



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

DECISIONS FILED

MARCH 20, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

JoAnn M. Wahl , CLERK

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

1357

CA 08-01022

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, PERADOTTO, AND PINE, JJ.

CB RICHARD ELLIS, BUFFALO, LLC,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

D.R. WATSON HOLDINGS, LLC,
DEFENDANT-APPELLANT.

BLAIR & ROACH, LLP, TONAWANDA (LARRY KERMAN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (BRIAN N. LEWANDOWSKI OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered December 7, 2007. The order, insofar as appealed from, granted in part the motion of plaintiff for summary judgment and awarded plaintiff a certain sum for leasing commissions.

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

Memorandum: Plaintiff commenced this action seeking leasing and sales commissions pursuant to a listing contract extension granting it the exclusive right to sell or lease defendant's property. Supreme Court properly granted that part of plaintiff's motion for summary judgment seeking leasing commissions and awarding plaintiff the sum of \$41,000 plus interest. We note at the outset that defendant's sole contention on appeal is that the court erred in granting that part of the motion because defendant raised a triable issue of fact whether an accord and satisfaction occurred with respect to the leasing commissions. We therefore cannot agree with the dissent that this Court should address the issue of plaintiff's entitlement to those commissions. It is well settled that "parties to a civil dispute are free to chart their own litigation course" (*Mitchell v New York Hosp.*, 61 NY2d 208, 214) and "may fashion the basis upon which a particular controversy will be resolved" (*Cullen v Naples*, 31 NY2d 818, 820). Thus, we see no reason to reach the issue raised sua sponte by the dissent.

We reject defendant's contention with respect to the defense of accord and satisfaction. A party seeking to establish that an accord and satisfaction occurred must demonstrate that the disputed claim was "mutually resolved through a new contract 'discharging all or part of

the[] obligations under the original contract' " (*Conboy, McKay, Bachman & Kendall v Armstrong*, 110 AD2d 1042, 1043; see *Pothos v Arverne Houses*, 269 AD2d 377, 378). Here, defendant relies solely on an alleged oral agreement between the parties' officers and failed to submit evidence sufficient to raise a triable issue of fact whether a payment of approximately \$8,000 to plaintiff constituted an accord and satisfaction.

The sole issue on appeal, according to defendant's brief, is whether there are "genuine issues of material fact . . . with respect to the defense of accord and satisfaction." Thus, contrary to the position taken by the dissent, the question of plaintiff's entitlement to a commission was never disputed by defendant, and thus the entitlement issue is not before us.

All concur except SMITH and PERADOTTO, JJ., who dissent and vote to reverse the order insofar as appealed from in accordance with the following Memorandum: We respectfully dissent because we conclude that plaintiff failed to meet its initial burden on that part of its motion for summary judgment seeking leasing commissions. We agree with the majority that plaintiff sought commissions for property leases pursuant to a listing contract extension (contract), but we cannot agree with its implicit conclusion that plaintiff established its entitlement to commissions under that contract. The contract provides that plaintiff shall be entitled to certain commissions "in case said property or any part thereof is leased before the expiration of the" contract, i.e., February 16, 2001, and the lease agreement for which plaintiff sought commissions is dated April 10, 2001. Although the contract contains several provisions permitting plaintiff to recover commissions for sales or leases occurring outside the term of the contract under certain circumstances, plaintiff failed to submit evidence in support of its motion establishing that any of those circumstances exist. Because plaintiff failed to meet its initial burden on that part of the motion with respect to leasing commissions (see *Barrister Referrals v Windels, Marx, Davies & Ives*, 169 AD2d 622; see generally *Ritta Personnel v Andrew F. Capoccia, P.C.*, 144 AD2d 196, 197-198), we conclude that Supreme Court erred in granting that part of the motion. In view of our decision, we do not address the sufficiency of defendant's opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). We therefore would reverse the order insofar as appealed from, deny plaintiff's motion in its entirety and vacate the sum awarded for leasing commissions.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1514

CA 08-01178

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

IBITSAM TAHER ABUHAMRA, INDIVIDUALLY AND AS
PARENT AND NATURAL GUARDIAN OF HAZAM K. ABUHAMRA,
AN INFANT, AND AS ASSIGNEE OF MOHAMAD KAID,
INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN
OF MUSTHAQ KAID, PLAINTIFF-RESPONDENT,

V

ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (LOUIS B. CRISTO OF
COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF JAMES MORRIS, BUFFALO (WILLARD M. POTTLE, JR., OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered March 31, 2008. The order, insofar as appealed, granted in part plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on February 19 and 20, 2009,

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1556

CA 08-01150

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, PERADOTTO, AND GREEN, JJ.

RICHMOND FARMS DAIRY, LLC AND
JOHN RICHMOND, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NATIONAL GRANGE MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT,
ERIE AND NIAGARA INSURANCE ASSOCIATION,
DEFENDANT-RESPONDENT,
SUSAN MILLER, GEORGE W. RAPSON, JR. AND
LORRAINE RICHARDSON,
DEFENDANTS-RESPONDENTS-APPELLANTS.

LORRAINE RICHARDSON, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

CHERRY VALLEY COOPERATIVE INSURANCE COMPANY,
THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (TIMOTHY E. DELAHUNT OF
COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

WALSH, ROBERTS & GRACE, BUFFALO (KEITH N. BOND OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-APPELLANT.

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT SUSAN MILLER.

LAW OFFICE OF PAUL NOTARO, WEST SENECA (JOHN J. MOLLOY OF COUNSEL),
FOR DEFENDANT-RESPONDENT-APPELLANT GEORGE W. RAPSON, JR.

SLIWA & LANE, BUFFALO (PAUL J. CALLAHAN OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT LORRAINE RICHARDSON AND THIRD-PARTY
PLAINTIFF-RESPONDENT.

Appeals and cross appeals from a judgment (denominated order) of
the Supreme Court, Erie County (John A. Michalek, J.), entered January
25, 2008 in a declaratory judgment action. The judgment, among other
things, granted in part the motion of defendant National Grange Mutual

Insurance Company for summary judgment and granted in part the cross motions of defendant Susan Miller and defendant-third-party plaintiff for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating in its entirety the declaration in the second decretal paragraph and granting judgment in favor of defendant National Grange Mutual Insurance Company as follows:

It is ADJUDGED and DECLARED that defendant National Grange Mutual Insurance Company is not obligated to defend or indemnify defendant-third-party plaintiff in the underlying actions under the business automobile insurance policy issued to plaintiff Richmond Farms Dairy, LLC,

and by vacating the declaration in the fourth decretal paragraph and granting judgment in favor of third-party defendant as follows:

It is ADJUDGED and DECLARED that third-party defendant is not obligated to provide excess coverage for defendant-third-party plaintiff in the underlying actions under the farm umbrella policy issued to plaintiff Richmond Farms Dairy, LLC,

and as modified the judgment is affirmed without costs.

Memorandum: As we set forth in our prior decision in *Miller v Richardson* (48 AD3d 1298, lv denied 11 NY3d 710), Susan Miller and George W. Rapson, Jr., who are defendants in the action and third-party action now before us, were injured when a vehicle driven by Lorraine Richardson, presently a defendant and the third-party plaintiff, made a sudden left turn in front of the motorcycle driven by Rapson on which Miller was a passenger. The vehicle driven by Richardson was towing a hay wagon owned by plaintiff, Richmond Farms Dairy, LLC (Richmond Farms). Richardson had purchased hay from Richmond Farms and was returning the empty hay wagon to Richmond Farms when the accident occurred. Miller and Rapson each commenced underlying actions.

Richmond Farms had a business automobile insurance policy (business policy) with National Grange Mutual Insurance Company (National Grange), a defendant herein, and a farm umbrella policy with Cherry Valley Cooperative Insurance Company (Cherry Valley), the third-party defendant herein. John Richmond ("Richmond") had a personal automobile insurance policy with National Grange.

National Grange disclaimed coverage under its business policy with Richmond Farms but subsequently agreed to defend Richmond Farms in the underlying actions commenced by Miller and Rapson. National Grange also disclaimed coverage under its personal automobile insurance policy with Richmond. In addition, National Grange and Cherry Valley disclaimed coverage for Richardson under all policies.

Richmond Farms and Richmond (collectively "the Richmonds") commenced this declaratory judgment action seeking a declaration that National Grange was obligated to defend and indemnify the Richmonds in the underlying actions pursuant to the business policy. Miller asserted a cross claim in which she joined in that request for declaratory relief, and Richardson asserted a cross claim seeking a declaration that National Grange was obligated to defend and indemnify her under both the business and automobile policies. Richardson also commenced a third-party action seeking a declaration that Cherry Valley must provide coverage for her under the umbrella policy.

Supreme Court thereafter granted in part the motion of National Grange and denied in part the cross motions of Richardson and Miller, declaring that National Grange is not obligated to defend or indemnify Richardson or her husband under the personal automobile insurance policy issued to Richmond. The court further denied in part the motion of National Grange and granted in part the cross motions of Richardson and Miller, declaring that National Grange is obligated to defend and indemnify Richardson under the business policy issued to Richmond Farms. In addition, the court granted the cross motion of the Richmonds, declaring that National Grange is obligated to defend and indemnify them under the business policy issued to Richmond Farms, and the court granted in part the cross motion of Richardson, declaring that Cherry Valley "must provide excess coverage" for her.

We note at the outset that the issue whether National Grange is obligated to indemnify the Richmonds is moot, based on our prior decision in *Miller* in which we determined as a matter of law that the Richmonds "are not liable for injuries sustained by Miller and Rapson by virtue of [their] ownership of the hay wagon being towed by Lorraine Richardson at the time of the collision" (*id.* at 1300).

We further conclude that the court erred in declaring that National Grange was obligated to defend and indemnify Richardson under the business policy, and we therefore modify the judgment accordingly. Addressing first the duty to indemnify, we note that such a duty may be imposed only in the event that the insured is liable for a loss that is covered by the policy (*see Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419). Here, we conclude that the truck driven by Richardson at the time of the accident was not a covered vehicle within the meaning of the business policy. Contrary to the contentions of Miller and Richardson, the truck was not a covered "auto" within the meaning of "nonowned autos" in the business policy. Such "nonowned autos" are defined as vehicles that "you [i.e., Richmond Farms,] do not own, lease, hire, rent or borrow that are used in connection with [Richmond Farms'] business." The definition of covered "autos" also includes "[m]obile equipment while being carried or towed by a covered 'auto.'" Under that definition, the hay wagon being towed by Richardson is covered only in the event that it was being towed by a covered "auto." We conclude that the vehicle driven by Richardson that was used to tow the hay wagon at the time of the collision is not a covered auto. The phrase "used in connection with your business" is not ambiguous under the facts of this case. Although that phrase is not defined in the policy, it is to " 'be

understood in [its] plain, ordinary, and popularly understood sense, rather than in a forced or technical sense' " (*Burriesci v Paul Revere Life Ins. Co.*, 255 AD2d 993, 994). In addition, a court " 'may not disregard clear provisions which the insurers inserted in the policies and that the insured accepted' " (*Baughman v Merchants Mut. Ins. Co.*, 87 NY2d 589, 592). Here, it is clear from the language of the business policy that the business policy covered vehicles that are not owned, leased, hired, rented or borrowed by Richmond Farms but are nevertheless associated with risks involving the business of Richmond Farms. The policy language "used in connection with your business" is not so broad as to encompass a customer using his or her own vehicle to transport purchased items home. Further, the record establishes that, although Richmonds were in the business of selling hay, they were not in the business of delivering hay. Indeed, Richardson asked to use the hay wagon in order to transport the hay, and she was not charged a fee for the use of the hay wagon. Thus, it is clear from the record before us that the hay wagon was used by Richardson for her own purposes.

Contrary to the further contentions of Richardson, Rapson and Miller, the vehicle driven by Richardson was not a covered auto within the meaning of hired autos, which are defined in the business policy as those vehicles that are leased, hired, rented or borrowed by Richmond Farms. Richardson and her husband submitted affidavits in which they contended that the husband loaned the vehicle driven by Richardson to Richmond Farms, which in turn loaned the vehicle to Richardson for towing the hay wagon. Those affidavits, however, are insufficient to raise an issue of fact concerning whether the vehicle was a hired auto, inasmuch as they are self-serving and contradicted by prior sworn testimony of Richardson and her husband (*see generally Martindale v Town of Brownville*, 55 AD3d 1387, *lv denied* 11 NY3d 715; *Liberty Mut. Ins. Co. v General Acc. Ins. Co.*, 277 AD2d 981). Moreover, the record contains an affidavit of Richmond in which he states that no one from Richmond Farms spoke with Richardson's husband about borrowing the vehicle, and that no one from Richmond Farms loaned the vehicle to Richardson.

We further conclude that National Grange did not have a duty to defend Richardson. "While the duty of the insurer to defend is broader than its duty to indemnify . . . and the policy must be construed liberally in favor of the insured and strictly against the insurer . . ., where it can be concluded as a matter of law that there is no possible factual or legal basis under which the insurer might eventually be found obligated to indemnify the insured, the insurer may properly decline to provide a defense" (*Propis v Fireman's Fund Ins. Co.*, 112 AD2d 734, 736, *affd* 66 NY2d 828). The complaints in the underlying actions allege that Richardson was towing the hay wagon at the direction of Richmond and in furtherance of the business of Richmond Farms. Although under this language, Richardson could be construed as driving a covered vehicle due to its alleged use in connection with Richmond Farms' business, there is nothing in the complaint that supports a finding that Richardson was an insured under the business auto policy. The definition of "insured" includes Richmond Farms and anyone who is using a "covered auto" owned, hired

or borrowed by Richmond Farms. The relevant vehicle herein is the vehicle driven by Richardson, and the complaints in the underlying actions do not allege that Richmond Farms owned, hired or borrowed the vehicle.

We further conclude that the court properly declared that National Grange is not obligated to defend and indemnify Richardson under the personal automobile insurance policy issued to Richmond. Pursuant to that policy, the term insured includes any person using a covered auto owned by Richmond, including any trailer owned by him. The term trailer is defined in relevant part as "a farm wagon or farm implement" that is towed by a private passenger auto, "pickup" or van. It is undisputed that the hay wagon constitutes a trailer within the meaning of the personal automobile insurance policy. We conclude however that the record establishes that the hay wagon was owned by Richmond Farms, not by Richmond. Richmond submitted an affidavit expressly stating that Richmond Farms owned the hay wagon, and explained that any indication in his deposition testimony to the contrary resulted only from the fact that he was not asked to differentiate between himself and Richmond Farms.

Finally, we conclude that the court erred in declaring that Cherry Valley must provide excess coverage for Richardson under the umbrella policy, and we therefore further modify the judgment accordingly. The umbrella policy provided extra liability insurance for any person who was, inter alia, covered under one of the basic policies of the Richmonds, including the business and personal automobile insurance policies. Based on our conclusion that Richardson is not covered under either of those policies, she likewise is not covered under the umbrella policy. Thus, under the circumstances of this case, we search the record pursuant to CPLR 3212 (b) and grant summary judgment in favor of Cherry Valley, a nonmoving party, and we grant judgment declaring that it is not obligated to provide excess coverage for Richardson under the umbrella policy. In light of our determination, we need not address Richardson's remaining contentions.

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

1560

KA 03-01576

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE A. ROMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 3, 2003. The judgment convicted defendant, upon a jury verdict, of attempted burglary in the third degree, possession of burglar's tools and criminal mischief in the fourth degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted burglary in the third degree (Penal Law §§ 110.00, 140.20) and, in appeal No. 2, defendant appeals from a judgment convicting him upon the same jury verdict of burglary in the third degree (§ 140.20) and criminal mischief in the fourth degree (§ 145.00 [1]). Defendant was indicted separately on charges arising from burglaries at a liquor store and a convenience store, and the indictments were consolidated for trial. Defendant contends in each appeal that Supreme Court erred in precluding him from testifying with respect to an out-of-court statement made by one of the victims on the ground that the hearsay statement falls under the exception to the hearsay rule as a statement against penal interest. We reject that contention. Defendant failed to establish that the victim was unavailable to testify at trial and that there were "supporting circumstances independent of the statement itself . . . to attest to its trustworthiness and reliability" (*People v Settles*, 46 NY2d 154, 167; see *People v Ross*, 43 AD3d 567, 570, lv denied 9 NY3d 964). Defendant failed to preserve for our review his further contention that the court's ruling with respect to the victim's statement deprived him of his right to testify and present a defense (see generally *People v Angelo*, 88 NY2d 217, 222) and, in any event, that contention lacks merit. We cannot conclude on the record

before us that the court denied defendant " 'a meaningful opportunity to present a complete defense' " (*Crane v Kentucky*, 476 US 683, 690, quoting *California v Trombetta*, 467 US 479, 485).

We also reject defendant's contention that defense counsel's failure to call the victim in question as a witness constitutes ineffective assistance of counsel. Although a single error may constitute ineffective assistance (see *People v Caban*, 5 NY3d 143, 152; *People v Lott*, 55 AD3d 1274, 1275, lv denied 11 NY3d 898), here defendant failed to establish that there was no legitimate or strategic reason for defense counsel's alleged error (see *People v Benevento*, 91 NY2d 708, 712; see generally *People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's further contention, the court did not abuse its discretion in consolidating the indictments. Although defendant made " 'a convincing showing that he ha[d] . . . important testimony to give concerning one [indictment],' " he failed to establish that he had a " 'strong need to refrain from testifying on the other' " (*People v Lane*, 56 NY2d 1, 8; see *People v Colon*, 32 AD3d 791, lv denied 7 NY3d 924; *People v Watson*, 281 AD2d 691, 693, lv denied 96 NY2d 925). We reject the contention of defendant that the court erred in permitting the arresting officer to testify that defendant fled when the officer approached him. "The limited probative force of flight evidence . . . is no reason for its exclusion" (*People v Yazum*, 13 NY2d 302, 304, rearg denied 15 NY2d 679; see *People v Burke*, 20 AD3d 932, 933, lv denied 5 NY3d 826), even where, as here, the defendant is not arrested close in time to the commission of the crimes (see *People v Waterman*, 39 AD3d 1259, lv denied 9 NY3d 927).

Defendant failed to preserve for our review his contention that the persistent violent felony offender statutes are unconstitutional (see CPL 470.05 [2]) and, in any event, that contention is without merit (see generally *People v Quinones*, ___ NY3d ___ [Feb. 24, 2009]; *People v Rivera*, 5 NY3d 61, 66-70, cert denied 546 US 984; *People v Rosen*, 96 NY2d 329, 335, cert denied 534 US 899; *People v Gomez*, 38 AD3d 1271, 1272). Finally, the sentence is not unduly harsh or severe.

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

1561

KA 03-01577

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE A. ROMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County
(Francis A. Affronti, J.), rendered June 3, 2003. The judgment
convicted defendant, upon a jury verdict, of burglary in the third
degree and criminal mischief in the fourth degree.

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

Same Memorandum as in *People v Roman* ([appeal No. 1] ____ AD3d ____
[Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1578

CA 08-01455

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

DAVID M. JOHNSON AND CATALINA B. JOHNSON,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

EBIDENERGY, INC., YONDER FARMS FRUIT
DISTRIBUTORS, LLC, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

EBIDENERGY, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

KVA ELECTRIC, THIRD-PARTY DEFENDANT,
AMS CONTRACTING AND GEORGE D. JOHNSON,
THIRD-PARTY DEFENDANTS-APPELLANTS.

YONDER FARMS FRUIT DISTRIBUTORS, LLC,
THIRD-PARTY PLAINTIFF-RESPONDENT,

V

KVA ELECTRIC, THIRD-PARTY DEFENDANT,
AMS CONTRACTING AND GEORGE D. JOHNSON,
THIRD-PARTY DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

GEORGE D. JOHNSON, PLAINTIFF-RESPONDENT,

V

EBIDENERGY, INC. AND YONDER FARMS FRUIT
DISTRIBUTORS, LLC, DEFENDANTS-APPELLANTS.

(AND TWO THIRD-PARTY ACTIONS.)
(ACTION NO. 2.)

EUSTACE & MARQUEZ, WHITE PLAINS (JOHN R. MARQUEZ OF COUNSEL), FOR
DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-RESPONDENT EBIDENERGY,
INC.

LUSTIG & BROWN, LLP, BUFFALO, LAW OFFICE OF MAX W. GERSHWEIR, NEW YORK
CITY (JENNIFER B. ETTENGER OF COUNSEL), FOR DEFENDANT-APPELLANT AND
THIRD-PARTY PLAINTIFF-RESPONDENT YONDER FARMS FRUIT DISTRIBUTORS, LLC.

HURWITZ & FINE, P.C., BUFFALO (PAUL J. SUOZZI OF COUNSEL), FOR
THIRD-PARTY DEFENDANTS-APPELLANTS.

THE MARASCO LAW FIRM, ROCHESTER (PAUL A. MARASCO OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS DAVID M. JOHNSON AND CATALINA B. JOHNSON.

DOMINIC PELLEGRINO, ROCHESTER, FOR PLAINTIFF-RESPONDENT GEORGE D.
JOHNSON.

Appeals from an order of the Supreme Court, Monroe County
(Matthew A. Rosenbaum, J.), entered September 21, 2007 in a personal
injury action. The order, inter alia, denied the motions for summary
judgment of defendants Ebidenergy, Inc. and Yonder Farms Fruit
Distributors, LLC in action Nos. 1 and 2.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting in part the cross motion
in action No. 1 and dismissing the third-party complaints against
third-party defendants AMS Contracting and George D. Johnson, and by
granting in part the motions in action No. 2 and dismissing the Labor
Law §§ 200 and 241 (6) causes of action and as modified the order is
affirmed without costs.

Memorandum: David M. Johnson (David) and his wife, the
plaintiffs in action No. 1, and George D. Johnson (George), the
plaintiff in action No. 2, commenced these actions seeking damages for
injuries sustained by David and George, David's father, when a fuse
installed by David in a switch box exploded, burning both David and
George. Ebidenergy, Inc. (Ebidenergy) "brokered" a grant running from
the New York State Energy Research and Development Authority to Yonder
Farms Fruit Distributors, LLC (Yonder Farms) for the installation of
metering equipment to monitor electrical usage at Yonder Farms.
Ebidenergy thereafter hired third-party defendant KVA Electric (KVA)
to install the metering equipment at Yonder Farms and David, an
employee of KVA, installed the equipment. George, who was an employee
of third-party defendant AMS Contracting (AMS), was at the site in
order to retrieve paperwork for work at a different site. Upon
discovering that a fuse had blown, David was directed by the manager
of Yonder Farms to purchase a new fuse, and the accident occurred
while David was installing that fuse. Ebidenergy and Yonder Farms
(collectively, defendants) are defendants in both actions, and KVA and
AMS are third-party defendants in both actions.

Defendants moved for summary judgment dismissing the complaint in
action No. 1 and the amended complaint in action No. 2, as well as the
cross claims against them in both actions. In action No. 1, AMS and
George cross-moved for, inter alia, summary judgment dismissing the
third-party complaints against them and, in action No. 2, AMS cross-
moved for, inter alia, summary judgment dismissing the third-party
complaints against it. As relevant on appeal, Supreme Court denied

the motions of defendants and the cross motion of AMS and George in action No. 1, and the court denied the motions of defendants in action No. 2.

We conclude with respect to action No. 1 that the court properly denied defendants' motion seeking dismissal of David's Labor Law § 241 (6) cause of action. Contrary to defendants' contention, David was engaged in "altering" a building within the purview of Labor Law § 241 (6) at the time of the accident (see *Joblon v Solow*, 91 NY2d 457, 466; *Smith v Pergament Enters. of S.I.*, 271 AD2d 870, 873; *Dedario v New York Tel. Co.*, 162 AD2d 1001, 1003). Prior to the accident, David spent six hours installing the metering equipment, which involved screwing 12 d-ring screws into the wall, threading low voltage pulse wire through the rings, connecting one end of the pulse wires to the recorder and the other end to current transducers (CTs), snapping the CTs around the outgoing wires of the switch box, installing a slave recorder, tandem wiring the slave recorder to a previously installed recorder, and powering up the CTs using fusible CT leads.

Contrary to the further contention of Ebidenergy, it may be held liable as a contractor pursuant to Labor Law § 241 (6). It is the entity's " 'right to exercise control over the work [that] denotes its status as a contractor, regardless of whether it actually exercised that right' " (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428). Here, the record establishes that Ebidenergy had the contractual authority to enforce safety standards, had the power to hire responsible contractors, and had some control over the methods used by subcontractors in performing installations. We further reject Ebidenergy's contention that the Industrial Code provisions upon which the plaintiffs in action No. 1 rely, namely 12 NYCRR 23-1.13 (b) (4) and (5), do not apply in this case because they refer only to employers and employees. While those provisions refer to duties of an employer, we note that 12 NYCRR 23-1.3 expressly provides that part 23, which includes the provisions upon which the plaintiffs in action No. 1 rely, "applies to persons employed in construction, demolition and excavation operations, to their employers and to owners, contractors and their agents obligated by the Labor Law to provide such persons with safe working conditions and safe places to work" (see 12 NYCRR 23-1.5; *Rice v City of Cortland*, 262 AD2d 770, 773-774).

We further conclude that the court properly denied those parts of defendants' motions in action No. 1 with respect to common-law negligence and Labor Law § 200. There is an issue of fact whether either of those defendants had some control over the method and manner of David's work (see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; see also *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352), and whether Yonder Farms helped to create the hazardous condition (see *Bonura v KWK Assoc., Inc.*, 2 AD3d 207, 207-208). With respect to Ebidenergy, the record establishes that it was the policy of Ebidenergy for installers to work on energized circuits, if possible, and David confirmed that it was his understanding that "there would be no power shutdowns in any facility." With respect to Yonder Farms, the record establishes that a representative of Yonder

Farms requested that David replace the blown fuse and that, when David asked that the power be shut off in order to change the fuse, the representative denied David's request.

Finally, we conclude with respect to action No. 1 that the court erred in denying that part of the cross motion of AMS and George for summary judgment dismissing the third-party complaints against them. AMS and George established that they did not supervise or control David's work and had no actual or constructive notice of the dangerous condition, i.e., the energized panel (see *Comes*, 82 NY2d at 877-878; *Schwab v Campbell*, 266 AD2d 840, 841), and third-party plaintiffs in action No. 1 failed to raise an issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore modify the order accordingly.

We conclude with respect to action No. 2, however, that the court erred in denying those parts of the motions of defendants for summary judgment dismissing the Labor Law §§ 200 and 241 (6) causes of action, inasmuch as George was not " 'permitted or suffered to work on a building or structure' " at the accident site (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577). The record establishes that George was at the site in order to pick up paperwork for another job and that he was not there to aid in the installation of the metering equipment. Thus, George was not within the class of workers protected by the Labor Law because he was "not a person 'employed' to carry out" the project (*Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109; see *Riedel v Steger Material Handling Co.*, 254 AD2d 819, 820). We therefore further modify the order accordingly.

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

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

1597

CA 08-01222

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, PINE, AND GORSKI, JJ.

T.L.C. WEST, LLC, DOING BUSINESS AS APPLEBEE'S
NEIGHBORHOOD GRILL & BAR,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

FASHION OUTLETS OF NIAGARA, LLC,
DEFENDANT-RESPONDENT-APPELLANT.

LEVENE GOULDIN & THOMPSON, LLP, BINGHAMTON (MICHAEL R. WRIGHT OF
COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 14, 2008. The order, among other things, denied plaintiff's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the cross motion, granting judgment in favor of plaintiff and against defendant on the first cause of action, vacating the second ordering paragraph and dismissing the counterclaim and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Plaintiff and defendant are the respective successor lessee and successor lessor under a ground lease for a restaurant at a shopping mall. The term of the lease commenced in April 1994. In June 2006, defendant notified plaintiff that it was in arrears for waste removal services since the inception of the lease and demanded payment for waste removal services through July 2006. Plaintiff began making monthly payments directly to the trash hauler for waste removal services "under protest" and thereafter commenced this action seeking, inter alia, a determination that defendant is responsible for all past and future waste removal services and a money judgment for all payments made by plaintiff for those services. Defendant counterclaimed for the arrears allegedly due for waste removal services.

