL FERRO, WALTER LOWE, CHARLES BOULEY, JR., AND DONALD GRILLO, DEFENDANTS-APPELLANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals dismissed. PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (581/11) CA 10-02342. -- SUSAN T. HUGHES, PLAINTIFF-APPELLANT, V SCOTT H. HUGHES, DEFENDANT-RESPONDENT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (770/11) KA 10-00418. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL MYERS, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument and reconsideration denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

MOTION NO. (771/11) KA 10-00419. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL MYERS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument and reconsideration denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

CAF 10-02165. -- IN THE MATTER OF STEVON R.A. MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT; DELSENIOR S.-J., RESPONDENT-APPELLANT. -- Appeal is dismissed without costs as moot. Counsel's motion to be relieved of assignment granted. (Appeal from Order of Family Court, Monroe County, Patricia E. Gallaher, J. - Visitation). PRESENT: SCUDDER, P.J., SMITH, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

KA 09-00855. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RENE E. BESSETTE, 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, A.J. - Criminal Sale of a Controlled Substance, 2nd Degree). PRESENT: SCUDDER, P.J., SMITH, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

KA 10-01912. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TUTOR BUTLER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, John R. Schwartz, A.J. - Attempted Burglary, 2nd Degree). PRESENT: SCUDDER, P.J.,

SMITH, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

KA 10-01691. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TAMMY M. HINES, 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 Jefferson County Court, Kim Hawn Martusewicz, J. - Attempted Robbery, 1st Degree). PRESENT: SCUDDER, P.J., SMITH, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

KA 07-00254. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLIFTON HUNT, ALSO KNOWN AS PETE HUNT, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, GREEN, AND GORSKI, JJ. (Filed Nov. 10, 2011.)

KA 08-00232. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JORGE LEON, DEFENDANT-APPELLANT. -- Sentence unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from a new sentence of Supreme Court, Monroe County, Joseph D. Valentino, J. - Criminal Possession of a Controlled Substance, 1st Degree). PRESENT: SCUDDER, P.J., SMITH, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)

KA 10-02306. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KELLY LUKE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Thomas P.

Franczyk, J. - Attempted Assault, 1st Degree). PRESENT: SCUDDER, P.J., SMITH, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Nov. 10, 2011.)