Defendant moved for summary judgment dismissing the complaint and for summary judgment on the counterclaim, and plaintiff cross-moved for summary judgment on the first cause of action, seeking a determination that defendant is responsible for the payment of waste

removal services and a money judgment for the amount paid by plaintiff for those services under protest. Plaintiff also sought summary judgment dismissing the counterclaim. Each party contended that the lease unambiguously supported its interpretation of the parties' respective rights and duties concerning waste removal services. We agree with plaintiff that Supreme Court erred in denying its cross motion seeking summary judgment on the first cause of action and summary judgment dismissing the counterclaim.

At issue is paragraph 9 of the lease, which provides in relevant part that "[t]he utilities and services furnished to the Demised Premises shall be provided and paid for by the Lessee . . . , including without limitation, gas, electricity, water and cost of maintenance of and repair of water meter, sewer charges and rental." Plaintiff also relies on paragraph 22 of the lease, pursuant to which defendant is responsible for all common area maintenance. We conclude that those paragraphs are ambiguous inasmuch as they are "reasonably susceptible of more than one interpretation" with respect to whether plaintiff is responsible for waste removal services (*Chimart Assoc. v Paul*, 66 NY2d 570, 573). Because neither party met its "burden of establishing that its construction of the [lease] 'is the only construction which can fairly be placed thereon' " (*St. Mary v Paul Smith's Coll. of Arts & Sciences*, 247 AD2d 859, 859), the intent of the contracting parties may properly be determined based on the extrinsic evidence submitted by the parties (*see Kirby's Grill v Westvale Plaza*, 272 AD2d 978).

Here, all of the extrinsic evidence contained in the record weighs in favor of plaintiff's interpretation of the lease. In support of its cross motion, plaintiff submitted the affidavit of its chief executive officer (CEO), who signed the lease as president of the original lessee and averred that the "understanding, agreement, intent and actual practice" of the parties was that "waste and trash removal were part of the common area maintenance for which the [l]essor was responsible and any costs relating thereto were . . . included in the base rent being paid by [the l]essee." Plaintiff also submitted the affidavit of the then vice-president of the original lessor, who negotiated and signed the lease. He averred that the intent and practice of the parties was that the lessor "was to and did provide a trash receptacle located within the common area for use by [the original lessee], at no additional charge, with such waste and trash removal being part of the common area maintenance for which the [l]essor was responsible." Plaintiff's CEO likewise further averred that, until defendant's June 2006 notification, plaintiff and the neighboring tenants deposited their waste in a common area waste receptacle maintained and paid for by defendant. Defendant does not controvert those statements concerning plaintiff's use of the waste receptacle in the common area at no cost to plaintiff. Indeed, that factual history is confirmed by a November 2006 memorandum to all tenants from defendant's general manager, who stated therein that "solid waste trash removal services **will no longer** be part of Common Area Maintenance."

"[T]here could be no more compelling evidence of intent than the sworn . . . affidavits of both parties to the contract" (*Federal Ins.*

Co. v Americas Ins. Co., 258 AD2d 39, 44). Further, "[t]he best evidence of the intent of parties to a contract is their conduct after the contract is formed" (*Waverly Corp. v City of New York*, 48 AD3d 261, 265; see *Westfield Family Physicians, P.C. v Healthnow N.Y., Inc.*, ___ AD3d ___, ___ [Feb. 6, 2009]; *Federal Ins. Co.*, 258 AD2d at 44). Here, the affidavits of both signatories to the lease and the 12-year course of conduct of both the original and the successor lessees and lessors unequivocally support plaintiff's interpretation of the lease. Plaintiff is therefore entitled to the relief sought in its cross motion (see generally *Waverly Corp.*, 48 AD3d at 265; *Federal Ins. Co.*, 258 AD2d at 44-45; *Weiner v Anesthesia Assoc. of W. Suffolk*, 203 AD2d 454). We thus modify the order accordingly, and we remit the matter to Supreme Court to determine the amount paid by plaintiff for waste removal services under protest and to direct the entry of judgment in favor of plaintiff for that amount together with interest, costs and disbursements.

The dissent erroneously concludes that the affidavit of defendant's general manager, who previously was a "specialty leasing agent" employed by the original lessor (hereafter, general manager), raises a triable issue of fact. The general manager was not employed by the original lessor until 1996, and the subject lease was executed in 1994. Thus, the general manager has no knowledge of the facts surrounding the execution of the lease, and can offer no evidence of " 'the true intention of the parties' " to the lease (*Chimart Assoc. v Paul*, 66 NY2d 570, 574; see *Hudson-Port Ewen Assoc. v Chien Kuo*, 165 AD2d 301, 305, *affd* 78 NY2d 944; *Tracey Rd. Equip. v Village of Johnson City*, 174 AD2d 849, 851; *cf. Newin Corp. v Hartford Acc. & Indem. Co.*, 62 NY2d 916, 918-919). In any event, we cannot agree with the conclusion of the dissent that the affidavit of defendant's general manager contradicts the evidence submitted by plaintiff concerning the parties' practice with respect to trash removal. In fact, that affidavit confirms that plaintiff had been disposing of its waste in the common area waste receptacle from the inception of the lease until 2006.

All concur except MARTOCHE and FAHEY, JJ., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part and would affirm. In our view, Supreme Court properly denied defendant's motion for, inter alia, summary judgment dismissing the complaint as well as plaintiff's cross motion for summary judgment on the first cause of action and for summary judgment dismissing the counterclaim. We agree with the majority that the provisions of the lease in question are ambiguous and that neither party established that its construction of those provisions " 'is the only construction which can fairly be placed thereon' " (*St. Mary v Paul Smith's Coll. of Arts & Sciences*, 247 AD2d 859, 859; see also *Chimart Assoc. v Paul*, 66 NY2d 570, 573). Although we of course further agree with the majority that the intent of the contracting parties thus may properly be determined based on the extrinsic evidence submitted by the parties, we cannot agree with the majority that "there is no disputed extrinsic evidence of intention" (*Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 293), i.e., that "all of the extrinsic

evidence contained in the record weighs in favor of plaintiff's interpretation of the lease." Rather, in our view, the interpretation of the provisions in question "depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence," and such interpretation thus is for the trier of fact (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172; see *Town of Wilson v Town of Newfane*, 181 AD2d 1045). We deem misplaced the majority's reliance on the affidavit of the then vice-president of the original lessor submitted by plaintiff in support of the cross motion. In support of its motion for, inter alia, summary judgment dismissing the complaint, defendant submitted the affidavit of its general manager, who was employed by defendant's predecessor in various capacities beginning in 1996. Her affidavit contradicts the affidavit submitted in support of plaintiff's motion with respect to the practices of the tenants concerning trash removal at the mall. Under the circumstances, the intent of the parties cannot be gleaned from the contract and there is a factual dispute with respect to the practices of the parties, thus precluding summary judgment.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1598

CA 07-01351

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

ROBERT VERLE CASE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CAYUGA COUNTY, JAMES H. ORMAN, CAYUGA COUNTY
TREASURER, ALAN P. KOZLOWSKI, DIRECTOR, CAYUGA
COUNTY REAL PROPERTY TAX SERVICES,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

MARY A. OSGOOD, GROTON, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered May 15, 2007. The order, among other things, dismissed the amended complaint against defendants Cayuga County, James H. Orman, Cayuga County Treasurer, and Alan P. Kozlowski, Director, Cayuga County Real Property Tax Services.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the amended complaint against defendants Cayuga County, James H. Orman, Cayuga County Treasurer, and Alan P. Kozlowski, Director, Cayuga County Real Property Tax Services, and by providing that the motion is granted in part and that plaintiff is directed to accept service of the answer to the amended complaint of those defendants dated November 27, 2006 and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, to vacate the conveyance of three parcels of property to defendant Cayuga County (County) following tax foreclosure proceedings. Supreme Court did not abuse its discretion in impliedly granting that part of the motion of the County, its County Treasurer and its Director of Real Property Tax Services (County defendants) for an order compelling plaintiff to accept service of their late answer to the amended complaint against them and in denying plaintiff's cross motion for a default judgment against them (*see* CPLR 3012 [d]; *Humphrey v WIXT News Ch. 9*, 12 AD3d 1087; *Cleary v East Syracuse-Minoa Cent. School Dist.*, 248 AD2d 1005; *see also Village of Parish v Weichert*, 291 AD2d 818). Because the order on appeal does not expressly grant that part of the motion seeking to compel plaintiff to accept service of the late answer, we modify the order accordingly. "Public policy favors the

resolution of a case on the merits, and a court has broad discretion to grant relief from a pleading default if there is a showing of merit to the defense, a reasonable excuse for the delay and it appears that the delay did not prejudice the other party" (*Cleary*, 248 AD2d 1005; see *Humphrey*, 12 AD3d 1087). The attorney's affirmation submitted in support of the motion established that the default was of short duration, was attributable to law office failure and was not willful. Further, inasmuch as the County defendants timely answered the original complaint and the amended complaint against them was substantially the same as the original complaint, plaintiff has failed to demonstrate that he was prejudiced by the six-day delay in the service of the answer to the amended complaint (see generally *Niagara Mohawk Power Corp. v Freed*, 278 AD2d 839, 841).

Contrary to plaintiff's contention, an affidavit of merit is not a precondition to obtaining relief under CPLR 3012 (d) (see *Weis v Weis*, 138 AD2d 968, 969; *Ching v Ching*, 125 AD2d 934). In any event, we conclude that the affirmation of the County defendants' attorney and the answer to the amended complaint itself established several meritorious defenses (see generally *Matter of Manufacturers & Traders Trust Co. v Myers*, 38 AD3d 965, lv dismissed 8 NY3d 1019). Contrary to plaintiff's further contention, any defect in the verification of the answer of the County defendants to the amended complaint should be ignored inasmuch as plaintiff failed to demonstrate that he was substantially prejudiced by that alleged defect (see CPLR 3026; *Duerr v 1435 Tenants Corp.*, 309 AD2d 607; *Matter of Nafalski v Toia*, 63 AD2d 1039).

We agree with plaintiff, however, that the court erred in sua sponte granting the County defendants summary judgment dismissing the amended complaint against them, and we therefore further modify the order accordingly. " 'While the [c]ourt has the power to award summary judgment to a nonmoving party, predicated upon a motion for that relief by another party, it may not sua sponte award summary judgment if no party has moved for summary judgment' . . . , unless it appears from a reading of the parties' papers that they were deliberately charting a course for summary judgment by laying bare their proof" (*Warren v Mickle*, 40 AD3d 974, 975). "The power of the court to award summary judgment for or against a nonmoving party pursuant to CPLR 3212 (b) does not dispense with the necessity for fair notice and an opportunity of a party to present his or her defenses" (*Whitman Realty Group, Inc. v Galano*, 52 AD3d 505, 506). Here, it does not appear on the record before us that plaintiff and the County defendants were "charting a course for summary judgment" (*Warren*, 40 AD3d at 975). The County defendants did not move for summary judgment dismissing the amended complaint against them, nor indeed did they move to dismiss the amended complaint against them for failure to state a cause of action pursuant to CPLR 3211 (a) (7). Although plaintiff's cross motion for a default judgment against the County defendants sought summary judgment on the amended complaint as an alternative form of relief, the attorney's affirmation submitted in support of the cross motion did not address the merits of the case, and we thus do not deem the cross motion to be one for summary

judgment (*see generally Sylvester v New Water St. Corp.*, 16 AD3d 486, 488).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1602

TP 08-01106

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

IN THE MATTER OF RITE AID OF NEW YORK, INC.,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT-PETITIONER,
AND NANCY L. FIX, RESPONDENT.

HODGSON RUSS LLP, BUFFALO (JOSEPH S. BROWN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

JOHN A. GALEZIEWSKI, TAMPA, FLORIDA, FOR RESPONDENT.

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 [Rose H. Sconiers, J.], entered September 26, 2007), to annul a determination of the Commissioner of respondent-petitioner New York State Division of Human Rights. The determination found that petitioner-respondent had discriminated against respondent and had constructively discharged her from employment.

It is hereby ORDERED that the determination is modified on the law and the petition is granted in part by annulling that part of the determination finding that respondent was constructively discharged and vacating the award of damages for back pay based on that finding, by reducing the award of compensatory damages for mental anguish and humiliation to \$5,000, and by vacating the date predetermination interest is to commence on the award of damages for back pay based on comparable work, and as modified the determination is confirmed without costs, the cross petition is granted in part and petitioner-respondent is directed to pay respondent the following sums: \$20,405 for back pay based on comparable work and \$5,000 for mental anguish and humiliation, with interest at the rate of 9% per annum, commencing March 16, 2007, and the matter is remitted to respondent-petitioner for further proceedings in accordance with the following Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of the Commissioner of respondent-petitioner, New York State Division of Human Rights (SDHR), finding that respondent (hereafter, complainant) was discriminated against based on her gender and was constructively discharged from her employment with petitioner. The Commissioner found that the compensation received by complainant was less than that

of her male counterparts who performed comparable work under essentially comparable working conditions, and that the constructive discharge was in retaliation for complainant's filing of a wage differential complaint with SDHR. The Commissioner ordered petitioner to pay complainant the sum of \$20,405, for back pay owed to her from a date after her promotion to manager until the date of her resignation on March 25, 1997 plus 9% interest from March 1999, a "reasonable intermediate date," to the date on which such payment is made; the sum of \$61,086, for back pay owed to complainant from the time of her resignation to the date on which she began earning a comparable salary at a new job, plus 9% interest from November 2001 to the date on which such payment is made; and the sum of \$15,000, for compensatory damages for mental anguish and humiliation, plus 9% interest from the date of the Commissioner's order to the date on which such payment is made. SDHR filed a cross petition seeking enforcement of the Commissioner's order.

We conclude that the determination that petitioner paid complainant less than her male counterparts for performing comparable work under essentially comparable working conditions is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180). We reject the contention that the back pay award based on comparable work must be limited to the one-year period contained in Executive Law § 297 (5). By failing to raise that contention at any point prior to this appeal despite its knowledge that back pay was sought in excess of that one-year period, petitioner implicitly waived the applicability of the limitation, and we decline to apply it now. We therefore confirm the Commissioner's determination with respect to back pay based on comparable work.

We conclude, however, that the determination that complainant was constructively discharged in retaliation for filing a wage differential complaint is not supported by substantial evidence, and we therefore modify the determination accordingly. We further conclude that, although the determination that complainant is entitled to compensatory damages for mental anguish and humiliation is supported by substantial evidence, the amount of that award is excessive. Complainant sought no medical treatment and her testimony in support of that award was sparse (*see generally Matter of Buffalo Athletic Club v New York State Div. of Human Rights*, 249 AD2d 986). In our view, an award of \$5,000 is the maximum award supported by the evidence, and we therefore further modify the determination accordingly.

Finally, we conclude that the Commissioner erred in requiring petitioner to pay predetermination interest relating to that portion of the "unreasonable delay" in determining the complaint that is attributable solely to SDHR (*Matter of Corning Glass Works v Ovsanik*, 84 NY2d 619, 625; *see generally Matter of M. Passucci Gen. Constr. Co. v Hudacs*, 221 AD2d 987, *lv denied* 87 NY2d 811). We therefore further modify the determination accordingly, and we remit the matter to SDHR to set the date that predetermination interest is to commence on the award of damages for back pay based on comparable work after taking into account the period of time attributable solely to SDHR's

unreasonable delay (see *Corning Glass Works*, 84 NY2d at 624-625).

All concur except GREEN and GORSKI, JJ., who dissent in part and vote to confirm in the following Memorandum: We respectfully dissent in part. In our view, the Commissioner's award of \$15,000 for mental anguish and humiliation is supported by the record (see *Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 218-219), and is consistent with awards for comparable injuries (see generally *Matter of R & B Autobody & Radiator, Inc. v New York State Div. of Human Rights*, 31 AD3d 989, 991). That award therefore should not be disturbed. We further conclude that the Commissioner's determination that complainant was constructively discharged is supported by substantial evidence (see generally *Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 707), and that the award of damages relating to that constructive discharge also should not be disturbed. Finally, contrary to the majority, we would not disturb the award of predetermination interest. "[C]onsistent with the underlying purpose and intent of the Human Rights Law to compensate victims of employment discrimination, here the award of pre-determination interest, accruing from the date of discrimination, complements the back pay award and is appropriate" (*Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 27). We therefore would confirm the determination, dismiss the petition and grant the cross petition seeking enforcement of the Commissioner's order.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1684

CA 08-01307

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

HEARTWOOD FORESTLAND FUND, III, L.P.,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CROOKED LAKE PRESERVE, LLC, AND BERNARD J.
RYAN, DEFENDANTS-RESPONDENTS.

MCPHILLIPS, FITZGERALD & CULLUM, LLP, GLENS FALLS (W. BRADLEY KRAUSE
OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SLYE & BURROWS, WATERTOWN (CHRISTINA E. STONE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Lewis County (Hugh A. Gilbert, J.), entered November 5, 2007 in an action for a permanent injunction. The order, among other things, granted defendants' cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied, the complaint is reinstated, the motion is granted, the counterclaim is dismissed and defendants are permanently enjoined from interfering with plaintiff's use of the right-of-way over the property in question as set forth in and restricted by the agreement dated March 9, 1987.

Memorandum: In March 1987, nonparty Champion International Corporation (Champion) entered into an agreement with defendants' predecessors in interest (agreement) that, inter alia, granted Champion, "its successors and assigns" a right-of-way over Crooked Lake Road, which runs across property in the Town of Watson that is currently owned by defendants (Crooked Lake property). The agreement provided in relevant part that "[s]aid road shall be used by [Champion], its successors and assigns, for all purposes of logging and maintenance and care of its woodlands situate on [Champion] Land Easterly of the Crooked Lake Property." The agreement further provided that it would terminate automatically "should the [Champion] property be transferred by conveyance, appropriation, or otherwise to the State of New York." The Champion property encompassed approximately 4,000 acres surrounding the Crooked Lake property.

In June 1999, Champion conveyed 139,000 acres to The Conservation Fund, including the property subject to the agreement, and The

Conservation Fund in turn conveyed a "conservation easement" over the property to the State of New York. Plaintiff subsequently purchased 110,000 acres of property from The Conservation Fund that was subject both to the agreement and to the conservation easement. In December 2003, defendants notified plaintiff that the conveyance of the conservation easement triggered the termination provision of the agreement between Champion and defendants' predecessors in interest. Plaintiff commenced this action seeking, inter alia, to enjoin defendants from interfering with its use of the right-of-way over the Crooked Lake property.

We agree with plaintiff that Supreme Court erred in denying its motion seeking, inter alia, summary judgment on the complaint and in granting defendants' cross motion for summary judgment dismissing the complaint. We note at the outset our agreement with defendants that the termination provision of the agreement is unambiguous, and we thus do not consider extrinsic evidence in determining the intent of the parties to the agreement. "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324; see *South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277; *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475). We nevertheless conclude that the plain meaning of the termination provision establishes that the agreement would be terminated only in the event that there was a transfer of a fee interest in the Champion property to the State of New York, and that is not the case here (see generally *Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534; *Fingerlakes Chiropractic v Maggio*, 269 AD2d 790, 792). The term "the [Champion] property" as used in the termination provision encompasses the entire " 'bundle of rights' " associated with the property, i.e., the fee interest (*Consumers Union of U.S., Inc. v State of New York*, 5 NY3d 327, 355 n 23, quoting *Nollan v California Coastal Commn.*, 483 US 825, 831; see generally *Matter of Gibson v Gleason*, 20 AD3d 623, 627, lv denied 5 NY3d 713), and here only a conservation easement rather than a fee interest was conveyed to the State of New York.

We further note, however, that the right-of-way to use Crooked Lake Road that was conveyed by Champion to The Conservation Fund and thereafter from The Conservation Fund to plaintiff is limited to the "purposes of logging and maintenance and care of . . . woodlands [on the Champion property]." Although the conservation easement conveyed to the State of New York included as one of its objectives the provision of "opportunities for [p]ublic [r]ecreation . . .," the Conservation Fund could not transfer a right-of-way to use the Crooked Lake Road for public recreation inasmuch it did not originally obtain such a right-of-way from Champion (see *Staine v Summit Place, Inc.*, 40 AD3d 330, 331; *City of Kingston v Knaust*, 287 AD2d 57, 59-60).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1703

CA 07-02530

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

LEON R. KOZIOL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KELLY HAWSE KOZIOL, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LEON R. KOZIOL, UTICA, PLAINTIFF-APPELLANT PRO SE.

SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (John W. Grow, J.), entered February 12, 2007 in a divorce action. The order, insofar as appealed from, denied the motion of plaintiff for custody and suspension of his support obligations pending determination of the action.

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

Memorandum: As limited by his brief, in appeal No. 1 plaintiff appeals from those parts of a pendente lite order concerning his custody and support obligations. Appeal No. 1 must be dismissed because, inter alia, the order in that appeal was rendered moot by the subsequent judgment of divorce issued in appeal No. 2 (*see Kelly v Kelly*, 19 AD3d 1104, 1105-1106, *appeal dismissed* 5 NY3d 847, *rearg denied and lv dismissed in part and denied in part* 6 NY3d 803). Appeal No. 2 also must be dismissed because plaintiff's contentions with respect to the judgment therein concern issues that were resolved by the parties' 2004 "Stipulation of Settlement" and 2005 "Modification Agreement" that were incorporated but not merged in the judgment of divorce. Thus, plaintiff is not aggrieved by the judgment in appeal No. 2 (*see CPLR 5511; Gaudette v Gaudette*, 234 AD2d 619, 621, *appeal dismissed* 89 NY2d 1023, *rearg denied* 90 NY2d 845, *rearg dismissed* 90 NY2d 937; *Hopkins v Hopkins*, 97 AD2d 457). "The proper remedy is a motion to set aside th[e] stipulation [and agreement]" (*Hopkins*, 97 AD2d at 458).

In appeal No. 3, plaintiff contends that, because of the "sensitive family matters" involved in this action, Supreme Court erred in refusing to amend the caption of the pleadings in order to protect the anonymity of the parties and their children. We reject that contention. "In matters involving child custody issues such

relief should be granted only in the rare case, where, in considering the best interests of the children, there is a finding that their health and welfare would be protected, not their 'privacy' " (*Anonymous v Anonymous*, 27 AD3d 356, 361), and plaintiff has failed to establish that this is one of those rare cases. We conclude with respect to appeal No. 4 that the court properly denied plaintiff's post-divorce cross motion seeking "custody and/or parenting time." The judgment of divorce referred all future matters concerning custody and visitation to Family Court and, indeed, plaintiff commenced a proceeding seeking custody in Family Court (see generally Family Ct Act § 651 [a]).

Finally, contrary to plaintiff's contention, the court was not divested of jurisdiction in this divorce action based on the fact that the Attorney General was not placed on notice of plaintiff's constitutional challenges to certain sections of the Domestic Relations Law. Pursuant to CPLR 1012 (b) (3), the court shall not consider the constitutionality of any state statute "unless proof of service of the notice required by [CPLR 1012] is filed with such court." Thus, it is the burden of the party challenging the state statute to place the Attorney General on notice of the constitutional challenge, and there is nothing in the record establishing that plaintiff provided such notice to the Attorney General or filed proof of service with the court. The court therefore properly did not address the constitutionality of the statutes challenged by plaintiff (see *Gina P. v Stephen S.*, 33 AD3d 412, 415-416).

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

1704

CA 08-00163

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

LEON R. KOZIOL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KELLY HAWSE KOZIOL, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LEON R. KOZIOL, UTICA, PLAINTIFF-APPELLANT PRO SE.

SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (John W. Grow, J.), entered September 25, 2007 in a divorce action. The judgment, insofar as appealed from, determined custody and plaintiff's support obligations in accordance with a stipulation of settlement and modification agreement that were incorporated but not merged in the judgment.

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

Same Memorandum as in *Koziol v Koziol* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1705

CA 08-00164

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

LEON R. KOZIOL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KELLY HAWSE KOZIOL, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

LEON R. KOZIOL, UTICA, PLAINTIFF-APPELLANT PRO SE.

SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (John W. Grow, J.), entered November 28, 2007 in a divorce action. The order, insofar as appealed from, denied plaintiff's request to amend the caption and settled the record on appeal.

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

Same Memorandum as in *Koziol v Koziol* ([appeal No. 1] ___ AD3d
___ [Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1706

CA 08-00165

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

LEON R. KOZIOL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KELLY HAWSE KOZIOL, DEFENDANT-RESPONDENT.
(APPEAL NO. 4.)

LEON R. KOZIOL, UTICA, PLAINTIFF-APPELLANT PRO SE.

SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (John W. Grow, J.), entered December 6, 2007 in a divorce action. The order, insofar as appealed from, denied the cross motion of plaintiff for custody and/or parenting time.

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

Same Memorandum as in *Koziol v Koziol* ([appeal No. 1] ___ AD3d
___ [Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

1712

KA 08-01555

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, CENTRA, AND FAHEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PETER J. MALISZEWSKI, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered June 26, 2008. Defendant was resentenced to an indeterminate term of incarceration of three to six years and restitution upon his conviction of burglary in the third degree.

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

Memorandum: Defendant appeals from a resentence imposed upon remittal of this matter to County Court (*People v Maliszewski*, 49 AD3d 1165). In the prior appeal from a judgment convicting defendant upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), we agreed with defendant that the court erred in "enhancing his sentence of incarceration based upon his failure to pay restitution arising from previous convictions" (*id.* at 1165). We further concluded that the court "erred in failing to conduct a hearing on the issue of restitution" for the instant offense (*id.* at 1166). We therefore modified the judgment by vacating the sentence, and we "remit[ted] the matter to County Court to resentence defendant to an indeterminate term of incarceration of 2 to 4 years and to impose restitution for the instant offense following a hearing to determine the amount of restitution or to afford defendant the opportunity to withdraw his plea" (*id.*).

The record of the original plea proceeding establishes that counsel had discussed a plea agreement of 2½ to 5 years and that the court had not yet agreed to any plea proposal when defendant asked the court to impose an indeterminate term of incarceration of 2 to 4 years in the event that he paid one half of the amount of restitution that he owed with respect to previous convictions. The court stated that it would sentence defendant as requested if he paid the agreed-upon restitution within three weeks and that, if he did not pay that

restitution, the court would impose an indeterminate term of incarceration of 3 to 6 years. Based upon defendant's failure to pay any restitution, the court imposed an indeterminate term of incarceration of 3 to 6 years and restitution for the instant offense.

Contrary to defendant's contention, we did not direct the court upon remittal to afford *defendant* the option to be resentenced to an indeterminate term of incarceration of 2 to 4 years with the proper amount of restitution for the instant offense only, or to withdraw his plea. Rather, as the court properly determined upon remittal, it was for the *court* to determine whether to resentence defendant to an indeterminate term of incarceration of 2 to 4 years or to afford defendant the opportunity to withdraw his plea (*see generally People v Waggoner*, 53 AD3d 1143, 1144; *People v Appleberry*, 34 AD3d 1257; *People v Robinson*, 21 AD3d 1356, 1357). The court exercised its option to afford defendant the opportunity to withdraw his plea, thereby in effect "afford[ing] defendant the option of either withdrawing his guilty plea and proceeding to trial on the original indictment or accepting [a] proper sentence. Defendant, by declining to withdraw his guilty plea, effectively chose the latter option" (*People v D'Avolio*, 176 AD2d 1245, *lv denied* 79 NY2d 855). The court thereafter properly resentenced defendant as a second felony offender to an indeterminate term of incarceration of 3 to 6 years (*see Penal Law* § 70.06 [3] [d]; [4] [b]; *D'Avolio*, 176 AD2d 1245).

All concur except CENTRA and FAHEY, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent because we cannot agree with the majority that, pursuant to the decision of this Court in the prior appeal (*People v Maliszewski*, 49 AD3d 1165), County Court upon remittal properly sentenced defendant to an indeterminate term of incarceration of 3 to 6 years after he declined to withdraw his plea. We set forth in our prior decision that the original plea agreement provided that defendant would be sentenced to an indeterminate term of incarceration of 2 to 4 years if he paid half the amount of restitution that remained unpaid from previous convictions and "that the term of incarceration would otherwise be 3 to 6 years" (*id.* at 1165). When it appeared at sentencing that defendant had failed to pay the requisite amount of restitution, the court imposed an indeterminate term of incarceration of 3 to 6 years and restitution for the instant offense (*id.*). This Court determined that it was illegal to enhance the sentence of incarceration based upon defendant's failure to pay restitution arising from previous convictions, and we remitted the matter to County Court with the directive quoted in the majority's decision (*id.* at 1166).

In our view, the language of our prior decision establishes that the intent was to remit the matter to County Court for the purpose of imposing an indeterminate term of incarceration of 2 to 4 years and restitution in an amount to be determined following a hearing in the event that defendant declined to withdraw his plea. Inasmuch as we previously concluded that the term of incarceration of 3 to 6 years originally imposed was illegal, plain logic does not support an

unencumbered remittal permitting the court to impose the enhanced sentence that we concluded was illegal. We therefore would reverse the resentence and remit the matter to County Court for a further resentencing before a different judge in accordance with our prior decision (*id.*).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

12

KA 05-01408

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH WALLACE, DEFENDANT-APPELLANT.

BETH A. RATCHFORD, ROCHESTER, FOR DEFENDANT-APPELLANT.

KENNETH WALLACE, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Elma A. Bellini, A.J.), rendered April 26, 2005. The judgment convicted defendant, upon a jury verdict, of rape in the third degree (seven counts), criminal sexual act in the third degree, rape in the first degree and 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 following a jury trial of, inter alia, seven counts of rape in the third degree (Penal Law § 130.25 [2]). Contrary to the contention of defendant, Supreme Court properly precluded him from cross-examining his wife with respect to the child custody petition that she filed against him in Family Court. Evidence concerning the motive of a witness to lie is never collateral and thus is not an improper subject of cross-examination (see *People v Corby*, 6 NY3d 231, 235-236; *People v Hudy*, 73 NY2d 40, 56-57; see generally *People v Shairzai*, 215 AD2d 259, 263, lv denied 86 NY2d 802). The court, however, may preclude a party from cross-examining a witness with respect to his or her motive to lie when such questioning calls for speculation (see *People v Wheatley*, 211 AD2d 572, lv denied 85 NY2d 916; *People v Ayers*, 161 AD2d 770, 770-771, lv denied 76 NY2d 937), and that is the case here.

We agree with defendant that the court erred in precluding him from cross-examining his wife concerning prior bad acts committed by her that resulted in an adjournment in contemplation of dismissal (see *People v Jones*, 24 AD3d 815, 816, lv denied 6 NY3d 777; *People v Batista*, 113 AD2d 890, 891, lv denied 67 NY2d 648). We also agree with defendant that the court erred in precluding him from cross-examining the victim concerning a poem that she gave to him in which

she expressed her love for him (*see generally People v Rosado*, 53 AD3d 455, 456, *lv denied* 11 NY3d 835). We nevertheless conclude, however, "that there is no reasonable possibility that [those] error[s] might have contributed to defendant's conviction and that [they were] thus harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237). We note in particular that defendant was permitted to cross-examine his wife concerning her conviction of welfare fraud and to cross-examine the victim with respect to her love for defendant.

We reject the further contention of defendant that he was denied his right to a fair trial based on the court's alleged hostility toward defense counsel. We conclude that the court did not display any animosity that it may have had toward defense counsel in the presence of the jury and that its treatment of defense counsel before the jury was fair. In any event, the court instructed the jury to disregard any impression it may have formed with respect to the court's opinion concerning the case, and the jury is presumed to have followed that instruction (*see People v Harris*, 57 AD3d 1523, 1524; *People v Bassett*, 55 AD3d 1434, 1435; *People v Dickerson*, 55 AD3d 1276, 1278, *lv denied* 11 NY3d 924). We further conclude that the sentence is not unduly harsh or severe.

We reject the contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to rebut the expert testimony concerning child sexual abuse accommodation syndrome (CSAAS) (*see generally People v Baldi*, 54 NY2d 137, 147). The expert witness who testified with respect to CSAAS provided only a general explanation of the possible behaviors demonstrated by a victim of child sexual abuse, and he did not impermissibly offer an opinion on the issue whether defendant had committed the sex crimes charged in the indictment (*see People v Carroll*, 95 NY2d 375, 387; *People v Stuckey*, 50 AD3d 447, 449, *lv denied* 11 NY3d 742; *People v Pomales*, 49 AD3d 962, 963-964, *lv denied* 10 NY3d 938). We also reject the contention of defendant in his pro se supplemental brief that defense counsel was ineffective in failing to request a *Frye* hearing with respect to the testimony concerning CSAAS. It is well settled that testimony concerning CSAAS "is admissible to assist the jury in understanding the unusual conduct of victims of child sexual abuse" where, as here, it is general in nature (*Bassett*, 55 AD3d at 1436; *see also People v Herington*, 11 AD3d 931, *lv denied* 4 NY3d 799), and "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success'" (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Contrary to the contention of defendant in his main brief, he was not denied his right to effective assistance of counsel based on defense counsel's failure to cross-examine his wife concerning his destruction of evidence. Defendant failed to meet his burden of demonstrating "the absence of strategic or other legitimate explanations" for that alleged error (*People v Rivera*, 71 NY2d 705, 709; *see People v Loret*, 56 AD3d 1283, *lv denied* 11 NY3d 927; *People v*

Webster, 56 AD3d 1242, *lv denied* 11 NY3d 931). Defendant further contends that he was denied his right to effective assistance of counsel because defense counsel's office represented his wife in a prior case. We reject that contention. The record establishes that defense counsel was unaware of that prior representation until after the commencement of trial and that defendant "informed the court that he wanted defense counsel to continue to represent him . . . [I]t thus cannot be said that defendant was denied effective assistance of counsel" (*People v Chenevert*, 52 AD3d 1259, 1259, *lv denied* 11 NY3d 786; see *People v Floyd*, 45 AD3d 1457, 1459-1460, *lv denied* 10 NY3d 810, 811, 818).

Defendant failed to preserve for our review the contention in his pro se supplemental brief that the court erred in permitting a nurse practitioner to testify that it is not uncommon for child victims to delay reporting instances of sexual abuse (see CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Finally, even assuming, arguendo, that defendant was not required to preserve for our review his further contention in his pro se supplemental brief that the court mishandled two jury notes (see *People v Kisoan*, 8 NY3d 129, 135; cf. *People v DeRosario*, 81 NY2d 801, 803; *People v Neal*, 268 AD2d 307, *lv denied* 95 NY2d 837), we conclude that defendant's contention lacks merit. The record establishes that the court advised defendant of the substance of the two jury notes and gave him an opportunity to be heard before responding to them (see generally *People v O'Rama*, 78 NY2d 270, 277-278).

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

14

CA 08-01032

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

JOHN M. SUMMERS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER, MAYOR OF THE CITY OF
ROCHESTER, AND EXPORT FINANCE INSURANCE
CORPORATION, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER, FOR DEFENDANTS-
RESPONDENTS CITY OF ROCHESTER AND MAYOR OF THE CITY OF ROCHESTER.

UNDERBERG & KESSLER LLP, ROCHESTER (GORDON J. LIPSON OF COUNSEL), FOR
DEFENDANT-RESPONDENT EXPORT FINANCE INSURANCE CORPORATION.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Stephen K. Lindley, J.), entered February 11, 2008 in an action for a declaratory judgment and an injunction. The judgment granted the motion of defendants City of Rochester and Mayor of the City of Rochester for summary judgment and declared that certain agreements did not violate the NY Constitution or any other law and were fully enforceable, and denied plaintiff's cross motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by dismissing the second amended complaint against defendants City of Rochester and Mayor of the City of Rochester and vacating the declaration and as modified the judgment is affirmed without costs.

Memorandum: In September 2004, a ferry service between Rochester and Toronto that received financing assistance from defendant Export Finance Insurance Corporation (Export Finance) was discontinued because of mounting operating losses. Defendant City of Rochester (City) wished to continue the ferry service and formed Rochester Ferry Company, LLC (RFC) as a limited liability company in order to purchase and operate the ferry. The City was the sole member of RFC. On February 24, 2005, RFC borrowed \$40 million from Export Finance to purchase and operate the ferry, and the City entered into a guarantee and indemnity agreement (guarantee agreement) with Export Finance to guarantee the loan to RFC. The ferry was purchased by RFC at an

auction on February 28, 2005 for \$32 million, and the City took a mortgage on the ferry to secure payment of RFC's loan. Less than a year later, on January 10, 2006, the newly-elected defendant Mayor of the City terminated the operations of the ferry service, again because of mounting operating losses. On May 4, 2006, the City Council adopted ordinances pursuant to which the City assumed RFC's debt and dissolved RFC. The City executed a Deed of Novation, Amendment and Restatement (assumption agreement) on June 30, 2006 in which it assumed RFC's debt to Export Finance. The City sold the ferry for \$30 million on April 19, 2007, with a balance of \$19.4 million owed to Export Finance.

Plaintiff, an owner of real property in the City, was originally a vocal proponent of the City's operation of the ferry. Nevertheless, he commenced this action in August 2007 alleging that the City's actions were illegal. In his second amended complaint, plaintiff alleged that the City violated several provisions of the NY Constitution, the Local Finance Law, and other statutes, and he sought judgment declaring that the guarantee and assumption agreements were null and void. In addition, he sought to enjoin the City from making any payments to Export Finance. In appeal No. 1, plaintiff appeals from a judgment that granted the motion of the City and the Mayor (City defendants) for summary judgment, denied plaintiff's cross motion for summary judgment, and declared that the guarantee and assumption agreements did not violate the NY Constitution or any other law and were fully enforceable. In appeal No. 2, plaintiff appeals from an order that sua sponte granted summary judgment to Export Finance pursuant to CPLR 3212 (b) on the ground that Supreme Court's decision with respect to the City defendants "resolv[ed] the action." We modify the judgment in appeal No. 1 by dismissing the second amended complaint against the City and the Mayor and vacating the declaration, and we modify the order in appeal No. 2 by dismissing the second amended complaint against Export Finance.

We note at the outset that, contrary to the determination of the court, this action is barred by the defense of laches. The City defendants raised the defense of laches in support of their motion, and they may rely on that defense on appeal as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130). The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party (*see Matter of Schulz v State of New York*, 81 NY2d 336, 348; *Resk v City of New York*, 293 AD2d 661, 662, *lv denied* 99 NY2d 507). In support of their motion, the City defendants established that they would be prejudiced by plaintiff's delay in bringing this action. Plaintiff, having been a vocal proponent of the acquisition of the ferry, was undoubtedly aware of the actions taken by the City, including the formation of RFC in January 2005, as well as the execution of the guarantee agreement in February 2005 and the assumption agreement in June 2006, yet he waited until August 2007 to bring what was originally a CPLR article 78 proceeding naming only the City as a respondent. The City defendants established that, by that time, the only option left to the City would be to refrain from paying

Export Finance, thereby harming its credit rating for nonpayment of debt, or to pay Export Finance and attempt to recoup the payments in an Australian court. Export Finance contended that, if anyone had challenged the City's ability to enter into the guarantee and assumption agreements, Export Finance would not have relinquished its maritime lien and would have sold the ferry to another purchaser. The City defendants thus made a showing of delay and prejudice, establishing their entitlement to the defense of laches, and plaintiff failed to rebut that showing. Plaintiff's contention that the defense of laches is against public policy is without merit (see generally *Schulz*, 81 NY2d at 348-350).

In any event, we nevertheless address the merits of plaintiff's contentions. In doing so, we note that we are concerned only with the legality of the actions of the City, not its wisdom in entering into the agreements (see *Local Govt. Assistance Corp. v Sales Tax Asset Receivable Corp.*, 2 NY3d 524, 528). Contrary to plaintiff's contention, the City's guarantee and assumption agreements with respect to RFC's loan were not in violation of NY Constitution, article VIII, § 1. That constitutional provision prohibits a city from loaning "its credit to or in aid of any individual, or public or private corporation or association, or private undertaking" (*id.*). The purpose of the provision is to prohibit a municipality from lending its credit to others, including other municipalities (see generally *Wein v State of New York*, 39 NY2d 136, 142-145; *Union Free School Dist. No. 3 of Town of Rye v Town of Rye*, 280 NY 469, 474, 477-478; *Long Is. Light. Co. v Mack*, 137 AD2d 285, 291-292, appeal dismissed 74 NY2d 804). Inasmuch as the City was the sole member of RFC, it did not lend its credit to others in violation of that constitutional provision.

We reject plaintiff's further contention that the City violated NY Constitution, article VIII, § 2 and Local Finance Law § 11.00 by contracting for indebtedness for longer than the period of probable usefulness. Pursuant to that constitutional provision, "[n]o . . . city . . . shall contract any indebtedness . . . for longer than the period of probable usefulness of the object or purpose for which such indebtedness is to be contracted" (NY Const, art VIII, § 2). Local Finance Law § 11.00 (a) codifies that constitutional prohibition, and further provides that the period of probable usefulness of the acquisition of a ferry boat is 35 years while that of a system of ferry boat transportation is 10 years (§ 11.00 [a] [26], [47]). The City guaranteed payments to Export Finance for the purchase of the ferry through 2021, less than the 35 years provided in Local Finance Law § 11.00 (a) (26). The fact that the Local Finance Law provides for a shorter term with respect to the acquisition of a system of ferry boat transportation does not preclude reliance on the longer period for purchases of ferry boats (see generally *Friedman v Board of Educ. of E. Ramapo Cent. School Dist.*, 259 AD2d 464, 465). Moreover, the fact that the City sold the ferry shortly after it assumed RFC's debt to Export Finance did not render inapplicable the 35-year period set forth in the Local Finance Law.

Plaintiff next contends that the City was prohibited from forming RFC as a limited liability company (LLC). NY Constitution, article X, § 5 provides that a public corporation must be created by special act of the Legislature. Here, the record establishes that the City contemplated asking the Legislature to form a public authority to purchase and operate the ferry. Due to time constraints, however, the City decided instead to create RFC as an LLC, and plaintiff contends that the City thereby circumvented constitutional safeguards preventing the formation of public corporations in the absence of legislative approval. We reject that contention. There is nothing in the Limited Liability Company Law prohibiting municipalities from creating an LLC and, as the court properly noted, the Legislature could have enacted such a prohibition had it wished to do so (see generally *Longway v Jefferson County Bd. of Supervisors*, 83 NY2d 17, 22). We have considered plaintiff's remaining contentions and conclude that they are without merit.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

15

CA 08-01048

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

JOHN M. SUMMERS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER, ET AL., DEFENDANTS,
AND EXPORT FINANCE INSURANCE CORPORATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (GORDON J. LIPSON OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Stephen K. Lindley, J.), entered February 27, 2008 in an action for a declaratory judgment and an injunction. The order granted summary judgment to defendant Export Finance Insurance Corporation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the second amended complaint against defendant Export Finance Insurance Corporation and as modified the order is affirmed without costs.

Same Memorandum as in *Summers v City of Rochester* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

22.1

CA 07-02552

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

DAVID P. RICKICKI AND PATRICIA RICKICKI,
PLAINTIFFS-APPELLANTS,

V

ORDER

BORDEN CHEMICAL, DIVISION OF BORDEN, INC.,
ET AL., DEFENDANTS,
UNIMIN CORPORATION AND U.S. SILICA COMPANY,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

MICHAEL C. CROWLEY AND SHARON M. CROWLEY,
PLAINTIFFS-APPELLANTS,

V

C-E MINERALS, INC., ET AL., DEFENDANTS,
NYCO MINERALS COMPANY, UNIMIN CORPORATION,
U.S. SILICA COMPANY, MEYERS CHEMICALS,
MALVERN MINERALS COMPANY, FERRO CORPORATION,
CHARLES B. CHRYSTAL CO., INC., AND UNIMIN
SPECIALTY MINERALS, INC.,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)
(APPEAL NO. 1.)

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

PHILLIPS LYTLE, LLP, BUFFALO (NATHAN A. SCHACHTMAN, OF THE NEW JERSEY
AND PENNSYLVANIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), BOND,
SCHOENECK & KING, PLLC, AND SMITH, MURPHY & SCHOEPPERLE, LLP, FOR
DEFENDANTS-RESPONDENTS UNIMIN CORPORATION, U.S. SILICA COMPANY, MEYERS
CHEMICALS, AND UNIMIN SPECIALTY MINERALS, INC.

GOLDBERG SEGALLA LLP, ROCHESTER (MELANIE S. WOLK OF COUNSEL), FOR
DEFENDANT-RESPONDENT NYCO MINERALS COMPANY.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (KIMBERLY D. GENSLER OF
COUNSEL), FOR DEFENDANT-RESPONDENT MALVERN MINERALS COMPANY.

DAMON & MOREY LLP, BUFFALO (SHERI L. MOONEY OF COUNSEL), FOR
DEFENDANT-RESPONDENT FERRO CORPORATION.

Appeals from an order of the Supreme Court, Cattaraugus County (Patrick H. NeMoyer, J.), entered January 26, 2007. The order dismissed the complaints.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

22.2

CA 07-01668

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

DAVID P. RICKICKI AND PATRICIA RICKICKI,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

BORDEN CHEMICAL, DIVISION OF BORDEN, INC.,
ET AL., DEFENDANTS,
UNIMIN CORPORATION AND U.S. SILICA COMPANY,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

MICHAEL C. CROWLEY AND SHARON M. CROWLEY,
PLAINTIFFS-APPELLANTS,

V

C-E MINERALS, INC., ET AL., DEFENDANTS,
NYCO MINERALS COMPANY, UNIMIN CORPORATION,
U.S. SILICA COMPANY, MEYERS CHEMICALS,
MALVERN MINERALS COMPANY, FERRO CORPORATION,
CHARLES B. CHRYSTAL CO., INC., AND UNIMIN
SPECIALTY MINERALS, INC.,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)
(APPEAL NO. 2.)

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

PHILLIPS LYTTLE, LLP, BUFFALO (NATHAN A. SCHACHTMAN, OF THE NEW JERSEY
AND PENNSYLVANIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), BOND,
SCHOENECK & KING, PLLC, AND SMITH, MURPHY & SCHOEPPERLE, LLP, FOR
DEFENDANTS-RESPONDENTS UNIMIN CORPORATION, U.S. SILICA COMPANY, MEYERS
CHEMICALS, AND UNIMIN SPECIALTY MINERALS, INC.

GOLDBERG SEGALLA LLP, ROCHESTER (MELANIE S. WOLK OF COUNSEL), FOR
DEFENDANT-RESPONDENT NYCO MINERALS COMPANY.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (KIMBERLY D. GENSLER OF
COUNSEL), FOR DEFENDANT-RESPONDENT MALVERN MINERALS COMPANY.

DAMON & MOREY LLP, BUFFALO (SHERI L. MOONEY OF COUNSEL), FOR
DEFENDANT-RESPONDENT FERRO CORPORATION.

Appeals from an order of the Supreme Court, Cattaraugus County (Patrick H. NeMoyer, J.), entered April 12, 2007. The order granted the motions of defendants-respondents for summary judgment dismissing the complaints and cross claims against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions in part and reinstating the negligence and products liability causes of action insofar as those causes of action are based on failure to warn and the loss of consortium claims against defendants Unimin Corporation and U.S. Silica Company in action No. 1 and against defendants NYCO Minerals Company, Unimin Corporation, U.S. Silica Company, Meyers Chemicals, Malvern Minerals Company, Ferro Corporation, Charles B. Chrystal Co., Inc., and Unimin Specialty Minerals, Inc. in action No. 2 and as modified the order is affirmed without costs.

Memorandum: David P. Rickicki and Patricia Rickicki, the plaintiffs in action No. 1, and Michael C. Crowley and Sharon M. Crowley, the plaintiffs in action No. 2, appeal from an order granting the motions of defendants-respondents (hereafter, defendants) for summary judgment dismissing the complaints and cross claims against them. The plaintiffs commenced these actions seeking damages for injuries sustained by plaintiff husbands resulting from their inhalation of silica dust while working for Dexter Corporation, Hysol Division (Dexter). Defendants are the manufacturers of the silica. We note at the outset that plaintiffs on appeal have raised no issues with respect to the dismissal of their causes of action for breach of warranty and nuisance and thus are deemed to have abandoned any such issues (*see Palmer v Niagara Frontier Transp. Auth.*, 56 AD3d 1245; *Ciesinski v Town of Aurora*, 202 AD2d 984).

We agree with the plaintiffs in each action that Supreme Court erred in granting those parts of defendants' motion for summary judgment dismissing the causes of action in each complaint for negligence and products liability insofar as those causes of action are based on defendants' failure to warn plaintiff husbands of the latent dangers of silica dust inhalation (*see generally Gebo v Black Clawson Co.*, 92 NY2d 387, 392; *Codling v Paglia*, 32 NY2d 330, 335). We therefore modify the order accordingly. Although each complaint contains five causes of action, each including a claim for loss of consortium, the court in its written decision set forth that each complaint contained four causes of action, i.e., negligence, breach of warranty, "strict liability" and nuisance, thus presumably folding the failure to warn causes of action into the negligence and/or "strict liability" causes of action, and the court did not mention the loss of consortium claims.

We cannot agree with defendants that they met their burden with respect to the negligence and products liability causes of action by establishing as a matter of law that they provided adequate warnings of the dangers of silica inhalation to Dexter. According to defendants, Dexter was a "sophisticated intermediary" already knowledgeable of such dangers and was in the best position to take safety measures for its employees (*see Goodbar v Whitehead Bros.*, 591

F Supp 552, 556-557, *affd sub nom. Beale v Hardy*, 769 F2d 213). Even assuming arguendo, that what has been termed the "sophisticated intermediary" or "responsible intermediary" theory is viable in New York under the facts of this case (*see Rivers v AT&T Tech.*, 147 Misc 2d 366, 371-372), we conclude that plaintiffs raised a triable issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The plaintiffs submitted the affidavit of an expert setting forth the differences between amorphous silica and crystalline silica, the effect that those two categories of silica have on lung health, and the additional measures needed to prevent inhalation of crystalline silica. That affidavit raises an issue of fact whether Dexter was knowledgeable about those differences and, thus, whether defendants' failure to warn with respect to those differences was a proximate cause of the injuries sustained by plaintiff husbands (*see generally Banks v Makita, U.S.A.*, 226 AD2d 659, 660, *lv denied* 89 NY2d 805; *Johnson v Johnson Chem. Co.*, 183 AD2d 64, 70).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

31

KA 03-02632

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MIA CARL CHILDRES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), rendered November 20, 2003. The judgment convicted defendant, upon a nonjury verdict, of rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, rape in the second degree and sodomy in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the period of postrelease supervision imposed for sexual abuse in the first degree to a period of three years and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a nonjury trial of, inter alia, rape in the first degree (Penal Law § 130.35 [1]) and sexual abuse in the first degree (§ 130.65 [1]), defendant contends that he was denied effective assistance of counsel. We reject that contention inasmuch as defendant failed to meet his burden of demonstrating " 'the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; see generally *People v Baldi*, 54 NY2d 137, 147). Defendant further contends that Supreme Court erred in refusing to suppress his 2003 statement to the police because the failure of the police to preserve the card containing the *Miranda* warnings that were read to defendant resulted in a presumption that his statement was involuntary. We reject that contention. The court's determination that the statement was voluntarily made "is entitled to great deference and will not be disturbed where, as here, it is supported by the record" (*People v Youngblood*, 294 AD2d 954, 955, lv denied 98 NY2d 704; see generally *People v Prochilo*, 41 NY2d 759, 761). Contrary to the further contention of defendant with respect to both his 1999 and 2003 statements, "[t]here is no Federal or State due process requirement that interrogations and confessions be electronically recorded" (*People v Falkenstein*, 288 AD2d 922, 923, lv denied 97 NY2d 704; see *People v Dukes* [appeal No. 1], 53 AD3d

1101, *lv denied* 11 NY3d 831; *People v Davis*, 48 AD3d 1086, 1087-1088, *lv denied* 10 NY3d 861).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although there were minor inconsistencies in the testimony of the victim concerning her statements to the police four years prior to the trial, it was for the court, as the trier of fact, to determine issues of credibility, and we see no basis for disturbing its credibility determinations (*see generally People v Kelley*, 46 AD3d 1329, 1330, *lv denied* 10 NY3d 813). In any event, those "complained of inconsistencies did not relate to whether the alleged sexual conduct occurred" (*People v Raymo*, 19 AD3d 727, 728, *lv denied* 5 NY3d 793).

We agree with defendant, however, that the sentence imposed on the count of sexual abuse in the first degree is illegal insofar as it includes a five-year period of postrelease supervision for a class D violent felony offense (*see Penal Law § 70.45 [former (2)]*). We therefore modify the judgment by reducing the period of postrelease supervision imposed for sexual abuse in the first degree to a period of three years, the maximum allowed (*see People v Keith*, 26 AD3d 879, 880, *lv denied* 6 NY3d 835).

Finally, defendant failed to preserve for our review his contention that the court erred in setting the duration of the order of protection (*see People v Nieves*, 2 NY3d 310, 315-317), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Sterrett*, 53 AD3d 1098, *lv denied* 11 NY3d 858).

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

33

KA 08-01462

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSHUA M. ZONA, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, SPECIAL DISTRICT ATTORNEY FOR SENECA COUNTY,
CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (W. Patrick Falvey, J.), rendered July 3, 2008. The judgment convicted defendant, upon a jury verdict, of petit larceny.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of one count of petit larceny (Penal Law § 155.25), defendant contends that County Court erred in denying his request to charge the jury on the claim of right defense (see § 155.15 [1]; *People v Chesler*, 50 NY2d 203). We agree. Viewing the evidence in the light most favorable to defendant (see *People v Banks*, 76 NY2d 799, 800; *People v Cunningham*, 12 AD3d 1131, 1132, lv denied 4 NY3d 829, 5 NY3d 761), we conclude that there is a reasonable view of the evidence that would enable a jury to find that defendant, a Seneca County Deputy Sheriff, took the allegedly stolen property from the surplus property warehouse of the Seneca County Sheriff's Department under a claim of right (see *People v Barody*, ___ AD3d ___ [Feb. 11, 2009]; *People v Ace*, 51 AD3d 1379, lv denied 11 NY3d 733). We note that, contrary to the court's conclusion, the defense applies where, as here, a defendant claims that he or she was given the right to possess the property by another person who has authority over it (see generally *Chesler*, 50 NY2d 203).

The indictment alleged, inter alia, that defendant stole property that included a boat and tires. At trial, the People presented the statement of defendant to the police indicating that the Undersheriff had given him permission to take the allegedly stolen items from the warehouse. The People also presented evidence establishing that the items in the warehouse included wrecked patrol cars, recovered property, out-of-service items, and other property that was no longer being used by the Sheriff's Department. The evidence establishes that

there was a bullet hole in the boat and that the tires taken by defendant were apparently unused, but there is no evidence establishing that the tires fit any Sheriff's Department vehicle that was still in service when defendant took the tires. Viewing the evidence in the light most favorable to defendant, including the evidence demonstrating that the Sheriff's deputies used their personal vehicles to perform departmental duties, we agree with defendant that there is a reasonable view of the evidence to support a finding that he had a good faith belief that the Undersheriff had authority to dispose of the surplus property and that the Undersheriff had given him permission to take the tires and the other property.

All concur except FAHEY and PERADOTTO, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent because in our view, County Court properly denied defendant's request to charge the jury on the defense of claim of right. We cannot agree with the majority that there is a reasonable view of the evidence, viewed in the light most favorable to defendant (*see People v Banks*, 76 NY2d 799, 800), that would enable a jury to find that defendant took property from the surplus warehouse of the Seneca County Sheriff's Department "under a claim of right made in good faith" (Penal Law § 155.15 [1]; *see People v Cunningham*, 12 AD3d 1131, 1132, *lv denied* 4 NY3d 829, 5 NY3d 761; *People v Geppner*, 122 AD2d 394, 396; *cf. People v Ace*, 51 AD3d 1379, *lv denied* 11 NY3d 733).

Defendant offered no direct evidence to support his alleged belief that he had the authority or right to take the property (*cf. Ace*, 51 AD3d at 1380). Indeed, we note that the evidence on which the majority relies to support defendant's alleged belief is a statement made by defendant to the police in which he stated, "[The Undersheriff] told us that he was taking a canoe home and he told us we could take what we want. [The Undersheriff] also took some old military lights and an old electric lawn mower. I took a Jon boat, a storage shelf and five 235 75R tires. I could not use the tires on my Ford F-150 pickup truck, so I took them to Trombley's in Seneca Falls and I traded them towards new tires for my truck." Notably, defendant did not inform the police that he believed that he had the right to take the property, nor did he state that he believed that the Undersheriff had the authority to give permission to take the property. Moreover, there was no evidence that the property in question had been abandoned, which renders this case distinguishable from *People v Barody* (___ AD3d ___ [Feb. 11, 2009]). Rather, the property here was surplus property of the Seneca County Sheriff's Department that was being stored in a warehouse.

Although the majority relies in part on evidence that Sheriff's deputies used their personal vehicles to perform departmental duties to support its conclusion that such evidence provided a possible justification for defendant's actions, we cannot agree that such evidence supports that conclusion. The Undersheriff's statement that defendant could take what he wanted from the warehouse was not limited to items that defendant might use in the course of his professional duties, and there is nothing in the record to suggest that defendant took the property in question, including a boat and tires, for use in

that capacity. In fact, the tires did not fit his personal vehicle, and he traded them in for new tires. In sum, there is no reasonable view of the evidence on this record to enable a jury to find that defendant, a Sheriff's deputy charged with enforcing the law, had a good faith belief that he had the right to take the property in question for his personal use and benefit. We therefore would affirm the judgment of conviction and would remit the matter to County Court for proceedings pursuant to CPL 460.50 (5).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

34

CA 07-01995

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF WIND POWER ETHICS GROUP (WPEG)
AND SARAH BOSS, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF TOWN OF CAPE VINCENT,
ST. LAWRENCE WINDPOWER, LLC,
RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.
(APPEAL NO. 1.)

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF
COUNSEL), FOR PETITIONERS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (MICHAEL G. STERTHOUS OF
COUNSEL), FOR RESPONDENT-RESPONDENT ZONING BOARD OF APPEALS OF TOWN OF
CAPE VINCENT.

NIXON PEABODY LLP, ALBANY (JENA R. ROTHEIM OF COUNSEL), FOR
RESPONDENT-RESPONDENT ST. LAWRENCE WINDPOWER, LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered August 27, 2007 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Respondent St. Lawrence Windpower, LLC (St. Lawrence) applied to the Town of Cape Vincent Planning Board for, inter alia, site plan approval for its proposed construction of a series of wind-powered generators (project) on property designated as an "Agricultural Residential District." Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Zoning Board of Appeals of Town of Cape Vincent (ZBA) that the series of wind-powered generators qualified as a utility and that the project therefore was a permitted site plan use in that district. With respect to the judgment in appeal No. 1, we conclude that Supreme Court properly dismissed the petition. Petitioners' contention that the ZBA failed to refer St. Lawrence's application to the appropriate county planning agency pursuant to General Municipal Law § 239-m is raised for the first time in petitioners' reply papers and thus is not properly before us (*see Matter of Ball v New York State Dept. of*

Envtl. Conservation, 35 AD3d 732, 733-734; *Matter of Falk v Village of Scarsdale Zoning Bd. of Appeals*, 254 AD2d 358; *Matter of Hill v New York City Tr. Auth.*, 222 AD2d 506, lv denied 88 NY2d 815).

We reject petitioners' further contention that the ZBA's determination was "arbitrary, capricious, illegal, *ultra vires* and void." Pursuant to section 315 of the Town of Cape Vincent Zoning Law, utilities are defined as "telephone dial equipment centers, electrical or gas substations, water treatment or storage facilities, pumping stations and similar facilities" that have been, inter alia, constructed or maintained by municipal agencies or public utilities. It is well settled that, "when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference" (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102), and we conclude that the classification by the ZBA of the series of wind-powered generators as a utility within the meaning of section 315 of its Zoning Law is neither irrational nor unreasonable, and that the determination is supported by substantial evidence (see *Matter of West Beekmantown Neighborhood Assn., Inc. v Zoning Bd. of Appeals of Town of Beekmantown*, 53 AD3d 954, 956; *Matter of May v Town of Lafayette Zoning Bd. of Appeals*, 43 AD3d 1427, 1428; see generally *Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d 364, 371).

With respect to the order in appeal No. 2, we reject the contention of petitioners that the court erred in excluding three documents in settling the record in appeal No. 1. Petitioners do not contend that the documents were before the court when it dismissed the petition, and thus they were properly excluded from the record on appeal (see *Matter of Gullo v Semon*, 265 AD2d 656, lv denied 94 NY2d 757; *Matter of Dyno v Village of Johnson City*, 255 AD2d 737). Alternatively, petitioners contend that we should take judicial notice of the three documents. We reject that contention. One of the documents, "A Joint Comprehensive Plan for the Village & Town of Cape Vincent," is not relevant to the issues raised in appeal No. 1, and judicial notice is not available with respect to the remaining two documents.

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

35

CA 08-01409

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF WIND POWER ETHICS GROUP (WPEG)
AND SARAH BOSS, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF TOWN OF CAPE VINCENT,
RESPONDENT-RESPONDENT,
ET AL., RESPONDENTS.
(APPEAL NO. 2.)

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF
COUNSEL), FOR PETITIONERS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (MICHAEL G. STERTHOUS OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered June 16, 2008 in a proceeding pursuant to CPLR article 78. The order settled the record on the appeal taken from the judgment entered August 27, 2007.

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

Same Memorandum as in *Wind Power Ethics Group v Zoning Bd. of Appeals of Town of Cape Vincent* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

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CA 08-01624

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF LAIDLAW ENERGY AND
ENVIRONMENTAL, INC., PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF ELLICOTTVILLE, TOWN OF ELLICOTTVILLE
ZONING BOARD OF APPEALS, JOHN E. KRAMER, IN HIS
CAPACITY AS CHAIR OF TOWN OF ELLICOTTVILLE
ZONING BOARD OF APPEALS, CYNTHIA DAYTON, IN HER
CAPACITY AS CO-CHAIR OF TOWN OF ELLICOTTVILLE
ZONING BOARD OF APPEALS, AND ALLEN ADAMS, JOHN E.
CADY, AND NORMAN WINKLER, IN THEIR RESPECTIVE
CAPACITIES AS MEMBERS OF TOWN OF ELLICOTTVILLE
ZONING BOARD OF APPEALS, RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (ANDREW J. LEJA OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order (denominated order and judgment) of the
Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered October
31, 2007 in a proceeding pursuant to CPLR article 78. The order
denied respondents' motion to dismiss the petition.

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

Memorandum: On appeal from an order denying their motion to
dismiss the petition, respondents contend that petitioner did not
properly commence this CPLR article 78 proceeding and thus that
Supreme Court erred in denying the motion. We reject that contention.
Although we note at the outset that no appeal lies as of right from a
nonfinal order in a CPLR article 78 proceeding (see CPLR 5701 [b]
[1]), we nevertheless treat the notice of appeal as an application for
permission to appeal and grant petitioner such permission (see *Matter
of Engelbert v Warshefski*, 289 AD2d 972). We further note that we
recently decided an appeal involving the underlying matter (*Matter of
Laidlaw Energy & Env'tl., Inc.*, ___ AD3d ___ [Feb. 6, 2009]).

On the day on which the statute of limitations expired, July 11,
2007, a legal assistant from the office of petitioner's attorney
(assistant) went to the Erie County Clerk's Office (Clerk's Office)

with papers that included a notice of petition, verified petition and memorandum of law. Upon arriving at the Clerk's Office, the assistant filed an application for an index number and a request for judicial intervention (RJI), and he paid \$305 to file the notice of petition, verified petition, memorandum of law and RJI. According to an affidavit of the assistant, he obtained an index number and entered it on the notice of petition and verified petition. An employee of the Clerk's Office stamped the cover page of the notice of petition with an official date-stamp. When the assistant thereafter asked the employee for a return date, the employee "indicated that [the] Court would establish a return date." According to the affidavit of the assistant, he was then "given the original papers by the [employee] and instructed to deliver them to [the court's] Chambers."

According to the affidavit of an employee of a delivery company retained by petitioner's attorney, along with a letter from petitioner's attorney to the court attached to that affidavit, on August 3, 2007 the employee hand delivered an "original Verified Petition with exhibits and Memorandum of Law . . . together with proof of timely service" to the court's drop box located outside the assigned justice's chambers.

Contrary to the contention of respondents, we conclude that petitioner filed the petition in accordance with CPLR former 304. Pursuant to that statute, a special proceeding was commenced by, inter alia, the filing of a petition with the clerk of the court. The clerk of Supreme Court is the County Clerk (see NY Const, art VI, § 6 [e]; County Law § 525 [1]) and, pursuant to CPLR former 304, "filing shall mean the delivery of the . . . petition to the clerk of the court" Inasmuch as petitioner paid the requisite fees and obtained an index number, the only issue before us is whether the petition was delivered in accordance with CPLR former 304. Delivery is defined as "[t]he formal act of transferring something . . . ; the giving or yielding possession or control of something to another" (Black's Law Dictionary 461 [8th ed 2004]; see generally *Peace v Yumin Zhang*, 15 AD3d 956, 958), and "[p]apers are filed within the meaning of CPLR [former] 304 upon their physical receipt by the court clerk or the clerk's designee" (*Sharratt v Hickey*, 298 AD2d 956, 957; see *Matter of Grant v Senkowski*, 95 NY2d 605, 609; see also *Davis v Bollweg*, 249 AD2d 972). After the papers are delivered, it is the clerk of the court who is required to take further action by date-stamping the filed papers, filing them, maintaining a record of the date of the filing and returning a date-stamped copy, together with an index number, to the filing party (see CPLR former 304).

Here, the assistant gave the papers to the County Clerk's employee, who proceeded to date-stamp them. Instead of filing the papers, however, the employee returned them to the assistant and instructed him to deliver the papers to the court. The failure of an employee "to perform his [or her] duty in filing a [petition] does not impair the rights of an individual who has properly delivered it to him or [her]" (*New York County Natl. Bank v Wood*, 169 App Div 817, 821, *affd* 222 NY 662; see *Matter of Blossick v Monroe County Dept. of*

Social Servs., 6 Misc 3d 621, 623; see also *Resch v Briggs*, 51 AD3d 1194, 1196; *Peace*, 15 AD3d at 958).

Because the papers were properly filed, we do not address whether there was a curable defect in the filing itself (see CPLR 2001).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

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CA 08-01310

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

MICHAEL GUIFFRIDA, INDIVIDUALLY AND DOING
BUSINESS AS THE STOMPING GROUNDS, HORAN & HORAN
OF SYRACUSE, INC., ALFRED GUIFFRIDA, ANTOINETTE
GUIFFRIDA AND LOUANNE GUIFFRIDA,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

STORICO DEVELOPMENT, LLC, ROBERT DOUCETTE,
RICHARD DEVITO, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

WHITELAW & FANGIO, ESQS., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN
A. CIRANDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County
(James P. Murphy, J.), entered December 24, 2007 in an action for
conversion. The judgment awarded plaintiffs, after a nonjury trial,
compensatory and treble damages.

It is hereby ORDERED that the judgment so appealed from is
unanimously modified on the law by vacating the amount of damages
awarded and as modified the judgment is affirmed without costs, and
the matter is remitted to Supreme Court, Onondaga County, for further
proceedings in accordance with the following Memorandum: Plaintiff
Horan & Horan of Syracuse, Inc. (Horan & Horan) leased property from
defendant Storico Development, LLC (Storico) but eventually assigned
the lease to Michael Guiffrida, doing business as The Stomping Grounds
(plaintiff). We note in addition that Guiffrida, in his individual
capacity, was president of Horan & Horan. Despite knowledge of the
lease assignment, Storico commenced an eviction proceeding against
Horan & Horan only. Five days before plaintiff was served with the
warrant of eviction naming only Horan & Horan as a party defendant to
the eviction proceeding, plaintiff was locked out of the premises.
Storico, Robert Doucette, and Richard DeVito (collectively,
defendants) thereafter refused to allow plaintiff to recover personal
property that remained in the leased premises. Plaintiffs Alfred
Guiffrida, Antoinette Guiffrida and Louanne Guiffrida (secured
creditors) had security interests in the property.

Plaintiffs commenced this action against, inter alia, defendants

seeking damages for conversion as well as punitive damages. After defendants filed their answer, plaintiff filed for bankruptcy relief under chapter 7 of the Bankruptcy Code. Following a bench trial, Supreme Court found that plaintiff was wrongfully evicted and that Storico wrongfully exercised dominion and control over the property remaining at the premises. The court calculated compensatory damages to be \$79,245, and trebled the damages pursuant to RPAPL 853.

Contrary to the contention of defendants, they waived their right to challenge plaintiff's legal capacity to pursue this action due to the pending bankruptcy by failing to move to amend their answer to assert plaintiff's lack of legal capacity as an affirmative defense (see CPLR 3211 [a] [3]; [e]; *Edwards v Siegel, Kelleher & Kahn*, 26 AD3d 789; cf. *Mehlenbacher v Swartout*, 289 AD2d 651; *Hansen v Madani*, 263 AD2d 881, 882). In any event, defendants' contention lacks merit. The record establishes that the Bankruptcy Trustee abandoned the action, thereby revesting plaintiff with the legal capacity to pursue this action (see 11 USC § 554; *Culver v Parsons*, 7 AD3d 931, 932; see generally *Dynamics Corp. of Am. v Marine Midland Bank-New York*, 69 NY2d 191, 196).

Contrary to the further contention of defendants, the court properly awarded compensatory damages to plaintiffs despite the allegation that plaintiff did not actually own the property. In this case, the issue of ownership is irrelevant to the award of damages for conversion because plaintiff had an "immediate superior right of possession" to the property (*Auble v Doyle*, 38 AD3d 1264, 1266 [internal quotation marks omitted]). In addition, we reject defendants' contention that the court erred in awarding damages to the secured creditors. There is sufficient evidence in the record to establish their interests in the property (see generally UCC 9-203 [b]; 9-310; *Badillo v Tower Ins. Co. of N.Y.*, 92 NY2d 790, 794-796). We likewise reject the contention of defendants that they had a right to repossess the property based on their unperfected security interests (see generally UCC 9-322 [a]; *Chrysler Credit Corp. v Simchuk*, 258 AD2d 349).

Finally, although we conclude that the court did not abuse its discretion in denying defendants' claim for a setoff (see generally 11 USC § 553 [a]; *Camelback Hosp. v Buckenmaier*, 127 BR 233, 237-238), or in awarding plaintiff treble damages pursuant to RPAPL 853 (see *Moran v Orth*, 36 AD3d 771, 772-773), we conclude that the court erred in calculating the amount of compensatory damages to which plaintiffs are entitled. Plaintiff conceded that certain items of property were returned to him before trial, but the court nevertheless included in its award the value of some of those items. We therefore modify the judgment by vacating the amount of damages awarded, and we remit the matter to Supreme Court to recalculate compensatory and treble damages consistent with our decision.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

53

KA 07-01035

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALEXIS OBERLANDER, DEFENDANT-APPELLANT.

DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 16, 2007. The judgment convicted defendant, upon a jury verdict, of grand larceny in the second degree and offering a false instrument for filing in the first degree (12 counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, counts 1 through 12 of the indictment are dismissed and a new trial is granted on count 13 of the indictment.

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of 12 counts of offering a false instrument for filing in the first degree (Penal Law § 175.35) and one count of grand larceny in the second degree (§ 155.40 [1]). Defendant is convicted of failing to report on 12 recertification applications to the Genesee County Department of Social Services (DSS) for child care, food stamp and Medicaid benefits that the father of one of her children was residing in her household. We agree with defendant that the evidence is legally insufficient to support the conviction of grand larceny and 11 of the counts charging offering a false instrument for filing, and we therefore dismiss counts 1 through 12 of the indictment.

We first address the 11 counts charging defendant with offering a false instrument for filing in the first degree. It is undisputed that Jeffrey Banks, the father of defendant's youngest child, frequently spent the night at defendant's residence and that defendant did not list him as a person who lived there on her recertification applications to DSS. It is also undisputed that prior to and subsequent to the time period in question, defendant lived at other addresses, and she listed Banks as a person who lived with her at those addresses. We conclude, however, that the People failed to

establish that Banks "was living in [defendant's] household within the commonly understood meaning of that phrase" during the time period in question here (*People v Stumbrice*, 194 AD2d 931, 933, *lv denied* 82 NY2d 727). Two prosecution witnesses who were frequent visitors at defendant's residence, including one who stayed at defendant's residence for a few months, testified that Banks lived at defendant's residence, and defendant's landlord testified that he believed that Banks lived at the residence. The basis for the testimony of those prosecution witnesses, however, was only that they often observed Banks at defendant's residence. The People failed to present other evidence to support the conclusion of those witnesses that Banks lived at defendant's residence, e.g., evidence that Banks received his mail at the residence, performed household chores, or paid household bills (*cf. People v Hure*, 16 AD3d 774, 775, *lv denied* 4 NY3d 854; *Stumbrice*, 194 AD2d at 933).

According to the testimony of defendant, although Banks was often at her residence and slept there 2 to 3 nights per week, he did not live there and spent the remainder of the time at another woman's home or at the homes of his family members. Three other defense witnesses who were often at defendant's residence testified that Banks was frequently at the residence but that they did not observe any of his personal effects there, nor did they have any knowledge that he lived there. A fourth defense witness testified that she rarely saw Banks at defendant's residence and had no knowledge that he lived with defendant. Neither the People nor defendant called Banks as a witness. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude with respect to counts 2 through 12 of the indictment that the evidence is legally insufficient to establish that Banks lived with defendant and her children and thus that defendant knowingly filed a written instrument containing a false statement with the intent to defraud DSS (*see Penal Law* § 175.35; *see generally People v Bleakley*, 69 NY2d 490, 495).

We further conclude that the evidence is legally insufficient to establish that defendant committed grand larceny in the second degree by stealing DSS benefits in excess of \$50,000 (*see generally Bleakley*, 69 NY2d at 495). The People failed to establish that defendant received benefits to which she would not have been entitled had Banks been living with her and that the value of those benefits exceeded \$50,000 (*see People v Hunter*, 34 NY2d 432, 438-439; *cf. People v Martinez*, 202 AD2d 735, 737; *Stumbrice*, 194 AD2d at 934). "The extent of undeserved benefits is especially important here where the conviction is for grand larceny in the [second] degree, which requires proof that the specific value of the property wrongfully obtained is in excess of [\$50,000]" (*Hunter*, 34 NY2d at 439). Indeed, DSS employees testified that the presence of Banks in the residence may not have impacted defendant's eligibility to receive benefits.

We reject defendant's contention that the evidence is legally insufficient to support the conviction of count 13 of the indictment, which concerns the final recertification application. The People

established that defendant and Banks both signed a rental agreement for a new residence approximately two weeks before defendant applied for that recertification of benefits and that defendant did not include Banks as a member of her household on that application. We nevertheless grant a new trial on that count inasmuch as County Court abused its discretion in denying defendant's request for a brief continuance to present a witness who, according to defendant, would testify that Banks spent 2 to 3 nights per week at the residence of that witness during the time period that defendant claimed that Banks did not live in her household (see *People v Walker*, 28 AD3d 1116, 1116-1117, *rearg granted* 31 AD3d 1226). By denying the request by defendant for a continuance, the court not only deprived her of "the fundamental right to present [a] witness[] in [her] defense, but . . . effectively deprive[d her] of the defense itself and cast doubt upon [her] credibility" (*People v Foy*, 32 NY2d 473, 478). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

54

KA 07-01914

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEON WEBB, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (PAUL E. BONANNO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 8, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), robbery in the second degree, attempted robbery in the first degree, attempted robbery in the second degree and 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 jury verdict of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [4]) and one count of assault in the second degree (§ 120.05 [7]), arising from three separate incidents. As defendant correctly concedes, he failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as he failed to move for a trial order of dismissal on the ground raised on appeal (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). We therefore reject the further contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to make a motion on that ground. "There can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion . . . that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152; *see People v Odom*, 53 AD3d 1084, 1087, lv denied 11 NY3d 792; *People v Phelps*, 4 AD3d 863, lv denied 2 NY3d 804). Furthermore, "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342,

349), we further conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

Contrary to the contention of defendant, the letters that he wrote to his fiancée in which he admitted that he committed the assault and implied that he committed several of the other crimes were properly admitted in evidence under the party admissions exception to the hearsay rule (see *People v Swart*, 273 AD2d 503, 505, *lv denied* 95 NY2d 908; see generally *People v Humphrey*, 15 AD3d 683, 685, *lv denied* 5 NY3d 763). Defendant further contends that County Court abused its discretion in admitting certain photographs in evidence. We reject that contention. With respect to the photograph of an individual holding a shotgun, a witness testified that the shotgun was the same as that used in the robberies charged in the indictment and that defendant was the person holding it. Inasmuch as defendant's possession of the shotgun was at issue, evidence that defendant possessed that weapon at an earlier time was relevant, and the probative value of the photograph outweighed its prejudicial effect (cf. *People v Brown*, 216 AD2d 737, 737-738; see generally *People v Marrero*, 191 AD2d 289, *lv denied* 81 NY2d 973). Contrary to the further contention of defendant, the People were permitted to introduce the photograph to strengthen their case although they had already established a prima facie case with respect to defendant's possession of a weapon (see generally *People v Alvino*, 71 NY2d 233, 245; *People v Marrin*, 205 NY 275, 280; *People v Radoncic*, 259 AD2d 428, *lv denied* 93 NY2d 1005). With respect to the remaining photographs, we conclude that they were properly admitted in evidence because they were also relevant to material issues in the case, and "[p]hotographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant" (*People v Poblner*, 32 NY2d 356, 370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905; see *People v Giles*, 20 AD3d 863, 864, *lv denied* 5 NY3d 806), which was not the case here.

Contrary to defendant's contention, the showup identification procedure used in connection with two of the victims was not unduly suggestive inasmuch as "the showup was 'conducted in close geographic and temporal proximity to the crime' " (*People v Lewis*, 306 AD2d 931, 932, *lv denied* 100 NY2d 596, quoting *People v Brisco*, 99 NY2d 596, 597). With respect to the photo array viewed by a third victim, we conclude that "the People met their initial burden of establishing the reasonableness of the police conduct . . . , and defendant failed to meet his ultimate burden of proving that the photo array was unduly suggestive" (*People v Bell*, 19 AD3d 1074, 1075, *lv denied* 5 NY3d 803, 850; see *People v Levy*, 281 AD2d 984, *lv denied* 96 NY2d 831).

Even assuming, arguendo, that defendant preserved for our review his contention that the court erred in denying his motion to sever certain counts of the indictment, we conclude that "[t]he counts were properly joined under CPL 200.20 (2) (b), and the court had no discretion to sever them" (*People v Van Duser* [appeal No. 2], 277 AD2d 1034, 1035, *lv denied* 96 NY2d 739; see *People v Bongarzone*, 69 NY2d 892, 895; see generally *People v Lane*, 56 NY2d 1, 7). The sentence is

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

62

CAF 08-00265

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

IN THE MATTER OF SARAH A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WAYNE A., RESPONDENT-APPELLANT.

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

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC.,
BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR SARAH A.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 4, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order denied the motion of respondent to vacate a default order of fact-finding and disposition terminating his parental rights.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the order entered January 18, 2007 is vacated, and the matter is remitted to Family Court, Erie County, for a hearing on the petition.

Memorandum: Respondent father appeals from an order denying his motion "to Reopen a Finding by Default Terminating Parental Rights" with respect to his daughter based upon findings that he abandoned and permanently neglected her. We agree with the father that Family Court erred in denying his motion. We conclude that the court violated the father's fundamental right to due process by failing to conduct either a fact-finding hearing or "inquest" before making its findings of abandonment and permanent neglect, regardless of the father's default status on the scheduled hearing date. Specifically, we note that "[a]ll proceedings to terminate parental rights . . . must include a fact finding hearing where the Judge of the Family Court must determine that the parent is guilty of some fault, either lack of visitation and contact in the case of abandonment, or lack of planning in the case of permanent neglect" (Carrieri, Practice Commentaries, McKinney's Cons Laws of NY, Book 52A, Social Services Law § 384-b, at 258). Here, although a fact-finding hearing was scheduled, no hearing was conducted when the father did not appear. Indeed, petitioner offered no evidence at the scheduled fact-finding hearing to support its petition, and the record thus is devoid of any evidence that the

father "is guilty of some fault" to support any such determination by the court (*id.*), or that petitioner engaged in the requisite diligent efforts to strengthen the relationship between the father and his daughter (see *Matter of Kyle K.*, 49 AD3d 1333, 1335, *lv denied* 10 NY3d 715; see also Social Services Law § 384-b [7] [f]). We therefore reverse the order, grant the father's motion, vacate the default order of fact-finding and disposition, and remit the matter to Family Court for a hearing on the petition.

With respect to the remaining contentions of the father, we conclude that he failed to demonstrate that he was prejudiced by his attorney's alleged ineffective assistance (see *Matter of James R.*, 238 AD2d 962, 963), and that there is nothing in the record to support his contention that the Law Guardian was ineffective.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

63

CAF 08-00771

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

IN THE MATTER OF CARL A. GUTZMER,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MYRIAM L. SANTINI, RESPONDENT-RESPONDENT.

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

OAK ORCHARD LEGAL SERVICES A DIVISION OF NEIGHBORHOOD LEGAL SERVICES,
INC., BATAVIA (JOHN ZONITCH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DEREK R. BROWNLEE, LAW GUARDIAN, BATAVIA, FOR CAILYN G.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 1, 2008 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of petitioner to vacate an order dismissing two of his petitions and seeking recusal.

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

Memorandum: Petitioner father appeals from an order denying his motion seeking to vacate a prior order dismissing two of his petitions and seeking recusal. We affirm. Family Court properly denied that part of the motion to vacate the prior order because that order was entered upon stipulation of the parties, and the record belies the contention of the father that he did not understand the consequences of his agreement to withdraw his petitions (*see generally Matter of Abeido v Abeido*, 54 AD3d 330, *lv dismissed* 11 NY3d 846; *Sontag v Sontag*, 114 AD2d 892, 893, *lv dismissed* 66 NY2d 554). Contrary to the further contention of the father, the court properly denied that part of his motion seeking recusal. The father failed to allege any basis for mandatory disqualification or recusal (*see* Judiciary Law § 14; 22 NYCRR 100.3 [E] [1]), and we conclude that the court did not abuse its discretion in refusing to recuse itself (*see Matter of Jason A.C. v Lisa A.C.*, 30 AD3d 1110; *see also Matter of Steven Glenn R.*, 51 AD3d 802). Indeed, the record establishes that the court has accommodated the father, particularly in view of the fact that it did not exercise its discretion to direct the father to obtain leave of the court before filing or refile any more petitions (*see Matter of Simpson v Ptaszynska*, 41 AD3d 607; *Matter of Pignataro v Davis*, 8 AD3d 487, 489;

Matter of Shreve v Shreve, 229 AD2d 1005, 1006).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

64

CA 07-02403

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

DEANNA M. KMIOTEK,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

GENE M. CHABA AND TOWN OF AMHERST,
DEFENDANTS-RESPONDENTS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (MICHAEL J. KEANE OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered November 13, 2007 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 modified on the law by granting the post-trial motion and setting aside the verdict with respect to damages for past and future pain and suffering and as modified the judgment is affirmed without costs, and a new trial is granted on damages for past and future pain and suffering only unless defendants, within 20 days of service of the order of this Court with notice of entry, stipulate to increase the award of damages for past pain and suffering to \$75,000 and for future pain and suffering to \$150,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff appeals and defendants cross-appeal from a judgment awarding plaintiff damages for past pain and suffering in the amount of \$35,000 and future pain and suffering in the amount of \$40,000 over her remaining life expectancy of 40 years for injuries she sustained to her lumbar spine in a motor vehicle accident. Addressing first the cross appeal, we reject defendants' contention that Supreme Court erred in directing a verdict on the issue of serious injury (*see generally Szczerbiak v Pilat*, 90 NY2d 553, 556). The uncontroverted medical evidence established that plaintiff sustained an annular tear and herniated discs at L4-5 and L5-S1 that required surgery. Plaintiff thus established that she sustained a permanent consequential limitation of use of her back and a significant limitation of use of her back within the meaning of

Insurance Law § 5102 (d). We have reviewed defendants' remaining contention and conclude that it is without merit.

With respect to the appeal, we reject the contention of plaintiff that she was denied a fair trial based on the allegedly improper remarks of defendants' attorney during his summation. "Although those remarks were arguably improper, they did not constitute a pattern of behavior designed to divert the attention of the jurors from the issues at hand" (*Krumper v Millfeld Trading Co.* [appeal No. 3], 272 AD2d 879, 881; cf. *Kennedy v Children's Hosp. of Buffalo* [appeal No. 3], 288 AD2d 918). We agree with plaintiff, however, that the court erred in denying her post-trial motion to set aside the verdict on damages for past and future pain and suffering. In our view, that award of damages deviates materially from what would be reasonable compensation for the injuries sustained by plaintiff (see generally CPLR 5501 [c]), and we conclude that \$75,000 for past pain and suffering and \$150,000 for future pain and suffering are the minimum amounts the jury could have awarded as a matter of law based on the evidence at trial (see generally *Orlikowski v Cornerstone Community Fed. Credit Union*, 55 AD3d 1245, 1247). We therefore modify the judgment accordingly, and we grant a new trial on damages for past and future pain and suffering only unless defendants, within 20 days of service of the order of this Court with notice of entry, stipulate to increase the award of damages for past pain and suffering to \$75,000 and for future pain and suffering to \$150,000, in which event the judgment is modified accordingly.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

67

CA 08-01864

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

MICHAEL A. HIXSON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

COTTON-HANLON, INC., AND FORTUNA ENERGY, INC.,
DEFENDANTS-RESPONDENTS.

DWYER, BLACK & LYLE, LLP, OLEAN (JEFFREY A. BLACK OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

PETRONE & PETRONE, P.C., BUFFALO (J. WILLIAM SAVAGE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Allegany County (Thomas P. Brown, J.), entered May 1, 2008 in a personal injury action. The judgment awarded money damages to plaintiff upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the post-trial motion in part and setting aside the verdict with respect to damages for future pain and suffering and as modified the judgment is affirmed without costs, and a new trial is granted on damages for future pain and suffering only unless defendants, within 20 days of service of the order of this Court with notice of entry, stipulate to increase the award of damages for future pain and suffering to \$125,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when a 1,000-pound pipe fell on his left foot, crushing his "great and second" toes and requiring their amputation. The jury awarded plaintiff \$100,000 for past pain and suffering but no damages for future pain and suffering or for future orthotics costs. We conclude that Supreme Court properly precluded testimony on plaintiff's need for future pain medication and plaintiff's future loss of earnings because that testimony would have been speculative (*see Galaz v Sobel & Kraus*, 280 AD2d 427). Although we agree with plaintiff that the court erred in precluding an orthopedic surgeon from testifying with respect to his future need for orthotics, that error was harmless because another witness testified with respect thereto and thus the testimony of the orthopedic surgeon would have been cumulative (*see Sweeney v Peterson*, 24 AD3d 984, 985).

We agree with plaintiff, however, that the court erred in denying that part of his post-trial motion seeking to set aside the verdict with respect to damages for future pain and suffering. Indeed, we agree with plaintiff that "[t]he verdict insofar as it awards no damages for future pain and suffering is contrary to the weight of the evidence" (*Corsaro v Mt. Calvary Cemetery*, 258 AD2d 969, 969; see *Pouso v City of New York*, 22 AD3d 395, 397). The uncontroverted evidence established that plaintiff has a 25% to 30% loss of use of his foot, has some difficulty walking, and has occasional pain (see *Quigley v Sikora*, 269 AD2d 812, 813). In our view, the sum of \$125,000 for the future pain and suffering of plaintiff, who at the time of trial had a life expectancy of an additional 50 years, is the minimum amount that the jury could have awarded to plaintiff (see generally *Pouso*, 22 AD3d at 396-397). We therefore modify the judgment accordingly, and we grant a new trial on damages for future pain and suffering only unless defendants, within 20 days of service of the order of this Court with notice of entry, stipulate to increase the award of damages for future pain and suffering to \$125,000, in which event the judgment is modified accordingly.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

76

KA 03-02311

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES E. COMFORT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JAMES E. COMFORT, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered September 23, 2003. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, rape in the third degree, attempted sodomy in the first degree, attempted sodomy in the third degree, assault in the second degree, sexual abuse in the third degree (three counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing those parts convicting defendant of sexual abuse in the third degree under counts 6 and 9 of the indictment and dismissing those counts of the indictment and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of various crimes, including rape in the first degree (Penal Law § 130.35 [1]) and attempted sodomy in the first degree (§ 110.00, former § 130.50 [1]). The conviction stems from allegations that defendant forcibly raped a 16-year-old girl and attempted to sodomize her, and sexually abused the girl and another young girl who was her friend. In appeal No. 2, defendant appeals with permission of a Justice of this Court from an order denying his CPL 440.10 motion to vacate the judgment of conviction in appeal No. 1.

Contrary to the contention of defendant in appeal No. 1, he was not denied due process or his right to a fair trial based on County Court's denial of his repeated requests for an adjournment of the trial. The court granted defendant's "demand[]" for a new attorney

approximately two weeks before trial was scheduled to commence, and defense counsel accepted the assignment with knowledge of the time constraints. We thus conclude that the court did not abuse its discretion in refusing to grant the requested adjournments (*see People v Arroyave*, 49 NY2d 264, 272; *People v Povio*, 284 AD2d 1011, *lv denied* 96 NY2d 923).

Defendant further contends in both appeals that he was denied due process and his right to a fair trial by alleged *Brady* and *Rosario* violations. We note at the outset that defendant's contentions in appeal No. 2 with respect to the alleged *Brady* and *Rosario* violations are not properly before us because they could have been raised, and indeed have been raised, on defendant's direct appeal (*see* CPL 440.10 [2] [b]). Even assuming, *arguendo*, that the prosecutor delayed in providing defendant with *Brady* material, we conclude that reversal is not warranted inasmuch as defendant received the material " 'in time for its effective use at trial' " (*People v Reese*, 23 AD3d 1034, 1036, *lv denied* 6 NY3d 779 [emphasis omitted]; *see People v Cortijo*, 70 NY2d 868, 870). Although the prosecutor committed a *Rosario* violation by failing to disclose a police officer's handwritten notes until after the direct examination of the People's second witness, that violation does not warrant reversal under the circumstances of this case. Defendant had the official report of the police officer, and defendant failed to establish that he was "substantially prejudiced by the delay" in the disclosure of the handwritten notes (*People v Watkins*, 17 AD3d 1083, 1084, *lv denied* 5 NY3d 771).

Defendant concedes that he failed to preserve for our review his contention in appeal No. 1 that he was denied due process and the right to a fair trial "by the application of" CPL 270.20 (2) (*see generally People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408, *rearg denied* 7 NY3d 742), 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]). Even assuming, *arguendo*, that defendant preserved for our review his further contention in appeal No. 1 that he was denied the right to present a defense, we conclude that his contention lacks merit. "Trial courts have broad discretion and wide latitude to limit cross-examination on collateral matters designed to impeach the victim's credibility" (*People v Love*, 307 AD2d 528, 532, *lv denied* 100 NY2d 643; *see generally People v Corby*, 6 NY3d 231, 234-235), and "[t]he record does not support the contention of defendant that the court violated his fundamental right to present a defense by refusing to allow him to call . . . witness[es] in his own behalf" (*People v Bradley*, 17 AD3d 1050, 1052, *lv denied* 5 NY3d 786).

Defendant further contends in appeal No. 1 that he was denied due process and his right to a fair trial by numerous instances of prosecutorial misconduct. Defendant failed to object to most of the challenged comments or acts and thus has failed to preserve for our review his contention with respect to those challenged comments or acts (*see* CPL 470.05 [2]). In any event, we conclude that the prosecutor's alleged misconduct was not so egregious as to have denied defendant due process or the right to a fair trial (*see generally*

People v Mott, 94 AD2d 415, 418-421).

Defendant contends in both appeals that the court erred in admitting *Molineux* evidence. That contention with respect to appeal No. 2, as well as his remaining contentions in appeal No. 2, are not properly before us (see CPL 440.10 [2] [b]). With respect to appeal No. 1, we conclude that defendant's *Molineux* contention is not preserved for our review (see *People v Ward*, 10 AD3d 805, 806, lv denied 4 NY3d 768; *People v Hood*, 288 AD2d 923, 924, lv denied 97 NY2d 705). In any event, we conclude that the evidence was properly admitted because it tended to establish defendant's identity as the man who raped the victim (see generally *People v Alvino*, 71 NY2d 233, 241-242), and the probative value of the evidence was not outweighed by its prejudicial effect (see *People v Hudy*, 73 NY2d 40, 55; *Alvino*, 71 NY2d at 242).

Contrary to the further contention of defendant, he received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147). 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, with the exception of counts 6 and 9 (see generally *People v Bleakley*, 69 NY2d 490, 495). We therefore modify the judgment in appeal No. 1 accordingly. Defense counsel stated that he "d[id] not have any objection" to the introduction of a videotape depicting 40 seconds of the gynecological examination of the victim, and defendant thus failed to preserve for our review his contention that the videotape was improperly admitted in evidence (see *People v Russell*, 71 NY2d 1016, 1017, rearg dismissed 79 NY2d 975). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

81

KA 05-00820

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES E. COMFORT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (William D. Walsh, J.), entered March 10, 2005. The order denied the motion of defendant pursuant to CPL 440.10 to vacate the judgment convicting him of, inter alia, rape in the first degree.

It is hereby ORDERED that said appeal from the order insofar as it concerned those parts of the judgment convicting defendant of sexual abuse in the third degree under counts 6 and 9 of the indictment is unanimously dismissed and the order is otherwise affirmed.

Same Memorandum as in *People v Comfort* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

92

CA 07-01802

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

MARY E. LEONARD, ESQ., BANKRUPTCY TRUSTEE
IN REGARDS TO THE ESTATE OF SAMUEL VANHORN
AND ELLEN VANHORN, BANKRUPTCY CASE NO.
04-65584, UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF NEW YORK,
PLAINTIFF-RESPONDENT,

V

ORDER

THOMPSON & JOHNSON EQUIPMENT CO., INC., AND
CLARK EQUIPMENT COMPANY, DOING BUSINESS AS
MELROE COMPANY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

THORN GERSHON TYMANN AND BONANNI, LLP, ALBANY (ARTHUR H. THORN OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

ALEXANDER & CATALANO, LLC, SYRACUSE (JAMES L. ALEXANDER OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County
(Deborah H. Karalunas, J.), entered July 30, 2007 in a personal injury
action. The order, insofar as appealed from, denied the motions of
defendants for summary judgment dismissing the complaint and cross
claims against them.

It is hereby ORDERED that said appeals are unanimously dismissed
without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988;
Chase Manhattan Bank, N.A. v Roberts & Roberts, 63 AD2d 566, 567; *see*
also CPLR 5501 [a] [1]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

93

CA 08-01609

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

MARY E. LEONARD, ESQ., BANKRUPTCY TRUSTEE
IN REGARDS TO THE ESTATE OF SAMUEL VANHORN
AND ELLEN VANHORN, BANKRUPTCY CASE NO.
04-65584, UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF NEW YORK,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THOMPSON & JOHNSON EQUIPMENT CO., INC., AND
CLARK EQUIPMENT COMPANY, DOING BUSINESS AS
MELROE COMPANY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

THORN GERSHON TYMANN AND BONANNI, LLP, ALBANY (ARTHUR H. THORN OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

ALEXANDER & CATALANO, LLC, SYRACUSE (JAMES L. ALEXANDER OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeals from a judgment of the Supreme Court, Onondaga County
(Deborah H. Karalunas, J.), entered June 9, 2008 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.

Memorandum: Plaintiff, as bankruptcy trustee of the estate of
Samuel VanHorn (VanHorn) and his wife, commenced this action seeking
damages for injuries sustained by VanHorn when he fell to the floor
while attempting to enter a Bobcat Skid Steer Loader (Bobcat). His
employer had purchased the Bobcat from defendant Thompson & Johnson
Equipment Co., Inc. (Thompson), and defendant Clark Equipment Company,
doing business as Melroe Company (Melroe), had manufactured the
Bobcat. Plaintiff asserted causes of action for negligence, products
liability and breach of warranty.

For reasons set forth in its bench decision, Supreme Court
properly denied the motions of defendants for summary judgment
dismissing the complaint and all cross claims against them. As the
court properly determined, there are issues of fact with respect to
the liability of both defendants as well as with respect to the
comparative negligence of VanHorn (*see generally Zuckerman v City of*

New York, 49 NY2d 557, 562). We note that, even assuming, arguendo, that defendants established as a matter of law that the warnings were adequate, plaintiff raised an issue of fact with respect thereto by submitting a safety notice that was issued by Melroe prior to the accident. According to the affirmation of plaintiff's attorney, that notice concerned "virtually the identical scenario" that resulted in VanHorn's accident. Additionally, plaintiff submitted the affidavit of an expert who stated that the specific warnings of the hazard should have been covered and contained in the training materials and operating manuals.

The case then proceeded to trial, whereupon the jury found that, although the Bobcat was not defectively designed, it was sold with inadequate warnings that were a substantial factor in causing VanHorn's injuries. The jury further found that VanHorn, by the use of reasonable care, could not have discovered the alleged defect but that he nevertheless could have avoided his injuries. The jury found him 60% responsible and defendants 40% responsible for his injuries and awarded damages. Thompson made a post-trial motion for, inter alia, judgment notwithstanding the verdict, and Melroe moved post-trial for judgment notwithstanding the verdict or, in the alternative, for a new trial. We conclude that the court properly denied those post-trial motions. With respect to those parts of the post-trial motions seeking judgment notwithstanding the verdict, we conclude based upon the evidence presented at trial that defendants failed to establish that "there [was] no rational process by which the [jury] could base a finding in favor of [plaintiff,] the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556; see *Ellis v Borzilleri*, 41 AD3d 1170, 1171). Additionally, we reject the contention of defendants that on the record before us the issue of causation may be decided in their favor as a matter of law (see *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784, 829).

Finally, we conclude that the court properly denied that part of the post-trial motion of Melroe to set aside the verdict and for a new trial. The evidence does not so preponderate in favor of Melroe that the verdict in favor of plaintiff could not have been reached on any fair interpretation of the evidence (see generally *Garrison v Geyer*, 19 AD3d 1136, 1136-1137).

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

94

CA 08-01610

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

MARY E. LEONARD, ESQ., BANKRUPTCY TRUSTEE
IN REGARDS TO THE ESTATE OF SAMUEL VANHORN
AND ELLEN VANHORN, BANKRUPTCY CASE NO.
04-65584, UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF NEW YORK,
PLAINTIFF-RESPONDENT,

V

ORDER

THOMPSON & JOHNSON EQUIPMENT CO., INC., AND
CLARK EQUIPMENT COMPANY, DOING BUSINESS AS
MELROE COMPANY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

THORN GERSHON TYMANN AND BONANNI, LLP, ALBANY (ARTHUR H. THORN OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

ALEXANDER & CATALANO, LLC, SYRACUSE (JAMES L. ALEXANDER OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County
(Deborah H. Karalunas, J.), entered July 16, 2008 in a personal injury
action. The order, insofar as appealed from, denied that part of the
motion of defendant Thompson & Johnson Equipment Co., Inc., for
judgment notwithstanding the verdict and denied the motion of
defendant Clark Equipment Company, doing business as Melroe Company,
for judgment notwithstanding the verdict or, in the alternative, for a
new trial.

It is hereby ORDERED that said appeals are unanimously dismissed
without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*,
155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

104

KA 08-00440

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GUNTHER J. FLINN, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 31, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the plea is vacated, and the matter is remitted to Jefferson County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that the plea was coerced by County Court's statements concerning the potential terms of incarceration in the event that defendant was convicted following a trial. Defendant failed to raise that contention in support of his motion to withdraw the plea, nor did he move to vacate the judgment of conviction on that ground. Defendant thus failed to preserve his contention for our review (*see People v Carlisle*, 50 AD3d 1451, *lv denied* 10 NY3d 957), but we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). At the plea proceeding, the court stated that it would treat defendant "very differently as far as the sentence is concerned" if he exercised his right to a trial and that his sentence after trial would be "nothing like the sentence that [he] would get if [he] stood up and accepted [his] responsibility." The court further stated that defendant was "going to be sentenced [to] substantially longer than" the agreed-upon term of six years of imprisonment if he exercised his right to a trial. We agree with defendant that the court's statements do not amount to a description of the range of the potential sentences but, rather, they constitute

impermissible coercion, "rendering the plea involuntary and requiring its vacatur" (*People v Fanini*, 222 AD2d 1111; see *People v Stevens*, 298 AD2d 267, 268, lv dismissed 99 NY2d 585; *People v Wilson*, 245 AD2d 161, 163, lv denied 91 NY2d 946). In light of our decision, we do not address defendant's remaining contentions.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

105

KA 05-00667

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY S. JONES, DEFENDANT-APPELLANT.

RICHARD W. YOUNGMAN, CONFLICT DEFENDER, ROCHESTER, FOR
DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered December 3, 2004. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [2]), defendant contends that his plea was not knowingly, intelligently and voluntarily entered. We reject that contention (see *People v Alexander*, 185 AD2d 712, lv denied 80 NY2d 926). In fact, the record belies the contention of defendant that County Court accepted his guilty plea despite an unresolved issue concerning his competency. There is nothing in the record before us to indicate that the court should have questioned the competency of defendant at the time he withdrew his motion pursuant to CPL article 730 and entered his plea (see generally *People v Francabandera*, 33 NY2d 429, 438-439; *People v Sims*, 217 AD2d 912, 912-913, lv denied 87 NY2d 851). We have reviewed defendant's remaining contentions and conclude that none requires reversal.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

112

CA 08-01177

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

MARGARETTA FOXWORTH, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN JENKINS, DEFENDANT,
AND ARTHUR E. PHILLIPS, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR
DEFENDANT-APPELLANT.

VINAL & VINAL, AMHERST (JEANNE M. VINAL OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered March 12, 2008 in a personal injury action. The order, insofar as appealed from, denied that part of the motion of defendant Arthur E. Phillips for leave to renew his motion to vacate a default judgment and order awarding damages against him.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion for leave to renew is granted and, upon renewal, the motion to vacate the default judgment and order awarding damages is granted, the judgment entered July 26, 2006 and the order dated October 26, 2006 are vacated in their entirety, and defendant Arthur E. Phillips is granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the motor vehicle she was operating was rear-ended by a vehicle owned by defendant Arthur E. Phillips and operated by defendant John Jenkins. On a prior appeal, we affirmed the order denying the motion of Phillips seeking, inter alia, to vacate the default judgment against him (*Foxworth v Jenkins*, 48 AD3d 1261). We conclude that Supreme Court erred in denying that part of the motion of Phillips for leave to renew his motion to vacate the default judgment and order awarding damages against him. "A motion for leave to renew must be based upon new facts that were unavailable at the time of the original motion" and that would change the prior determination (*Boreanaz v Facer-Kreidler*, 2 AD3d 1481, 1482; see CPLR 2221 [e] [2]). "Although a court has discretion to grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made . . ., it may not exercise that discretion unless the movant establishes a reasonable

justification for the failure to present such facts on the prior motion" (*Robinson v Consolidated Rail Corp.*, 8 AD3d 1080 [internal quotation marks omitted]). Here, the affidavit of Jenkins submitted in support of the motion for leave to renew presents new facts with respect to the cause of the collision, and Phillips offered a reasonable excuse for failing to submit the affidavit in support of his prior motion inasmuch as Jenkins could not be located for approximately one year from the time Phillips learned of the default judgment against him. Moreover, the affidavit of Jenkins provided a nonnegligent explanation for the collision (see *Ramadan v Maritato*, 50 AD3d 1620, 1621).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

132

CA 08-01656

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

CAROLYN RAK, INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF TYLER HALEY, AN INFANT
UNDER THE AGE OF 14 YEARS,
PLAINTIFF-RESPONDENT,

V

ORDER

COUNTRY FAIR, INC., PRIME REALTY, INC., PRIME
REALTY II, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

DAMON & MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

FARRELL & FARRELL, HAMBURG (KENNETH J. FARRELL OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered November 21, 2007 in a personal injury action. The judgment was entered upon a finding of liability against defendants Country Fair, Inc., Prime Realty, Inc. and Prime Realty II, Inc. after a jury trial.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on March 9, 2009,

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

137

CA 08-01176

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

LAURIE JOHNSON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DELTA INTERNATIONAL MACHINERY CORP. AND
SYRACUSE INDUSTRIAL SALES CO., LTD.,
DEFENDANTS-RESPONDENTS.

LONGSTREET & BERRY, LLP, SYRACUSE (MARTHA L. BERRY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DANIEL R. RYAN OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered February 19, 2008 in a personal injury action. The order and judgment granted defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained while using a 10-inch Tilting Arbor Unisaw (Unisaw) allegedly manufactured by defendant Delta International Machinery Corp. and distributed by defendant Syracuse Industrial Sales Co., Ltd. At the time of the accident, the safety guard on the Unisaw had been removed, and plaintiff was performing a non-through cut without using a push stick. Defendants moved for summary judgment dismissing the complaint on the grounds that they had no duty to warn plaintiff and that there was no defect in the Unisaw. We conclude that Supreme Court erred in granting the motion.

Defendants failed to establish as a matter of law that they had no duty to warn plaintiff of the danger of using the Unisaw. Although "[t]here are hazards for which no warnings are required as a matter of law . . . 'because they are patently dangerous or pose open and obvious risks' " (*Gian v Cincinnati, Inc.*, 17 AD3d 1014, 1016, quoting *Liriano v Hobart Corp.*, 92 NY2d 232, 241), "where reasonable minds might disagree as to the extent of plaintiff's knowledge of the hazard, the question is one for the jury" (*Liriano*, 92 NY2d at 241). In our view, although the danger of placing one's hand near a rapidly rotating saw may be viewed as open and obvious (*see e.g. Lamb v Kysor*

Indus. Corp., 305 AD2d 1083, 1084-1085; *Banks v Makita, U.S.A.*, 226 AD2d 659, 660, *lv denied* 89 NY2d 805), here plaintiff was not an experienced user of the Unisaw (*cf. Lamb*, 305 AD2d at 1084; *Banks*, 226 AD2d at 660), and she was not aware that the safety guard had been removed (*cf. Felle v W.W. Grainger, Inc.*, 302 AD2d 971, 972; *Conn v Sears, Roebuck & Co.*, 262 AD2d 954, 955, *lv denied* 94 NY2d 755; *Baptiste v Northfield Foundry & Mach. Co.*, 184 AD2d 841, 843). Further, plaintiff's employer directed plaintiff not to use a push stick. We thus conclude that there are issues of fact whether the danger of using the Unisaw without a guard or a push stick was open and obvious to plaintiff.

We further conclude that there is a triable issue of fact whether the absence of an adequate warning was a proximate cause of the accident. Although the Unisaw had a warning label instructing operators of the saw to use a push stick for non-through cuts, the label was written in small print and it was located at knee level. Generally, the " 'adequacy of the warning in a products liability case based on failure to warn is, in all but the most unusual circumstances, a question of fact to be determined at trial' " (*Dunn v Black Clawson Co., Inc.*, 38 AD3d 1212, 1213; *see Liriano*, 92 NY2d at 241-242; *Nagel v Brothers Intl. Food, Inc.*, 34 AD3d 545, 547-548). Even assuming, *arguendo*, that defendants established as a matter of law that the failure to warn plaintiff of the danger of using the Unisaw was not a proximate cause of the accident, we conclude that plaintiff raised a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In her affidavit in opposition to the motion, plaintiff averred that, had she been aware of the warning to use a push stick for non-through cuts, she would have used one despite her employer's directive not to do so.

We further conclude that defendants "failed to meet their 'initial burden of establishing that there was no defect in the design or manufacture of the [Unisaw]' " (*Sapp v Niagara Mach. & Tool Works*, 45 AD3d 1261, 1263), inasmuch as they failed to submit evidence that the Unisaw "met all applicable industry standards for safety and was reasonably safe for its intended use when it was manufactured" (*Gian*, 17 AD3d at 1016; *cf. Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 967). Thus, the burden never shifted to plaintiff to raise a triable issue of fact with respect to the alleged defect in the Unisaw (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

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

140

CA 08-01125

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

KATHLEEN B. SHORT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RONALD A. SHORT, DEFENDANT-RESPONDENT.

CAROLE C. LIVSEY, ROCHESTER, FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), dated July 25, 2007 in a divorce action. The order dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended complaint is reinstated, and the matter is remitted to Supreme Court, Wayne County, for further proceedings in accordance with the following Memorandum: We conclude that Supreme Court erred in dismissing the amended complaint in this divorce action on the ground that plaintiff failed to establish cruel and inhuman treatment on the part of defendant. Plaintiff met her burden of establishing by a preponderance of the credible evidence that defendant engaged in "serious misconduct . . . such that plaintiff's physical or mental well-being was endangered and continued cohabitation with defendant is unsafe or improper" (*Ridley v Ridley*, 275 AD2d 941, 942; see Domestic Relations Law § 170 [1]; *Brady v Brady*, 64 NY2d 339, 343; *Collins v Collins*, 284 AD2d 743, 745), and defendant failed to rebut that showing (see *Levine v Levine*, 2 AD3d 498, 500). We therefore reverse the order, reinstate the amended complaint, and remit the matter to Supreme Court to grant judgment in favor of plaintiff and to determine the remaining issues.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

148

KA 07-02262

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER H. OSBORNE, DEFENDANT-APPELLANT.

FERO AND INGERSOLL, LLP, ROCHESTER (CARL M. DARNALL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 29, 2005. The judgment convicted defendant, after a nonjury trial, of, inter alia, manslaughter in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of driving while intoxicated and unlicensed operation of a motor vehicle and dismissing counts 7, 8 and 11 of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a bench trial of, inter alia, manslaughter in the second degree (Penal Law § 125.15 [1]), vehicular manslaughter in the second degree (§ 125.12 [former (2)]), assault in the second degree (§ 120.05 [4]), vehicular assault in the second degree (§ 120.03 [1]), driving while intoxicated (Vehicle and Traffic Law § 1192 [2], [3]), and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). The People correctly concede that counts 7 and 8, charging defendant with driving while intoxicated, are lesser inclusory concurrent counts of count 2, charging defendant with vehicular manslaughter in the second degree; and that count 11, charging defendant with unlicensed operation of a motor vehicle, is a lesser inclusory concurrent count of count 6, charging defendant with aggravated unlicensed operation of a motor vehicle. Thus, counts 7, 8 and 11 must be dismissed as a matter of law (*see generally People v Moore*, 41 AD3d 1149, 1152, *lv denied* 9 NY3d 879, 992), and we therefore modify the judgment accordingly.

Defendant did not object to the verdict on the grounds that it was inconsistent both to find him guilty of manslaughter in the second degree and vehicular manslaughter, and to find him guilty of assault

in the second degree and vehicular assault, and defendant thus failed to preserve for our review his contention with respect to the alleged inconsistencies (see CPL 470.05 [2]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (see generally *People v Griffin*, 48 AD3d 1233, 1234, lv denied 10 NY3d 840; *People v Eccleston*, 161 AD2d 1184, 1185, lv denied 76 NY2d 855). We reject the further contention of defendant that defense counsel's failure to ask the court to consider those counts in the alternative deprived him of effective assistance of counsel. Although we agree with defendant that defense counsel should have asked the court to do so, we note that this was a bench trial (cf. *People v Smith*, 30 AD3d 693, 693-694), that defendant was acquitted of murder in the second degree (Penal Law § 125.25 [4]), that the evidence is legally sufficient to support the more serious charges, and that the sentences on the inconsistent counts run concurrently with respect to each other. We therefore conclude that defendant received meaningful representation (see *People v Benevento*, 91 NY2d 708, 712), and that the "single lapse by otherwise competent counsel" did not deprive defendant of his constitutional right to effective assistance of counsel (*People v Turner*, 5 NY3d 476, 478).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

153

KA 05-02215

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EFRAIN COTTO, JR., DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 13, 2005. 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 amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Although defendant failed to preserve for our review his contention that the order of protection is invalid (*see People v Nieves*, 2 NY3d 310, 315-317), we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). We agree with defendant that Supreme Court erred in determining the maximum expiration date, which exceeds three years from the expiration of the maximum term of the determinate sentence of imprisonment that was imposed (*see CPL 530.13 [former (4)]*), and that the court also erred in failing to consider the jail time credit to which defendant is entitled (*see People v Goins*, 45 AD3d 1371, 1372). We therefore modify the judgment by amending the order of protection, and we remit the matter to Supreme Court to determine the jail time credit to which defendant is entitled, and to specify in the order of protection an expiration date in accordance with CPL 530.13 (former [4]), the version of the statute in effect when the judgment was rendered on September 13, 2005 (*see id.*).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

154

CA 08-00707

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

IN THE MATTER OF LARRY BALL, MICHAEL CULKIN,
THOMAS P. WEIGAND, PAUL R. THOMPSON, AND
DAVID J. WALTERS,
PETITIONERS-APPELLANTS-RESPONDENTS,

V

MEMORANDUM AND ORDER

CITY OF SYRACUSE, ITS OFFICERS, AGENTS, SERVANTS,
REPRESENTATIVES, OFFICIALS, AND/OR EMPLOYEES,
RESPONDENTS-RESPONDENTS-APPELLANTS.

LAW OFFICES OF ROBERT G. WALSH, P.C., BLASDELL (ROBERT G. WALSH OF
COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS.

RORY A. MCMAHON, CORPORATION COUNSEL, SYRACUSE (NANCY J. LARSON OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 20, 2008 in a proceeding pursuant to CPLR article 78. The order, among other things, denied respondents' motion to dismiss the petitions.

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

Memorandum: Petitioners commenced these CPLR article 78 proceedings, which have since been consolidated, alleging that they were wrongfully terminated from their employment with respondent City of Syracuse (City). They further alleged that respondents acted arbitrarily by interpreting the City Charter to require a "domicile" in the City rather than a "residence" in the City. Attached to the petitions were various documents, including memoranda indicating that the City's policy pursuant to City Charter § 8-112 (2) is to require that all employees have an "actual principal domicile" in the City. Respondents moved to dismiss the petitions pursuant to CPLR 3211 (a) (7), and Supreme Court converted the motion to an objection in point of law pursuant to CPLR 7804 (f). The court further determined that the City's interpretation of the residency requirement in section 8-112 (2) was "valid and consistent with law" but denied the motion to dismiss the petitions. We note at the outset that, although no appeal or cross appeal lies as of right from a nonfinal intermediate order in a CPLR article 78 proceeding, we treat the notice of appeal and notice of cross appeal as applications for permission to appeal, and we grant such permission (*see Matter of Engelbert v Warshefski*, 289 AD2d 972).

Petitioners have submitted documentary evidence establishing that the policy of the City requires all City employees to be domiciled in the City, and the City does not dispute that petitioners have accurately set forth its policy. We conclude that the court properly determined that the City Charter is valid and consistent with the law (see *Mandelkern v City of Buffalo*, 64 AD2d 279, 280). Petitioners' contention that the court improperly relied on extrinsic evidence in determining the issue is without merit. Indeed, petitioners themselves submitted documents along with the petitions with respect to the policy, and the court properly took judicial notice of the local rules and regulations of an executive department (see *Matter of Phillies*, 12 NY2d 876).

"In determining motions to dismiss in the context of [a CPLR] article 78 proceeding, a court may not look beyond the petition and must accept all allegations in the petition as true . . . where, as here, no answer or return has been filed" (*Matter of Scott v Commissioner of Correctional Servs.*, 194 AD2d 1042, 1043). Here, there is no evidence in the record with respect to the actual domicile of the petitioners, and we thus conclude that the court properly denied respondents' motion to dismiss the petitions based on the record before it.

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

161

CA 08-01124

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

TODD KONOPCZYNSKI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ADF CONSTRUCTION CORP., DEFENDANT-RESPONDENT.

COLLINS & MAXWELL, L.L.P., BUFFALO (ALAN D. VOOS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered November 27, 2007 in a personal injury action. The order granted defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the Labor Law § 200 and common-law negligence claims 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 when he tripped and fell in a depression in the floor at the work site. There were approximately 132 depressions built into the flooring so that the floor could be adjusted or relocated by lifting hooks and then used as an earthquake simulator. Supreme Court properly granted that part of defendant's motion for summary judgment dismissing the claim pursuant to Labor Law § 241 (6), which is premised on defendant's alleged violation of 12 NYCRR 23-1.7 (e). It is undisputed that the depressions in the floor were permanently embedded so that the floor could serve as a "shake table," and we thus agree with defendant that the regulation does not apply to this case because the alleged tripping hazard was " 'an integral part of the construction' " (*Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157, quoting *O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806; see *Gist v Central School Dist. No. 1 of Towns of Elma, Marilla, Wales, Lancaster & Aurora, Erie County, & Bennington, Wyoming County*, 234 AD2d 976; *Adams v Glass Fab*, 212 AD2d 972, 973).

We agree with plaintiff, however, that the court erred in granting those parts of defendant's motion with respect to the Labor Law § 200 and common-law negligence claims, and we therefore modify

the order accordingly. A "defendant may bear responsibility under Labor Law § 200 and for common-law negligence if it had 'actual or constructive notice of the allegedly dangerous condition on the premises which caused the . . . plaintiff's injuries, regardless of whether [it] supervised [plaintiff's] work' " (*Riordan v BOCES of Rochester*, 4 AD3d 869, 870-871; see *Militello v New Plan Realty Trust*, 16 AD3d 1092, 1093). Here, defendant failed to meet its initial burden because it failed to establish that it had no constructive notice of the allegedly hazardous conditions in the floor. Indeed, by its own submissions, defendant established that the depressions were seven inches long, five inches wide and six inches deep, and that there were approximately 132 of these depressions throughout the floor, and its expert failed to address whether the condition of the floor was reasonably safe. Although defendant contended that it was not aware of any previous injuries as a result of the depressions, it offered no evidence to support its contention that it was unaware that workers at the site had repeatedly tripped in the holes, as testified to by plaintiff at his deposition. Contrary to defendant's further contention, "the open and obvious nature of the allegedly dangerous condition in this case 'does not negate the duty to maintain [the] premises in a reasonably safe condition but, [instead], bears only on the injured person's comparative fault' " (*Verel*, 41 AD3d at 1156).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

162

CA 08-01729

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

SULLIVAN CONTRACTING, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TURNER CONSTRUCTION CO., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

COUCH WHITE, LLP, ALBANY (JEREMY M. SMITH OF COUNSEL), FOR
DEFENDANT-APPELLANT.

ARMOND J. FESTINE, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Robert F. Julian, J.), entered January 7, 2008 in an action to foreclose on a mechanic's lien. The order, insofar as appealed from, denied the motion of defendant Turner Construction Co. for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Turner Construction Co. is granted and the complaint against that defendant is dismissed.

Memorandum: Plaintiff commenced this action seeking to foreclose on a mechanic's lien arising out of a construction project. Plaintiff had been hired by a contractor who in turn had been hired by Turner Construction Co. (defendant), the general contractor for the project. We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint against it. Plaintiff's notice of mechanic's lien is fatally defective because it fails to set forth "[t]he labor performed or materials furnished and the agreed price or value thereof," as required by Lien Law § 9 (4) (see *Brescia Constr. Co., Inc. v Walart Constr. Co., Inc.*, 249 App Div 151, 152, *affd* 273 NY 648; *Flaum v Picarreto*, 226 NY 468, 471-472; *Fanning v Belle Terre*, 152 App Div 718, 722-723; see also *Empire Pile Driving Corp. v Hylan Sanitary Serv.*, 32 AD2d 563). Plaintiff concedes that it failed to set forth the "labor performed or materials furnished" and contends that it failed to specify "the agreed price or value thereof" only because its subcontract stated that it would be paid on a cost plus basis of 112% of its auditable fees. Plaintiff thus contends that it substantially complied with the statute. We reject that contention. It is well established that the requirement that a notice of mechanic's lien state the "agreed price or value" may be satisfied by the inclusion of an agreed-upon cost plus percentage if

there is no specific dollar amount indicated in the contract (see *Fyfe v Sound Dev. Co.*, 235 NY 266, 269-270; *104 Contrs. v R.T. Golf Assoc.* [appeal No. 2], 270 AD2d 817, 818), but here plaintiff failed to set forth that the agreed price for its work was 112% of its auditable costs. By failing to include two material elements of a notice of mechanic's lien, plaintiff cannot be deemed to have substantially complied with the requirements of Lien Law § 9 (see *Bradley & Son v Huber Co.*, 146 App Div 630, 631-632, *affd* 210 NY 627; *cf. Davis Lbr. Co. v Blanchard*, 175 App Div 256, 259).

We further conclude that defendant was not obligated to plead the allegedly defective notice of mechanic's lien as an affirmative defense. It cannot be said that such an affirmative defense would surprise or prejudice plaintiff inasmuch as the notice of mechanic's lien was signed by plaintiff's president and provided the basis for this action (see *Foley v Pac Am Or Bearing*, 105 AD2d 1120; *cf. Millbrook Hunt v Smith*, 249 AD2d 283). In any event, even if defendant had included such an affirmative defense, the notice of mechanic's lien contained multiple defects and thus could not have been cured by an amendment pursuant to Lien Law § 12-a (see *Empire Pile Driving Corp.*, 32 AD2d 563; *cf. EFCO Corp. v Helena Assoc. LLC*, 45 AD3d 399, *lv dismissed* 10 NY3d 756).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

168

KA 07-02190

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JUAN RAMOS, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered October 17, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the DNA databank fee and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). We reject the contention of defendant that the police did not have an articulable reason for approaching the parked vehicle in which he was a passenger in order to request information (*see generally People v Hollman*, 79 NY2d 181, 191; *People v De Bour*, 40 NY2d 210, 223). That vehicle was one of two vehicles parked in the parking lot of a playground that had been the subject of neighborhood complaints concerning individuals selling drugs. We conclude that the totality of the information known to the police prior to entering the parking lot and their observations upon doing so provided an articulable reason for approaching the vehicle in question to request information with respect to the identity of the occupants and their purpose for being in the area (*see People v Hollman*, 79 NY2d 181, 191; *People v Wright*, 8 AD3d 304, 306).

Defendant failed to preserve for our review his contention that the questioning conducted by the officer following his initial approach of the vehicle exceeded the scope of a request for information (*see generally People v Arguinzoni*, 48 AD3d 1239, 1241, *lv denied* 10 NY3d 859; *People v Evans*, 34 AD3d 1301, 1302, *lv denied* 8

NY3d 845), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his contention that County Court erred in imposing the \$50 DNA databank fee authorized by Penal Law § 60.35 (1) (a) (v). Nevertheless, we exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]; *People v King*, 57 AD3d 1495). As the People correctly concede, Penal Law § 60.35 (1) (a) requires that a DNA databank fee be imposed upon an individual "convicted of a designated offense as defined by [Executive Law § 995 (7)]" The amended version of Executive Law § 995 (7) that defines " '[d]esignated offender' " as, inter alia, an individual who had been convicted of and sentenced for "a felony defined in the [P]enal [L]aw" became effective approximately two weeks after defendant committed the crime in question here, and we therefore modify the judgment by vacating the DNA databank fee.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

169

KA 06-01553

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT A. LAFFERTY, DEFENDANT-APPELLANT.

BONITA J. STUBBLEFIELD, PIFFARD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 8, 2005. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony, and aggravated unlicensed operation of a motor vehicle 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 Cattaraugus County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (ii)]) and aggravated unlicensed operation of a motor vehicle in the second degree (§ 511 [2] [a] [ii]). As part of the plea agreement, County Court stated that it would impose an indeterminate term of imprisonment of no more than 2 to 6 years. The court, however, failed to advise defendant that the sentence on the DWI count could include a fine. In addition to imposing a term of imprisonment of 2 to 6 years on the DWI count at the time of sentencing, the court ordered defendant to pay a fine of \$3,000 on that count, as well as a fine of \$1,000 on the aggravated unlicensed operation count.

As the People correctly concede, the court erred in imposing a fine on the DWI count without affording defendant an opportunity to withdraw his plea inasmuch as the fine was not mentioned at the time of the plea (see *People v Barber*, 31 AD3d 1145, 1146; *People v Fulton*, 238 AD2d 439). Although the issue is not preserved for our review (see CPL 470.05 [2]), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Because defendant was denied the benefit of his plea bargain, we modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the sentence promised on the DWI

count or to afford defendant the opportunity to withdraw his plea (see *People v Shabazz*, 203 AD2d 947; see also *Santobello v New York*, 404 US 257, 262-263). In the event that defendant does not withdraw his plea and the court imposes the sentence promised on the DWI count, we note that defendant must be resentenced on the aggravated unlicensed operation count in accordance with Vehicle and Traffic Law § 511 (2) (b).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

171

KA 07-02095

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DONALD BOWEN, DEFENDANT-APPELLANT.

WAGNER & HART, OLEAN (JANINE C. FODOR OF COUNSEL), FOR
DEFENDANT-APPELLANT.

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY (JOHN C. LUZIER OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered September 4, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree (two counts), grand larceny in the fourth degree, and petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of grand larceny in the fourth 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 grand larceny in the fourth degree (Penal Law § 155.30 [1]) as a lesser included offense of grand larceny in the third degree (§ 155.35), petit larceny (§ 155.25), and two counts of burglary in the third degree (§ 140.20). We reject the contention of defendant that he was denied a fair trial by prosecutorial misconduct. The record establishes that County Court issued prompt curative instructions that were sufficient to alleviate any prejudice to defendant arising from any misconduct (*see People v Murry*, 24 AD3d 1319, 1320, *lv denied* 6 NY3d 815). Contrary to defendant's further contention, the testimony of the witnesses did not render the indictment duplicitous inasmuch as that testimony did not "tend[] to establish the commission of multiple criminal acts during [the time periods] specified in the indictment" (*People v Bracewell*, 34 AD3d 1197, 1198).

We agree with defendant, however, that the court should have granted his request pursuant to CPL 30.30 seeking to dismiss the count of the indictment charging him with grand larceny in the third degree, and we therefore modify the judgment accordingly. For purposes of the statutory right to a speedy trial, the six-month readiness period begins to run when an action in which defendant is accused of "one or

more offenses, at least one of which is a felony," is commenced (CPL 30.30 [1] [a]). Here, the action was commenced by the filing of a felony complaint approximately eight months prior to the indictment. The felony complaint charged defendant with one count of burglary in the third degree but did not charge him with grand larceny in the third degree. Although the count charging defendant with burglary in the third degree was dismissed based on the People's noncompliance with CPL 30.30, we conclude that the crimes charged in both the felony complaint and the indictment "were based upon . . . acts 'so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident' " (*People v Stone*, 265 AD2d 891, 892, *lv denied* 94 NY2d 907). Thus, defendant also was entitled to dismissal of the count charging him with grand larceny in the third degree. We reject defendant's contention, however, that the dismissal of that count warrants a new trial on the remaining counts of which defendant was convicted. The evidence against defendant with respect to those remaining counts is overwhelming, and there is no significant probability that the jury would have acquitted defendant of those counts in the absence of the evidence presented concerning the grand larceny count (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Finally, the sentence is not unduly harsh or severe.

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

172

KA 07-01166

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARNELL GREEN, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered February 7, 2007. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). We reject the contention of defendant that Supreme Court erred in denying his first *Batson* challenge with respect to a black prospective juror. Defendant failed to present "facts and other relevant circumstances sufficient to raise an inference that the prosecution used its peremptory challenge[] to exclude" the potential juror because of her race (*People v Childress*, 81 NY2d 263, 266; see *People v Jones*, 11 NY3d 822, 823; see generally *Batson v Kentucky*, 476 US 79, 93-94). Contrary to the further contention of defendant, the court's determination that he did not establish good cause for his failure to serve and file a notice of intent to introduce psychiatric evidence in a timely manner was not an abuse of discretion, inasmuch as defendant failed to provide even informal notice of such intent until the trial had commenced (see CPL 250.10 [2]; *People v Berk*, 88 NY2d 257, 265-266, cert denied 519 US 859; *People v Heath*, 49 AD3d 970, 972, lv denied 10 NY3d 959).

Defendant waived his challenge to the legal sufficiency of the evidence by requesting that the court charge manslaughter in the first degree as a lesser included offense of murder in the second degree (Penal Law § 125.25 [1]; see CPL 300.50 [1]; *People v Richardson*, 88 NY2d 1049, 1051; *People v McDuffie*, 46 AD3d 1385, 1386, lv denied 10 NY3d 867). Viewing the evidence in light of the elements of the crime

as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Although none of the witnesses testified that he or she observed defendant with a knife, the testimony of several witnesses established that defendant was the initial unprovoked aggressor and that only defendant and the victim were involved in the altercation during which the victim was stabbed. We thus perceive no reason to disturb the jury's credibility determinations (see *People v Borthwick*, 51 AD3d 1211, 1214, *lv denied* 11 NY3d 734).

We further conclude that the court properly refused to suppress defendant's statements to the police. The intelligence of a defendant is only one factor to consider in determining whether his or her waiver of *Miranda* rights was voluntary and, here, the record supports the court's determination that defendant understood the meaning of the *Miranda* warnings prior to waiving his rights (see *People v Williams*, 62 NY2d 285, 288-290). We reject the contention of defendant that new *Miranda* warnings were required before he made statements to the transporting officer. Those statements were made within a reasonable time after the initial valid waiver by defendant of his *Miranda* rights, during which time defendant remained in continuous custody (see *People v Cox*, 21 AD3d 1361, 1363, *lv denied* 6 NY3d 753; *People v Johnson*, 20 AD3d 939, *lv denied* 5 NY3d 853).

Contrary to the contention of defendant, he was not denied a fair trial based on the court's expanded jury charge with respect to intent. The language used by the court was substantially similar to language recommended by the Committee on Criminal Jury Instructions, and "the court's charge, read as a whole, made clear that it was the jury's role to determine the defendant's intent, and that the People bore the burden of proving, beyond a reasonable doubt, that the defendant acted [intentionally]" (*People v Torres*, 46 AD3d 925, 925-926, *lv denied* 10 NY3d 817). The further contention of defendant that he was deprived of a fair trial by prosecutorial misconduct on summation is preserved for our review only with respect to certain instances of alleged misconduct (see CPL 470.05 [2]). In any event, we conclude that the prosecutor's comments on summation were "either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733; see *People v Farrell*, 228 AD2d 693, *lv denied* 88 NY2d 984). We have reviewed defendant's remaining contentions and conclude that they are without merit.

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

179

CA 08-01846

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, AND GORSKI, JJ.

HAROLD E. EWING, SR., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BRUNNER INTERNATIONAL, INC.
AND MCG CAPITAL CORPORATION,
DEFENDANTS-RESPONDENTS.

JEFFREY FREEDMAN ATTORNEYS AT LAW, BUFFALO (EDWARD J. MURPHY, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY LLP, BUFFALO (ROBERT E. SCOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT BRUNNER INTERNATIONAL, INC.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered January 17, 2008 in a personal injury action. The order denied the motion of plaintiff for partial summary judgment against defendant Brunner International, Inc.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the first affirmative defense of defendant Brunner International, Inc. is dismissed.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when a portion of the flat concrete roof on which he was standing collapsed, causing him to fall. We agree with plaintiff that Supreme Court erred in denying his motion seeking partial summary judgment on liability against Brunner International, Inc. (defendant) under Labor Law § 240 (1) as well as dismissal of the affirmative defense alleging that plaintiff's culpable conduct contributed in whole or in part to the accident. Plaintiff met his initial burden inasmuch as "[t]he collapse of a work site itself 'constitute[s] a prima facie violation of Labor Law § 240 (1)' " (*Bradford v State of New York*, 17 AD3d 995, 997, quoting *Richardson v Matarese*, 206 AD2d 353, 353), and defendant failed to raise a triable issue of fact whether the conduct of plaintiff was the sole proximate cause of his injuries (*cf. Tronolone v Praxair*, 22 AD3d 1031, 1033; *see generally Felker v Corning Inc.*, 90 NY2d 219, 224). In support of his motion, plaintiff submitted his deposition testimony in which he testified that it was the general practice on the work site to wear safety harnesses only when "tearing off" asphalt or working on "bad concrete" and that, when he fell, he was not tearing off asphalt and all but four inches of the concrete

decking requiring replacement had been removed. Defendant failed to submit any evidence raising a triable issue of fact whether plaintiff, a foreman on the roofing project, " 'knew or should have known' [that he was expected to wear a safety harness] . . .; 'that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured' " (*Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1053; *cf. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

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CA 08-01754

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, AND GORSKI, JJ.

ROY LEDWIN AND CAROL ANN LEDWIN, INDIVIDUALLY
AND AS HUSBAND AND WIFE, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JEFFREY AUMAN, MDC GENERAL CONTRACTOR, INC.,
TIFFANY BUILDER, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BURGIO, KITA & CURVIN, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR
DEFENDANT-APPELLANT JEFFREY AUMAN.

LAW OFFICE OF EPSTEIN & HARTFORD, WILLIAMSVILLE (ROBERT L. HARTFORD OF
COUNSEL), FOR DEFENDANTS-APPELLANTS MDC GENERAL CONTRACTOR, INC. AND
TIFFANY BUILDER, INC.

SARLES, FREY & JOSEPH, WILLIAMSVILLE, POPE LAW FIRM, PLLC, BUFFALO
(PHILIP A. MILCH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered March 14, 2008 in a personal injury action. The order denied the motion of defendant Jeffrey Auman for summary judgment and denied the cross motion of defendant MDC General Contractor, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the Labor Law § 240 (1) and § 241 (6) claims against defendant Jeffrey Auman and by granting the cross motion and dismissing the complaint against defendant MDC General Contractor, Inc. and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Roy Ledwin (plaintiff) when he fell from a ladder while inspecting the electrical system of a single-family home owned by defendant Jeffrey Auman. Defendant MDC General Contractor, Inc. (MDC), along with other contractors, had been hired by Auman to renovate his home. We agree with Auman that Supreme Court erred in denying those parts of his motion seeking summary judgment dismissing the Labor Law § 240 (1) and § 241 (6) claims against him, and we therefore modify the order accordingly. "Owners and contractors are subject to liability pursuant to Labor Law § 240 (1) and § 241 (6), except owners of one- and two-family dwellings who contract for but do not direct or control

the work" (*Zamora v Frantellizzi*, 45 AD3d 580, 581; see *Soskin v Scharff*, 309 AD2d 1102, 1104). Here, it is undisputed that Auman did not control, direct or supervise the manner in which plaintiff performed the electrical inspection on the property, nor did he provide plaintiff with the allegedly defective ladder. Auman's involvement in the renovation was "no more extensive than would be expected of the typical homeowner" (*Jumawan v Schnitt*, 35 AD3d 382, 383, *lv denied* 8 NY3d 809), and thus Auman is entitled to the protection of the homeowner exemption because it is undisputed that he did not offer any "specific direction as to how the injured plaintiff was to accomplish [the electrical inspection performed by plaintiff]" (*Angelucci v Sands*, 297 AD2d 764, 766; see *Schultz v Noeller*, 11 AD3d 964, 965).

We conclude, however, that the court properly denied those parts of the motion of Auman seeking summary judgment dismissing the Labor Law § 200 and common-law negligence claims against him. Auman failed to meet his initial burden of establishing as a matter of law that he did not have constructive notice of the allegedly unsafe condition when he in fact had used the allegedly defective ladder to access the basement prior to plaintiff's accident. Auman thus failed to establish as a matter of law that he did not have actual or constructive notice of the unsafe condition that gave rise to the accident (see *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 224-225; see also *Sponholz v Benderson Prop. Dev.*, 273 AD2d 791, 792-793).

We further conclude that the court erred in denying the cross motion of MDC for summary judgment dismissing the complaint against it, and we therefore further modify the order accordingly. We note that, although Tiffany Builder, Inc. (Tiffany) joined in the cross motion with MDC, according to the CPLR 5531 statement in the record the action against Tiffany has been discontinued. We therefore address the cross motion only insofar as it concerns MDC. With respect to liability under the Labor Law, MDC had to have the authority to control or supervise plaintiff's electrical work, and it is undisputed that Auman hired plaintiff and that MDC was not an agent of Auman (see *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-318; *Kesselbach v Liberty Haulage*, 182 AD2d 741, 742; see also *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876). Furthermore, with respect to liability for common-law negligence, MDC established that it neither supervised or controlled plaintiff's work nor had "actual or constructive notice of the [alleged] defect" (*Schwab v Campbell*, 266 AD2d 840, 841; see *Fuller v Spiesz*, 53 AD3d 1093, 1094-1095). Plaintiffs failed to raise a triable issue of fact to defeat MDC's cross motion and, indeed, we note that plaintiff testified at his deposition that MDC did not direct, supervise or control his work.

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

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KA 06-02985

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RYAN W. JACOBSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered September 21, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a weapon in the third degree and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the forfeiture of \$1,685 and by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for resentencing.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that County Court erred in refusing to suppress his statements to the police. We reject that contention. The evidence at the suppression hearing establishes that, after receiving his *Miranda* warnings, defendant indicated that he understood his rights and agreed to speak with the officer who administered the warnings (see *People v John*, 288 AD2d 848, *lv denied* 97 NY2d 705; see also *People v Smith*, 217 AD2d 221, 231-232, *lv denied* 87 NY2d 977). Consequently, the court properly refused to suppress his statements to that officer and to the officer who questioned him a few minutes later. The court also properly refused to suppress the statements made by defendant to the officer who questioned him 45 minutes later without readministering *Miranda* warnings. Contrary to defendant's contention, "[i]t is well settled that where a person in police custody has been issued *Miranda* warnings and voluntarily and intelligently waives those 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," and that is the case here (*People v Glinsman*,

107 AD2d 710, 710, *lv denied* 64 NY2d 889, *cert denied* 472 US 1021). In addition, the court properly determined that defendant's remaining statements were "spontaneous and were not the product of express interrogation or its functional equivalent" (*People v Wearen*, 19 AD3d 1133, 1134, *lv denied* 5 NY3d 834). The police are not required "to take affirmative steps, by gag or otherwise, to prevent a talkative person in custody from making an incriminating statement" (*People v Rivers*, 56 NY2d 476, 479, *rearg denied* 57 NY2d 775).

In his motion for a trial order of dismissal, defendant failed to identify any of the specific grounds now raised on appeal and thus failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that the court erred in refusing to grant a mistrial on the ground that the prosecutor failed to disclose in a timely manner an alleged electronic recording presented at trial, i.e., the telephone numbers recorded on a cellular telephone seized from defendant. Even assuming, *arguendo*, that the People were required to disclose that recording pursuant to CPL 240.20, we note that "[t]he sanction to be imposed for the failure of the People to comply fully with discovery demands until the time of trial is within the sound discretion of the trial court" (*People v Poladian*, 167 AD2d 912, 912-913, *lv denied* 77 NY2d 881; *see People v Collins*, 288 AD2d 860, *lv denied* 97 NY2d 752). We note in addition that "[t]he People's delay in complying with the provisions of CPL 240.20 constitutes reversible error . . . only when the delay substantially prejudices defendant" (*People v Benitez*, 221 AD2d 965, 966, *lv denied* 87 NY2d 970), and here defendant failed to establish that he suffered any actual prejudice from the late disclosure.

Defendant also contends that the court erred in denying his motions seeking a mistrial based on prosecutorial misconduct. Defendant made several such motions, contending that he had been denied a fair trial because the prosecutor failed to disclose the electronic recording prior to trial and repeatedly informed the court and defense counsel that no electronic recordings would be used at trial. We reject that contention. Reversal based on prosecutorial misconduct is "mandated only when the conduct [complained of] has caused such substantial prejudice to the defendant that he has been denied due process of law" (*People v Mott*, 94 AD2d 415, 419; *see People v Ferguson*, 17 AD3d 1074, *lv denied* 5 NY3d 788) and, as noted, defendant failed to establish that the prosecutor's alleged misconduct caused such prejudice.

Defendant further contends that he was denied effective assistance of counsel because, *inter alia*, defense counsel failed to secure a transcript of the *voir dire*. The record establishes,

however, that "defendant explicitly waived the transcription of voir dire" (*People v Collins*, 288 AD2d 860, 861, *lv denied* 97 NY2d 752; see generally *People v Harrison*, 85 NY2d 794, 796), and thus that contention is not properly before us. With respect to the remaining instances of alleged ineffective assistance of counsel, we conclude that defendant has failed to " 'demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712). Indeed, viewing "the evidence, the law, and the circumstances of [this] case, . . . in totality and as of the time of the representation," we conclude that defendant received meaningful representation (*People v Baldi*, 54 NY2d 137, 147).

As the People correctly concede, they failed to comply with the procedural requirements of Penal Law § 480.10. Although this issue is not preserved for our review (see CPL 470.05 [2]), we conclude that the failure to comply with Penal Law § 480.10 is a "fundamental, nonwaivable defect in the mode of procedure" for which preservation is not required (*People v Patterson*, 39 NY2d 288, 295, *affd* 432 US 197). We therefore modify the judgment by vacating the forfeiture of the money seized from defendant at the time of his arrest.

The sentence is not unduly harsh or severe, nor does the record support defendant's contention that the sentence was the product of vindictiveness (see *People v White*, 12 AD3d 1200, *lv denied* 4 NY3d 768). "The mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial" (*People v Simon*, 180 AD2d 866, 867, *lv denied* 80 NY2d 838; see *People v Pena*, 50 NY2d 400, 411-412, *rearg denied* 51 NY2d 770, *cert denied* 449 US 1087). We note, however, that "there is a discrepancy between the sentencing minutes and the certificate of conviction. The sentencing minutes provide that the sentence imposed for [criminal possession of a weapon] in the third degree shall run consecutively to the sentence imposed for [criminal possession of a controlled substance in the third] degree but the certificate[s] of conviction provide[] that the sentence[s] shall run concurrently" (*People v Rivera*, 30 AD3d 1019, 1020, *lv denied* 7 NY3d 870, 8 NY3d 884; see *People v Shand*, 280 AD2d 943, 944, *lv denied* 96 NY2d 834). We therefore further modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing.

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

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

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KA 06-03438

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JUAN CARLOS LUCIANO, DEFENDANT-APPELLANT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MONICA WAGNER OF COUNSEL), FOR RESPONDENT.

Appeal from a new sentence of the Onondaga County Court (William D. Walsh, J.), rendered October 11, 2006 imposed upon defendant's conviction of criminal possession of a controlled substance in the second degree. Defendant was resentenced pursuant to the 2005 Drug Law Reform Act upon his 2006 conviction.

It is hereby ORDERED that the sentence so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a new sentence upon his 2006 conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]) imposed pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1). We conclude that County Court erred in failing to set forth written findings of fact and the reasons for its determination to impose a determinate term of imprisonment of six years and a five-year period of postrelease supervision (see *People v Peterson*, 50 AD3d 1588, 1589). We therefore reverse the sentence and remit the matter to County Court to determine defendant's application in compliance with DLRA-2.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

203

CA 08-01090

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

HALLSTON MANOR FARM, LLC, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JULIE LYNN ANDREW, DEFENDANT-APPELLANT.

COTE, LIMPERT & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

COHEN & COHEN LLP, UTICA (DANIEL S. COHEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered February 11, 2008. The order denied the motion of defendant to vacate an order entered upon her default and to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the order dated June 15, 2007 is vacated, and the complaint is dismissed.

Memorandum: Defendant moved to vacate an order that was entered upon her default, and she sought dismissal of the complaint based on, inter alia, lack of personal jurisdiction. Supreme Court conducted a traverse hearing following the submission by defendant of affidavits in support of her contention that service pursuant to CPLR 308 (4) was improper. Although the process server did not testify at the hearing, his affidavit of service was admitted in evidence. The process server stated therein that he affixed the summons and complaint to defendant's door and mailed a copy of the summons and complaint to defendant's address on that same date, after making several prior attempts to serve process (see CPLR 308 [4]). We agree with defendant that the court erred in admitting that affidavit in evidence pursuant to CPLR 4520. Contrary to the court's determination, the affidavit was not admissible under CPLR 4520 inasmuch as the process server was not "required or authorized, by special provision of law" to make the affidavit of service (*cf. People v Hudson*, 237 AD2d 943, *lv denied* 89 NY2d 1094). We reject plaintiff's alternative contention that the affidavit of service was admissible under CPLR 4531. There was no showing that the process server could not "be compelled with due diligence to attend at the [traverse hearing]" (CPLR 4531; *cf. Koyenov v Twin-D Transp., Inc.*, 33 AD3d 967, 969; *Laurenzano v Laurenzano*, 222 AD2d 560). We thus conclude that plaintiff failed to meet its

"ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" (*Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 343; see generally *Bank One Natl. Assn. v Osorio*, 26 AD3d 452, 453; *U.S. 1 Brookville Real Estate Corp. v Spallone*, 21 AD3d 480, 481-482; *Boudreau v Ivanov*, 154 AD2d 638). We therefore conclude that defendant is entitled both to vacatur of the order entered upon her default and to dismissal of the complaint.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

205

CA 08-00204

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

MICHAEL CANTINERI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FREDERIC CARRERE, DOING BUSINESS AS HOME WORKS BUILDERS, DEFENDANT-RESPONDENT.

FREDERIC CARRERE, DOING BUSINESS AS HOME WORKS BUILDERS, THIRD-PARTY PLAINTIFF,

V

ROB CARD, DOING BUSINESS AS R.C. DRYWALL & PAINTING, THIRD-PARTY DEFENDANT-RESPONDENT, ET AL., THIRD-PARTY DEFENDANT.

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

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (TIMOTHY J. PERRY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered January 4, 2008 in a personal injury action. The order, among other things, denied plaintiff's motion for partial summary judgment and granted that part of defendant's cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the cross motion seeking summary judgment dismissing the Labor Law § 240 (1) cause of action and the Labor Law § 241 (6) cause of action insofar as it is premised upon the alleged violation of 12 NYCRR 23-1.8 (c) (1) and reinstating the Labor Law § 240 (1) cause of action and the Labor Law § 241 (6) cause of action to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while installing drywall in a residence under construction. In order to reach the higher parts of the room in which they were working, plaintiff and third-party defendant Kevin Tibbitts,

doing business as K&J Drywall (Tibbitts), erected a makeshift scaffold by placing one end of a wooden plank on a ladder rung and the other end of the plank on top of a wall. The plank slipped from the ladder rung when Tibbitts stepped off the scaffold, causing the plank to strike plaintiff while he was working at floor level.

We note at the outset that plaintiff has not raised on appeal any issues with respect to the propriety of the order granting that part of defendant's cross motion seeking summary judgment dismissing the third cause of action, as amplified by the bill of particulars, alleging common-law negligence and the violation of Labor Law § 200, and denying plaintiff's cross motion seeking an order quashing the statement of Tibbitts obtained by defendant and seeking sanctions and attorney's fees. Plaintiff therefore has abandoned any issues with respect to those parts of the order (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We further note that, contrary to defendant's contention, the notice of appeal does not limit plaintiff's appeal to only a part of the order (*cf. Johnson v Transportation Group, Inc.*, 27 AD3d 1135).

Supreme Court properly denied plaintiff's motion seeking partial summary judgment on liability pursuant to Labor Law § 240 (1) but erred in granting that part of defendant's cross motion seeking summary judgment dismissing that cause of action, and we therefore modify the order accordingly. Contrary to defendant's contention, " 'falling object' liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciamè Constr. Corp.*, 11 NY3d 757, 758-759). The collapse of a scaffold establishes a prima facie case of liability under the statute "whenever the employee is injured as a result of [the] collapse, regardless of whether the employee was on or under the scaffold when it collapsed" (*Thompson v St. Charles Condominiums*, 303 AD2d 152, 154, *lv dismissed* 100 NY2d 556). Neither plaintiff nor defendant established entitlement to judgment as a matter of law on the Labor Law § 240 (1) cause of action, however, because the evidence submitted by both parties raises triable issues of fact whether adequate safety devices were provided for plaintiff's use and whether the actions of plaintiff were the sole proximate cause of the accident (*see Brown v Concord Nurseries, Inc.*, 37 AD3d 1076, 1077).

The court also erred in granting that part of defendant's cross motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is premised upon defendant's alleged violation of 12 NYCRR 23-1.8 (c) (1), and we therefore further modify the order accordingly. Defendant did not meet his burden of establishing that the regulation was not violated or that the alleged violation did not cause or contribute to plaintiff's injury (*see generally Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 176).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

209.1

CA 08-01727

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF MARGARET M. POTTER, JOHN S. HUGHES, JANE B. ROBBINS, PETER T. WESTPHAL, ARTHUR J. GIACALONE, PETITIONERS-APPELLANTS, ET AL., PETITIONER,

V

MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF AURORA, MARTHA L. LIBROCK, AS TOWN CLERK OF TOWN OF AURORA, AND 300 GLEED AVENUE, LLC, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

ARTHUR J. GIACALONE, EAST AURORA, FOR PETITIONERS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, HOLLAND (RONALD P. BENNETT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN BOARD OF TOWN OF AURORA AND MARTHA L. LIBROCK, AS TOWN CLERK OF TOWN OF AURORA.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 19, 2008 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

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

Memorandum: The petitioners in appeal No. 1, property owners in the Town of East Aurora (Town), commenced a CPLR article 78 proceeding seeking, inter alia, to annul the resolution of respondent Town Board (Town Board) authorizing the Town's offer to purchase property from respondent 300 Glead Avenue, LLC to relocate the Aurora Town Hall from its present location to an existing building located less than three-quarters of a mile away, as well as the resolution to adopt a negative declaration pursuant to article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]) with respect to that property and the relocation of the Town Hall to the property. In appeal No. 2, the "petitioners/plaintiffs," some of whom are also petitioners in appeal No. 1, commenced a subsequent hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul further resolutions adopted by the Town Board with respect to the same property. We note at the outset that a declaratory judgment action is not an appropriate procedural vehicle for challenging the Town Board's administrative determinations, and thus the proceeding/declaratory judgment action in appeal No. 2 is

properly only a proceeding pursuant to CPLR article 78 (see *Matter of Schweichler v Village of Caledonia*, 45 AD3d 1281, lv denied 10 NY3d 703). We further note that the petitioners in appeal No. 2 do not raise any contentions with respect to intervention, consolidation of the petition/complaint with another proceeding, or their request for costs and sanctions, and they thus have abandoned any issues with respect thereto (see *Ciesinski v Town of Aurora*, 202 AD2d 984). The remaining issues raised are identical in both appeals.

The petitioners-appellants in appeal No. 1 and the petitioners in appeal No. 2 (collectively, petitioners) contend that the relocation of the Town Hall violates the provision in New York Constitution, article VIII, § 2 that no "town . . . shall contract any indebtedness except for . . . town . . . purposes," because the subject building has excess space that will be leased to private entities. We reject that contention. A town purpose is defined as a purpose that is " 'necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character, and authorized by the legislature' " (*Matter of Chapman v City of New York*, 168 NY 80, 86). Pursuant to Town Law § 220 (2), a town board may "[p]urchase, lease, construct, alter or remodel a town hall, a town lockup or any other necessary building for town purposes, acquire necessary lands therefor, and equip and furnish such buildings for such purposes" (see § 64 [2]). Thus, both the purchase of the building to be used as a Town Hall and the remodeling of that building to suit the Town's needs constitute a town purpose. Petitioners' contention that the purchase is not for a town purpose because the building in question is larger than that presently needed by the Town is lacking in merit. It is well settled that "an ordinary [town] purpose may be, and often should be, planned and executed with reference as well to future as to present needs, . . . and [a town] may erect a public building, having in view future necessities, and exceeding the demands of present use" (*Matter of Mayor of City of N.Y.*, 99 NY 569, 591).

Petitioners are correct that, pursuant to SEQRA, the purchase of a building and the relocation of the Town Hall to that location is an unlisted action (see 6 NYCRR 617.2 [ak]), thus requiring the preparation of an environmental assessment form (EAF) as defined in 6 NYCRR 617.2 (m) (see *Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 519). Although petitioners also are correct that a short EAF usually is prepared for an unlisted action, we conclude that the Town Board properly prepared a full EAF based upon its conclusion that "the short EAF would not provide the [Town Board] with sufficient information on which to base its determination of significance" (6 NYCRR 617.6 [a] [3]). Contrary to petitioners' further contention, the Town Board timely prepared the full EAF, i.e., before the Town was committed "to a definite course of future decisions" (6 NYCRR 617.2 [b] [2]; see *Matter of Billerbeck v Brady*, 224 AD2d 937). Indeed, the record establishes that the negative declaration was issued before the Town was committed to purchasing the property (see *Matter of Har Enters. v Town of Brookhaven*, 74 NY2d 524, 530-531). We further conclude that, in

issuing its negative declaration of environmental significance, the Town Board properly "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for [its] determination" (*id.* at 529; see *Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318).

We have considered petitioners' remaining contentions and conclude that they are without merit.

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

209.2

CA 08-01967

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF MARGARET M. POTTER, JOHN S. HUGHES, JOHN LYONS, NATALIE LYONS, PATRICK F. MCDONNELL, AND ARTHUR J. GIACALONE,
PETITIONERS/PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF AURORA, AND 300 GLEED AVENUE, LLC, RESPONDENTS/DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

ARTHUR J. GIACALONE, EAST AURORA, FOR PETITIONERS/PLAINTIFFS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, HOLLAND (RONALD P. BENNETT OF COUNSEL), FOR RESPONDENT/DEFENDANT-RESPONDENT TOWN BOARD OF TOWN OF AURORA.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 16, 2008 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition/complaint.

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

Same Memorandum as in *Matter of Potter v Town Bd. of Town of Aurora* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

209.3

KA 07-00835

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TRACY MARACLE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARIA A. MASSARO, NIAGARA FALLS, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), rendered March 29, 2007. 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 reversed on the law and the plea is vacated.

Same Memorandum as in *People v Maracle* ([appeal No. 2] ___ AD3d ___ [Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

209.4

KA 07-02636

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TRACY MARACLE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MARIA A. MASSARO, NIAGARA FALLS, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), rendered November 27, 2006. 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 reversed on the law, the plea is vacated, and the matter is remitted to Supreme Court, Niagara County, for further proceedings on the indictment.

Memorandum: In appeal No. 1, defendant appeals from a 2007 judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). In appeal No. 2, defendant appeals from a 2006 judgment convicting him, upon his plea of guilty, of the same count of attempted burglary in the second degree as in appeal No. 1 (§§ 110.00, 140.25 [2]).

Addressing first the judgment in appeal No. 2, we reject the contention of the People that defendant's appeal from that judgment is moot. Following the entry of that judgment, Supreme Court purported to grant defendant's motion to withdraw the plea underlying the judgment. Defendant's motion to withdraw the plea was made after sentence had been imposed, however, and the court therefore lacked the authority to grant the motion (see CPL 220.60 [3]; *People v Louree*, 8 NY3d 541, 546). Thus, the 2006 judgment remains in effect. Although defendant failed to preserve for our review his contention that the judgment in appeal No. 2 must be reversed and the plea vacated on the ground that he was not advised of the mandatory period of postrelease supervision, we nevertheless agree with defendant that reversal is required (see *Louree*, 8 NY3d at 544-545; *People v Catu*, 4 NY3d 242, 245). Contrary to the People's contention, it is well settled that a challenge to the court's failure to advise a defendant of the

mandatory period of postrelease supervision need not be preserved for our review (see *Louree*, 8 NY3d at 545-546).

With respect to the judgment in appeal No. 1, we conclude that the 2007 judgment must be reversed and the plea vacated because, as noted above, the 2006 judgment remained in effect at the time the 2007 judgment was entered. Thus, "any further criminal proceedings on the original charges [were] barred by [defendant's] constitutional right not to be twice put in jeopardy" (*Matter of Kisloff v Covington*, 73 NY2d 445, 452).

In light of our determination, we do not reach defendant's remaining contentions.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

224

CA 08-01814

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

BRIAN RAULS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DIRECTV, INC., DEFENDANT-APPELLANT.

LEMERY GREISLER LLC, SARATOGA SPRINGS (ROBERT A. LIPPMAN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

LAW OFFICE OF KENNETH P. BERNAS, WEST SENECA (KENNETH P. BERNAS OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered April 29, 2008. The order, insofar as appealed from, denied in part defendant's motion to vacate a default judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, the judgment entered November 27, 2007 is vacated in its entirety, and defendant is granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Defendant contends on appeal that Supreme Court erred in denying that part of its motion pursuant to CPLR 5015 (a) (1) seeking, inter alia, to vacate the default judgment entered against it with respect to the Labor Law § 240 claim. We agree. A defendant seeking to vacate a default judgment on the ground of excusable default "is required to establish both a reasonable excuse for the default and the existence of a meritorious defense" (*Genesee Mgt. v Barrette*, 4 AD3d 874, 875; see CPLR 5015 [a] [1]). We note at the outset with respect to defendant's reasonable excuse for the default that the court granted those parts of defendant's motion concerning vacatur of the default judgment with respect to other claims. We thus conclude that the court thereby implicitly determined that defendant's same excuse for the default is equally applicable with respect to the Labor Law § 240 (1) claim and thus is equally reasonable.

We agree with defendant, however, that the court erred in determining that defendant failed to establish that it has a meritorious defense to the Labor Law § 240 claim. To be liable under Labor Law § 240 as a general contractor, defendant must have been "responsible for the coordination and execution of all the work at the worksite" (*Feltt v Owens*, 247 AD2d 689, 691; see also *Russin v Louis*

N. Picciano & Son, 54 NY2d 311, 316). Here, defendant submitted evidence in support of its motion establishing that plaintiff's employer was an independent contractor with full control over the installation of defendant's satellite system equipment. We thus conclude that defendant raised a meritorious defense to the action, i.e., that it was not acting as a general contractor at the site where plaintiff was injured (see generally *Feltt*, 247 AD2d at 691).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

227

CA 08-01642

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

JACK L. DIPASQUALE,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

M.J. OGIONY BUILDERS, INC. AND FISHER
HOMES, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (THOMAS E. LIPTAK OF
COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT M.J. OGIONY BUILDERS,
INC.

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

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

Appeals and cross appeal from an order of the Supreme Court, Erie
County (Diane Y. Devlin, J.), entered February 1, 2008 in a personal
injury action. The order, inter alia, granted the motion of plaintiff
for partial summary judgment pursuant to Labor Law § 240 (1) against
defendant Fisher Homes, LLC.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by denying the motion and by denying
in its entirety the cross motion of defendant M.J. Ogiony Builders,
Inc. 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 allegedly sustained
while installing drywall in a home under construction. Supreme Court
granted plaintiff's motion for partial summary judgment on liability
under Labor Law § 240 (1) against defendant Fisher Homes, LLC
(Fisher). In addition, the court granted that part of the cross
motion of Fisher for summary judgment dismissing the Labor Law § 241
(6) claim against it, denied the cross motion of defendant M.J. Ogiony
Builders, Inc. (Ogiony) insofar as it sought summary judgment
dismissing the complaint against it, and granted the alternative
relief sought by Ogiony, i.e., summary judgment on its cross claim for
common-law indemnification against Fisher.

We agree with Fisher that the court erred in granting plaintiff's
motion against it, and we therefore modify the order accordingly.

Although plaintiff met his initial burden on the motion with respect to Fisher, we conclude that Fisher raised an issue of fact whether "plaintiff was . . . injured while falling from, or attempting to prevent himself from falling from, the scaffold" (*Milligan v Allied Bldrs., Inc.*, 34 AD3d 1268; see *Hicks v Montefiore Med. Ctr.*, 266 AD2d 14; cf. *Pulsifer v Eastman Kodak Co.*, 219 AD2d 880). "The fact that a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by section 240 (1) of the Labor Law" (*Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 977). Here, Fisher submitted evidence that plaintiff was injured when he tripped and fell onto the scaffold upon which he was working, thereby raising a triable issue of fact whether "plaintiff's injury was not related to the effects of gravity and could have happened at ground level" (*Auchampaugh v Syracuse Univ.*, 57 AD3d 1291, 1293; see generally *Bonaparte v Niagara Mohawk Power Corp.*, 188 AD2d 853, appeal dismissed 81 NY2d 1067).

We also agree with Fisher that the court erred in granting the cross motion of Ogiony for summary judgment on its cross claim for common-law indemnification against Fisher, the alternative request for relief in the cross motion, and we therefore further modify the order accordingly. In seeking that relief, Ogiony was required to establish as a matter of law that it was not negligent, and that Fisher was either "guilty of some negligence that contributed to the causation of the accident" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65; see *Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 495), or that Fisher had "the authority to direct, supervise, and control the work giving rise to the injury" (*Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557). Ogiony relied upon the latter theory of liability, and we conclude that it failed to submit evidence establishing as a matter of law that Fisher had the requisite authority to direct, supervise and control the work site (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to that part of the cross motion of Ogiony seeking summary judgment dismissing the Labor Law claims against it, we conclude that it failed to meet its initial burden of establishing as a matter of law that it did not own the property where the accident occurred. Thus, the court properly denied that part of the cross motion (cf. *Ryba v Almeida*, 27 AD3d 718; see generally *Goodell v Rosetti*, 52 AD3d 911, 914). Finally, we reject plaintiff's contention that the court erred in granting that part of the cross motion of Fisher for summary judgment dismissing the Labor Law § 241 (6) claim against it. Here, Fisher established as a matter of law that the Industrial Code regulation upon which plaintiff relies for the alleged violation of Labor Law § 241 (6), i.e., 12 NYCRR 23-1.7 (b) (1), does not apply to plaintiff's fall from a scaffold (see generally *Hotaling v Corning Inc.*, 12 AD3d 1064, 1065), and plaintiff failed to raise a triable issue of fact.

We have considered the remaining contentions of the parties and

conclude that they are without merit.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

229

TP 08-01532

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

IN THE MATTER OF QABAIL HIZBULLAHANKHAMON,
PETITIONER,

V

MEMORANDUM AND ORDER

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

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF
COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered July 17, 2008), to annul a determination of respondent. The determination found after a Tier III hearing that petitioner violated various inmate rules.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the amended petition is granted, and respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rules 113.22 (7 NYCRR 270.2 [B] [14] [xii]), 113.23 (7 NYCRR 270.2 [B] [14] [xiii]), and 114.10 (7 NYCRR 270.2 [B] [15] [i]).

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he violated various inmate rules relating to his alleged possession of contraband, i.e., a pornographic videotape, and the smuggling of that contraband. We agree with petitioner that the determination is not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). The charges were based on allegations that, while petitioner was distributing food at the correctional facility, another inmate placed a commissary bag on petitioner's cart. A correction officer who searched the bag found a pornographic video in it. Although a misbehavior report may by itself constitute substantial evidence of guilt (*see id.* at 140-141), here there was no evidence that petitioner had possession of the videotape or that he and the other inmate were attempting to smuggle it (*see generally Matter of Sanchez v Coughlin*, 132 AD2d 896). Indeed, the record establishes that, based on the order of the correction officer, petitioner

immediately delivered his cart with the bag to the correction officer and, according to the correction officer, petitioner never touched the bag or otherwise took possession of it. Furthermore, there was no evidence of a scheme between petitioner and the other inmate to smuggle the videotape. Thus, we agree with petitioner that the determination that he violated the inmate rules in question is not supported by substantial evidence.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

235

KA 06-01214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONALD THOMAS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RONALD THOMAS, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered February 9, 2006. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [former (1)]), defendant contends that County Court erred in denying his motion to dismiss the indictment on the ground that he was denied the right to testify before the grand jury pursuant to CPL 190.50 (5) (a). We reject that contention. Such a motion "must be made not more than five days after the defendant has been arraigned upon the indictment" (CPL 190.50 [5] [c]; see *People v Boodrow*, 42 AD3d 582, 583-584; *People v Bourdon*, 255 AD2d 619, 620, lv denied 92 NY2d 1028) and, here, the motion was made over three months after defendant's arraignment.

We reject defendant's further contention that the court erred in allowing a witness to make an in-court identification of defendant in the absence of a CPL 710.30 notice or a hearing with respect to the pretrial identification procedure. Such a notice is required only when there has been a pretrial identification (see CPL 710.30 [1] [b]), and the witness in question was unable to identify defendant at the pretrial identification procedure (see *People v Trammel*, 84 NY2d 584, 587-588; see also *People v Pagan*, 248 AD2d 325, 325-326, affd 93 NY2d 891). In any event, any alleged error is harmless inasmuch as

identification was not at issue in the trial.

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to credit the testimony of the prosecution witnesses with respect to the events that preceded the shooting (see generally *id.*). Defendant failed to preserve for our review his contention that the court penalized him for exercising his right to a trial by imposing a harsher sentence than that included in the pretrial plea offer (see *People v Griffin*, 48 AD3d 1233, 1236-1237, *lv denied* 10 NY3d 840; *People v Tannis*, 36 AD3d 635, *lv denied* 8 NY3d 927). In any event, that contention is without merit. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*People v Chappelle*, 14 AD3d 728, 729, *lv denied* 5 NY3d 786), and there is no evidence in the record that the sentencing court was vindictive (see *Tannis*, 36 AD3d 635). The sentence is not unduly harsh or severe.

The contention of defendant in his pro se supplemental brief concerning the alleged denial of effective assistance of counsel involves matters outside the record on appeal and thus is not reviewable on direct appeal (see *People v Martina*, 48 AD3d 1271, 1272-1273, *lv denied* 10 NY3d 961; *People v Prince*, 5 AD3d 1098, 1098-1099, *lv denied* 2 NY3d 804). Defendant failed to preserve for our review the contentions in his pro se supplemental brief with respect to the People's alleged violation of CPL 190.50 (see generally *People v Weis*, 56 AD3d 900, 901 n), and with respect to his sentence as a persistent violent felony offender (see *People v Samms*, 95 NY2d 52, 57; *People v Smith*, 73 NY2d 961). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

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

248

CA 08-01662

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

IN THE MATTER OF RESIDENTS AGAINST WAL-MART,
BY ITS PRESIDENT DONN P. RICE,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

PLANNING BOARD OF TOWN OF GREECE, ZONING BOARD OF
APPEALS OF TOWN OF GREECE, WIDEWATERS GROUP, INC.,
AND WAL-MART REAL ESTATE BUSINESS TRUST,
RESPONDENTS-RESPONDENTS.

DAVID J. SEEGER, BUFFALO, FOR PETITIONER-APPELLANT.

WILLKIE FARR & GALLAGHER, NEW YORK CITY (KEVIN J. KLESH OF COUNSEL),
NIXON PEABODY LLP, BUFFALO, PETERS & HOGGAN, LLP, ALBANY, AND
CHRISTOPHER SCHIANO, ROCHESTER, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated judgment and order) of the
Supreme Court, Monroe County (John J. Ark, J.), entered May 1, 2008.
The judgment granted the motion of respondents and dismissed the CPLR
article 78 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, inter alia, to annul the determination of respondent Planning
Board of Town of Greece (Planning Board) issuing a negative
declaration pursuant to article 8 of the Environmental Conservation
Law (State Environmental Quality Review Act [SEQRA]) and granting site
plan approval for the construction of, inter alia, a Wal-Mart
Supercenter (project). Petitioner appeals from a judgment dismissing
the petition. We affirm.

We note at the outset that Supreme Court erred in determining
that petitioner lacks standing to bring this proceeding. Petitioner
met its burden of demonstrating "that at least one of its members
would have standing to sue, that it is representative of the
organizational purposes it asserts and that the case would not require
the participation of individual members" (*New York State Assn. of
Nurse Anesthetists v Novello*, 2 NY3d 207, 211; see *Society of Plastics
Indus. v County of Suffolk*, 77 NY2d 761, 775; *Matter of Citizens
Organized to Protect the Env't. v Planning Bd. of Town of Irondequoit*,
50 AD3d 1460, 1460-1461). We further conclude that, although the

court properly determined that the owners of the property on which the project would be located should have been joined as necessary parties in this proceeding (see CPLR 1001 [a]; *Matter of Spence v Cahill*, 300 AD2d 992, 992-993, *lv denied* 1 NY3d 508), under the circumstances of this proceeding the court erred in dismissing the petition without summoning those property owners (see CPLR 1001 [b]; *Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 727).

Contrary to the contention of petitioner, however, that part of the Planning Board's determination granting site plan approval of the project was not arbitrary and capricious based on the alleged failure of the project to comply with certain zoning ordinance setback requirements (see generally *Matter of Frishman v Schmidt*, 61 NY2d 823, 825; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231). We reject petitioner's further contention that the project is inconsistent with any comprehensive master plan of the Town of Greece.

Petitioner also contends that the negative declaration of the Planning Board must be annulled because the Planning Board failed to complete parts 2 and 3 of the full environmental assessment form (EAF) pursuant to SEQRA. We reject that contention inasmuch as the minutes of the final Planning Board meeting at which the project was discussed establish that the Planning Board in fact addressed the factors set forth in parts 2 and 3 of the full EAF (see *Matter of Coursen v Planning Bd. of Town of Pompey*, 37 AD3d 1159, 1160).

Contrary to the further contention of petitioner, the Planning Board complied with the requirements of General Municipal Law § 239-m and § 239-n. In our view, the record does not demonstrate a deficiency in the materials referred to the Monroe County Department of Planning and Development (DPD) or a substantial difference between the materials forwarded to the DPD and those that were before the Planning Board for final action on the application for site plan approval (cf. *Matter of Ferrari v Town of Penfield Planning Bd.*, 181 AD2d 149, 152-153). Petitioner's contention that the Planning Board erred in issuing a conditional negative declaration in this Type I SEQRA action is also without merit (see 6 NYCRR 617.2 [h]). The record establishes that the conditions were not imposed in an attempt to avoid a determination that the project has a significant adverse environmental impact. Rather, those conditions addressed aesthetic aspects of the project (see generally *Matter of Cathedral Church of St. John the Divine v Dormitory Auth. of State of N.Y.*, 224 AD2d 95, 102-103, *lv denied* 89 NY2d 802).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

250

CA 07-02360

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

NORTHERN TRUST, NA, ADMINISTRATOR OF
THE ESTATE OF RICHARD SARKIS, DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

PATRICIA A. DELLEY,
DEFENDANT-RESPONDENT-APPELLANT.

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

MICHAEL J. CROSBY, HONEOYE FALLS, FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered October 3, 2007 in an action pursuant to Civil Rights Law § 80-b. The order, insofar as appealed and cross-appealed from, granted in part and denied in part the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in its entirety that part of the motion for summary judgment on the complaint and vacating the first and second ordering paragraphs and by granting that part of the motion for summary judgment dismissing the counterclaim and dismissing the counterclaim and as modified the order is affirmed without costs.

Memorandum: Richard Sarkis commenced this action pursuant to Civil Rights Law § 80-b seeking, inter alia, the return of gifts, including a ring and an interest in real property, that he purportedly gave to defendant in contemplation of a marriage that never occurred. Supreme Court granted the motion of Sarkis for summary judgment in part by directing defendant to execute a quitclaim deed conveying her interest in the property to him subject to a constructive trust in favor of defendant. The proceeds of the sale or rental of the property were to be placed in the constructive trust pending a final determination of the parties' respective financial interests in the property. The court otherwise denied the motion for summary judgment on the complaint and for summary judgment dismissing the counterclaim and also denied defendant's cross motion for summary judgment dismissing the third, fourth and fifth causes of action. Sarkis died during the pendency of this appeal by him and the cross appeal by defendant, and Northern Trust, NA, as administrator of the estate of Sarkis, was substituted as the plaintiff.

Addressing first the cross appeal, we agree with defendant that the court erred in failing to deny in its entirety that part of the motion for summary judgment on the complaint, and we therefore modify the order accordingly. Although Sarkis submitted evidence in admissible form establishing that he purchased the ring and added defendant's name to the deed to the property in question as a joint tenant in sole consideration of the impending marriage, he also submitted evidence in admissible form establishing that the ring was a birthday gift to defendant and that her name was added to the deed because she was selling her residence and leaving her employment in contemplation of the marriage. Thus, Sarkis raised a triable issue of fact by his own submissions, and the court erred in directing defendant to execute a quitclaim deed conveying her interest in the property to him. Indeed, we note that the court cited no legal authority for directing defendant to transfer her interest in the property.

With respect to the appeal, however, we agree with plaintiff that the court erred in denying that part of the motion for summary judgment dismissing the counterclaim, which sought relief that is not authorized by Civil Rights Law § 80-a (see generally *Hendrick v Tellier*, 274 AD2d 944). We therefore further modify the order accordingly.

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

260

KA 06-00121

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ANGEL MARTINEZ, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a new sentence of the Supreme Court, Monroe County (Harold L. Galloway, J.), rendered May 26, 2005 imposed on defendant's conviction of criminal sale of a controlled substance in the first degree. Defendant was resentenced pursuant to the 2004 Drug Law Reform Act upon his 1997 conviction.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

261

KA 08-00801

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TIM JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered June 28, 2006. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

262

KA 08-00236

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAHEIM HOWELL, DEFENDANT-APPELLANT.

WAGNER & HART, OLEAN (JANINE C. FODOR OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered January 14, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that County Court abused its discretion in denying his motion to withdraw his plea at the time of sentencing. We reject that contention. According to defendant, he entered the guilty plea under the mistaken belief that the sentence imposed would run concurrently with a sentence to be imposed in a matter pending in federal court. It is well settled, however, that a court's " 'refusal to permit withdrawal does not constitute an abuse of . . . discretion unless there is some evidence of innocence, fraud, or mistake in [the inducement of] the plea' " (*People v Thomas*, 17 AD3d 1047, 1047, lv denied 5 NY3d 770; see CPL 220.60 [3]; *People v Pillich*, 48 AD3d 1061, lv denied 11 NY3d 793). There is no such evidence here. Rather, the record establishes that the terms of the sentencing commitment were "susceptible to but one interpretation" (*People v Cataldo*, 39 NY2d 578, 580; see *People v Ramos*, 56 AD3d 1180; *People v Reyes*, 167 AD2d 920, 921, lv denied 77 NY2d 842), and the court adhered to that sentencing commitment (see *Cataldo*, 39 NY2d at 580).

The challenge by defendant to the factual sufficiency of the plea allocution is unpreserved for our review (see *People v Lopez*, 71 NY2d 662, 665), and it also is encompassed by his valid waiver of the right to appeal (see *People v Grimes*, 53 AD3d 1055, lv denied 11 NY3d 789; *People v Jackson*, 50 AD3d 1615, lv denied 10 NY3d 960). In any event,

his challenge is without merit.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

263

KA 04-01490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SUSAN M. COBAUGH, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

SUSAN M. COBAUGH, DEFENDANT-APPELLANT PRO SE.

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 February 2, 2005. The judgment convicted defendant, upon her plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). We agree with defendant that she did not validly waive her right to appeal. Supreme Court "failed to engage[] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Adams*, 57 AD3d 1385 [internal quotation marks omitted]). We nevertheless affirm the judgment of conviction. We reject defendant's contention that the statements of the court at sentencing reflect its "misapprehension that it had no ability to exercise its discretion" in determining whether to impose a lesser sentence (*People v Domin*, 284 AD2d 731, 733, *lv denied* 96 NY2d 918, *rearg granted on other grounds* 291 AD2d 580). Rather, the court acknowledged that the People would be entitled to withdraw their consent to the plea agreement in the event that the court imposed a lesser sentence than that included in the plea bargain (*see People v Hillie*, 281 AD2d 956, *lv denied* 96 NY2d 830). Nor does the record support defendant's further contention that the People acted in bad faith or breached the plea agreement by declining to recommend a lesser sentence based upon defendant's cooperation with their investigation. The record reflects that "in this case no promises were in fact breached" (*People v Linares*, 174 AD2d 847, 847, *lv denied* 78 NY2d 969).

We reject the contention of defendant that she was denied effective assistance of counsel on the ground that the attorney assigned as her lead counsel was not appointed from the roster of attorneys qualified for appointment as lead counsel in capital cases (see Judiciary Law § 35-b [5] [a]). Defendant has failed to demonstrate any prejudice resulting from the assignment (see *People v Owens*, 187 Misc 2d 317, 319; see also *People v Muhammed*, 183 Misc 2d 591, 594-599). In any event, the record establishes that defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). We further conclude that "this is one of those 'rare occasions' where" the court's error, if any, in refusing to suppress evidence obtained through a grand jury subpoena issued in New Jersey may be considered harmless with respect to defendant's plea (*People v Strain*, 238 AD2d 452, 453, *lv denied* 90 NY2d 864). The court properly determined that certain overbroad directives in the warrant to search defendant's New Jersey residence did not invalidate the entire warrant, which "was largely specific and based on probable cause" (*People v Brown*, 96 NY2d 80, 88; see *People v Couser*, 303 AD2d 981, 982). Thus, the court properly refused to suppress the notebook that was seized in accordance with the particularized portion of the warrant (see *Brown*, 96 NY2d at 85). Finally, we reject the contention of defendant that her waiver of a jury trial by her oral plea of guilty violated NY Constitution, article 1, § 2 (see *People v Hardy*, 53 AD2d 647, 648).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

265

KA 07-00264

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MICHAEL D. PETTY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered November 28, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

266

KA 07-02337

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SCOTT M. WOOD, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, LIVINGSTON COUNTY CONFLICT DEFENDERS, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), entered October 11, 2007. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court properly assessed 30 points and 10 points, respectively, under the risk factors for "number and nature of prior crimes" and "recency of prior felony or sex crime." Although defendant had not yet been sentenced for the violent felony of robbery in the second degree when he committed the two acts of rape in the second degree that constitute the "current offense" for purposes of the SORA registration process, he had entered a plea of guilty to that robbery. That plea falls within the definition of a "conviction" pursuant to CPL 1.20 (13), and we thus conclude that the robbery conviction was a proper basis for the assessment of points under the risk factor for "number and nature of prior crimes" (see Correction Law § 168-1 [5] [b] [iii]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 13 [2006]; see generally *People v Montilla*, 10 NY3d 663). Based on our conclusion that 30 points were properly assessed under that risk factor, we further conclude that 10 points were properly assessed under the risk factor for "recency of prior felony or sex crime" (see Risk Assessment Guidelines and Commentary, at 14).

Defendant failed to preserve for our review his contention that

the court erred in assessing points under the risk factor for "duration of offense conduct with victim" (see generally *People v Smith*, 17 AD3d 1045, lv denied 5 NY3d 705). In any event, we conclude that the People presented the requisite clear and convincing evidence that defendant engaged in two acts of sexual intercourse with the victim and that such "acts [were] separated in time by at least 24 hours" (Risk Assessment Guidelines and Commentary, at 10; see Correction Law § 168-n [3]). Finally, we conclude that the court's oral findings of fact and conclusions of law are supported by the record and are "sufficiently detailed to permit intelligent appellate review" (*People v Roberts*, 54 AD3d 1106, 1107, lv denied 11 NY3d 713; see § 168-n [3]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

268

KAH 08-00831

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
GERALD A. LANFAIR, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL CORCORAN, SUPERINTENDENT, CAYUGA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

CHARLES A. MARANGOLA, MORAVIA, FOR PETITIONER-APPELLANT.

GERALD A. LANFAIR, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 29, 2008 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that the amended indictment underlying his conviction is jurisdictionally defective. Supreme Court properly dismissed the petition. Petitioner could have raised his challenge to the amended indictment on his direct appeal from the judgment of conviction or by way of a motion pursuant to CPL 440.10, and thus habeas corpus relief is not available (*see People ex rel. Curry v Girdich*, 290 AD2d 912, 913, *lv denied* 98 NY2d 602; *People ex rel. Gonzalez v Bennett*, 263 AD2d 565, *lv denied* 94 NY2d 753). Further, petitioner has shown no reason to justify a departure "from traditional orderly procedure" (*People ex rel. Brown v Commissioner of N.Y. State Dept. of Correctional Servs.*, 252 AD2d 602). The contention of petitioner in his pro se supplemental brief that he was denied effective assistance of appellate counsel on his direct appeal is not preserved for our review (*see People ex rel. Velez v Artus*, 49 AD3d 1109, 1110, *lv denied* 10 NY3d 716, *rearg denied* 11 NY3d 772), and in any event would not provide a basis for habeas corpus relief (*see People ex rel. Rios v Irvin*, 256 AD2d 1169, *lv denied* 93 NY3d 816; *People ex rel. Hendy v Leonardo*, 173 AD2d 992, *lv denied* 78 NY2d 857,

rearg dismissed 82 NY2d 703).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

271

CAF 08-00181

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

IN THE MATTER OF LUCAS B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEFFERY V., RESPONDENT-APPELLANT.

GAIL BREEN O'CONNOR, BUFFALO, FOR RESPONDENT-APPELLANT.

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

KATHLEEN M. CONTRINO, LAW GUARDIAN, NORTH TONAWANDA, FOR LUCAS B.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 20, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: On appeal from an order terminating his parental rights with respect to his son on the ground of abandonment, respondent father contends that petitioner failed to establish abandonment by clear and convincing evidence. We reject that contention (*see Matter of Annette B.*, 4 NY3d 509, 514-515, *rearg denied* 5 NY3d 783). The father's parole officer testified at the hearing on the petition that, although the father was prohibited from contacting any child under the age of 18, he was not prohibited from contacting petitioner. Contrary to the contention of the father, his failure to communicate with petitioner is not excused by the fact that he was participating in a sex offender treatment program, nor is it excused by the fact that the conditions of his release on parole prohibited him from having any contact with children under the age of 18 (*see Matter of Oscar L.*, 8 AD3d 569, 569-570; *Matter of Orange County Dept. of Social Servs.*, 203 AD2d 367). "The parent who has been prohibited from direct contact with the child, in the child's best interest[s], continues to have an obligation to maintain contact with the person having legal custody of the child" (*Matter of Gabrielle HH.*, 306 AD2d 571, 573, *affd* 1 NY3d 549). Two caseworkers for petitioner testified at the fact-finding hearing that the father, who was represented by counsel throughout the statutory six-month period (*see Social Services Law* § 384-b [4] [b]), failed to communicate with petitioner concerning the status of the child and any

plans for the child's future, and he failed to request information concerning the child from caseworkers he saw in court. In addition, he failed to file a petition for custody of the child or visitation with him. Indeed, we note that the father admitted at the hearing that he never contacted the child's caseworker during the statutory six-month period.

Finally, the father failed to preserve for our review his contention that the testimony of petitioner's two caseworkers constituted inadmissible hearsay (see *Matter of Isaiah R.*, 35 AD3d 249; *Matter of "Baby Girl" Q.*, 14 AD3d 392, lv denied 5 NY3d 704).

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

272

CAF 08-01094

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

IN THE MATTER OF KEVIN CONLEY,
PETITIONER-APPELLANT,

V

ORDER

MARLENE NEVISON, RESPONDENT-RESPONDENT.

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

KIMBERLY CZAPRANSKI, ACTING CONFLICT DEFENDER, ROCHESTER (KELLEY PROVO
OF COUNSEL), FOR RESPONDENT-RESPONDENT.

ARDETH L. HOUDE, LAW GUARDIAN, ROCHESTER, FOR WINSOME C.

Appeal from an order of the Family Court, Monroe County (Thomas
W. Polito, R.), entered March 20, 2008 in a proceeding pursuant to
Family Court Act article 6. The order dismissed the petition.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

274

CA 08-01281

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

IN THE MATTER OF O'CONNELL MACHINERY CO., INC.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO ZONING BOARD OF APPEALS, D-175
GREAT ARROW, INC., FOURTH OF AUGUST, LLC, PIERCE
ARROW DEVELOPMENT, LLC, AND UNITED DEVELOPMENT
CORP., RESPONDENTS-RESPONDENTS.

PHILLIPS LYTTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR
PETITIONER-APPELLANT.

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (TIMOTHY A. BALL OF
COUNSEL), FOR RESPONDENT-RESPONDENT CITY OF BUFFALO ZONING BOARD OF
APPEALS.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS D-175 GREAT ARROW, INC., FOURTH OF AUGUST,
LLC, PIERCE ARROW DEVELOPMENT, LLC AND UNITED DEVELOPMENT CORP.

Appeal from a judgment of the Supreme Court, Erie County (Frank
A. Sedita, Jr., J.), entered April 15, 2008 in a proceeding pursuant
to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding seeking to
annul the determination of respondent City of Buffalo Zoning Board of
Appeals (ZBA) granting the application of the remaining respondents
(collectively, developers) for a use variance permitting the use of
two parcels in an M-1 light industrial district for a mixed use
development, including student housing and other residential uses, a
hotel, and commercial uses. Supreme Court properly dismissed the
petition. The ZBA determined that the developers met the requirements
for a use variance (see General City Law § 81-b [3]; City of Buffalo
Code § 511-125 [C]). The ZBA's determination has a rational basis and
is supported by substantial evidence, and thus the court was "without
power to substitute its judgment for that of [the ZBA]" (*Matter of
Dwyer v Polsinello*, 160 AD2d 1056, 1057). Contrary to petitioner's
contention, the developers established that the restrictions on the
property have caused "unnecessary hardship" (General City Law § 81-b
[3] [b]). The developers presented "proof, in dollars and cents

form," that they cannot realize a reasonable return on their investment because the property had been substantially vacant for 30 years, only 10% to 15% of the space was occupied at the time of the application, and the prospects for expanding occupancy and generating sufficient revenue to cover necessary maintenance, repairs and improvements were marginal (*Matter of Village Bd. of Vil. of Fayetteville v Jarrold*, 53 NY2d 254, 257; see generally *Matter of Center Sq. Assn., Inc. v City of Albany Bd. of Zoning Appeals*, 19 AD3d 968, 970; *Matter of Allen v Ferish*, 1 AD2d 918). In addition, the developers established that the hardship results from the unique characteristics of the property (see *Matter of Allen v Zoning Bd. of Appeals of City of Kingston*, 8 AD3d 810, 811; *Dwyer*, 160 AD2d at 1058), and that the variance will not alter the essential character of the neighborhood inasmuch as the mixed uses proposed by the developers currently exist in proximity to the property (see *Matter of West Vil. Houses Tenants' Assn. v New York City Bd. of Stds. & Appeals*, 302 AD2d 230, 231, lv dismissed in part and denied in part 100 NY2d 533). Finally, we conclude that "there is no basis to disturb the [ZBA's] finding that the hardship was not self-created" (*Matter of Sullivan v City of Albany Bd. of Zoning Appeals*, 20 AD3d 665, 667, lv denied 6 NY3d 701).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

275

CA 08-01390

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

1440 EMPIRE BOULEVARD DEVELOPMENT CORP.,
PLAINTIFF-RESPONDENT,

V

ORDER

LAWYERS TITLE INSURANCE CORPORATION,
DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR
DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered September 27, 2007. The order, among other things, granted plaintiff's motion for partial summary judgment on the issue of liability.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

276

CA 08-01721

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

JEANINE M. SHUFELT, PLAINTIFF-APPELLANT,

V

ORDER

DICE AMERICA, INC., DEFENDANT-RESPONDENT.

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

JONES AND SKIVINGTON, GENESEO (PETER K. SKIVINGTON OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered November 2, 2007 in a breach of contract action. The order, inter alia, granted defendant's motion 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: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

277

CA 07-01977

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

ELLIOT MARKOWITZ, CLAIMANT-RESPONDENT,

V

ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 105735.)

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF
COUNSEL), FOR DEFENDANT-APPELLANT.

ROURA & MELAMED, NEW YORK CITY, POLLACK, POLLACK, ISAAC & DECICCO
(JILLIAN ROSEN OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Philip J. Patti, J.), entered August 31, 2007 in a negligence action. The order, insofar as appealed from, granted the motion of claimant to vacate the note of issue and denied defendant's motion for a protective order.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

279

CA 08-02177

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

VIBO CORPORATION, DOING BUSINESS AS GENERAL
TOBACCO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ERIC R. WHITE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF
COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTTLE LLP, BUFFALO (DAVID J. MCNAMARA OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 26, 2008 in an action for conversion. The order and judgment, insofar as appealed from, awarded money damages to plaintiff against defendant Eric R. White after a nonjury trial.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, the motion for a trial order of dismissal is granted in part and the complaint against defendant Eric R. White is dismissed.

Memorandum: Plaintiff, a distributor of tobacco products, commenced this conversion action seeking the return of, or payment for, cigarettes delivered to United Seneca Warehouse (USW) pursuant to a consignment sale. The evidence presented at the bench trial in this action established that Eric R. White (defendant) is a creditor of USW by virtue of orders issued by the Peacemakers' Court of the Seneca Nation of Indians (Peacemakers' Court). Although at trial plaintiff established the existence of a consignment agreement with USW, that consignment agreement does not affect defendant's entitlement to seize the cigarettes based on the orders of the Peacemakers' Court. Indeed, "for purposes of determining the rights of creditors of . . . a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer" (UCC 9-319 [a]). It is undisputed that plaintiff did not perfect its security interest in the cigarettes and thus, because pursuant to UCC 9-319 (a) the rights of USW were identical to those of plaintiff, defendant was entitled to seize the cigarettes. We thus conclude that Supreme Court erred in denying in its entirety the motion for a trial

order of dismissal at the close of proof and in instead awarding judgment to plaintiff against defendant for the value of the cigarettes. The evidence presented at trial does not support the court's finding that defendant was aware of the consignment agreement between plaintiff and USW. Thus, even assuming, arguendo, that the "knowledge or signs" exception set forth in former subdivision (3) of UCC 2-326 would otherwise apply, we conclude that the evidence does not support its applicability in this case. In view of our decision, we do not address the parties' remaining contentions.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

280

TP 08-01974

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

IN THE MATTER OF FAIRPORT BAPTIST HOMES,
PETITIONER,

V

MEMORANDUM AND ORDER

RICHARD F. DAINES, M.D., COMMISSIONER OF HEALTH,
STATE OF NEW YORK, RESPONDENT.

HARTER SECREST & EMERY LLP, ROCHESTER (THOMAS G. SMITH OF COUNSEL),
FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE 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, Monroe County [Harold L. Galloway, J.], entered March 28, 2008) to annul a determination of respondent. The determination found that respondent properly reclassified certain salary costs as skilled nursing facility costs.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination that respondent properly reclassified the salary costs of household resident assistants (HRAs) as skilled nursing facility costs (see 10 NYCRR 455.37), rather than as activities costs (see 10 NYCRR 455.14), as reported by petitioner. Contrary to petitioner's contention, the determination is supported by a rational basis and is not unreasonable. Indeed, it is well settled that "the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549; see generally *Matter of Blossom View Nursing Home v Novello*, 4 NY3d 581, 594-595). Here, the record establishes that many duties of the HRAs expressly fall within the category of "expenses associated with providing skilled nursing care" (10 NYCRR 455.37). We reject petitioner's further contention that the reclassification by respondent violated the State Administrative Procedure Act. Contrary to petitioner's contention, respondent did not thereby adopt a new rule. Rather, we agree with respondent that he merely applied the

existing regulations to the duties performed by the HRAs in reclassifying their salary costs.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

282

TP 08-01569

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

IN THE MATTER OF JOHN NEVAREZ, PETITIONER,

V

ORDER

CARL B. HUNT, SUPERINTENDENT, GROVELAND
CORRECTIONAL FACILITY, RESPONDENT.

JOHN NEVAREZ, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF
COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Livingston County [Robert B. Wiggins, A.J.], dated June 30, 2008) to review the determinations of respondent. The determinations found after Tier II hearings that petitioner had violated various inmate rules.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

283

TP 08-02113

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

IN THE MATTER OF SEAN P. COYNE, PETITIONER,

V

ORDER

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

THOMAS J. CERIO, SYRACUSE, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL),
FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered October 9, 2008) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

284

TP 08-02052

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

IN THE MATTER OF COLLYER GOODMAN, PETITIONER,

V

ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, AND BRIAN FISCHER,
COMMISSIONER, NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, RESPONDENTS.

COLLYER GOODMAN, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF
COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered March 14, 2008) 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: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

288

KA 07-01928

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TROY F. RANDLEMAN, DEFENDANT-APPELLANT.

ALAN P. REED, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered September 19, 2006. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the third degree (Penal Law § 160.05). The contention of defendant that County Court abused its discretion in denying his request for youthful offender status is without merit. It is well established that the decision whether to grant youthful offender status " 'rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Shrubbsall*, 167 AD2d 929, 930). The record reflects that the court "carefully considered the request to be considered a youthful offender and stated the reasons for its denial" of that request (*People v Williams*, 37 AD3d 1193, 1194). We decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Martinez*, 55 AD3d 1334; *People v Bosse*, 23 AD3d 1063, lv denied 6 NY3d 809).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

290

KAH 08-00395

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
BERNARD PITTS, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DAVID UNGER, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered December 28, 2007 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: We reject the contention of petitioner that Supreme Court erred in dismissing his petition for a writ of habeas corpus. Petitioner's contention in support of the petition with respect to double jeopardy could have been raised on direct appeal or by a postjudgment motion pursuant to CPL article 440 (*see People ex rel. Pitts v McCoy*, 11 AD3d 985, *lv denied* 4 NY3d 705; *People ex rel. Hammock v Meloni*, 233 AD2d 929, *lv denied* 89 NY2d 807). Contrary to petitioner's contentions, the petition was properly dismissed in response to respondent's motion (*see* CPLR 404 [a]; *see also People ex rel. Goude v La Vallee*, 42 AD2d 648), and petitioner was afforded meaningful representation by the attorney assigned to represent him in connection with the habeas corpus petition (*see generally People v Benevento*, 91 NY2d 708, 712).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

294

CA 08-01992

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

PAUL G. CLOUTIER, PLAINTIFF,

V

ORDER

GENESEE COLLISION SERVICES, LLC, ET AL.,
DEFENDANTS.

SCOTT D. CANNON, ESQ., RESPONDENT;

CELLINO & BARNES, P.C., APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL),
APPELLANT PRO SE.

SCOTT D. CANNON, GENESEO, RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered March 5, 2008. The order apportioned attorney's fees between the attorneys who represented plaintiff in the personal injury action.

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: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

303

TP 08-01201

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

IN THE MATTER OF RICHARD SUNDAY IFILL,
PETITIONER,

V

ORDER

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

RICHARD SUNDAY IFILL, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF
COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered May 30, 2008) 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: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

304

KA 07-02421

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MICHAEL COLLIER, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (KATHLEEN H. VALONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered July 11, 2007. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and grand larceny in the fourth degree (two counts).

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

305

KA 06-03028

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

EBONY GORDON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 15, 2006. The judgment convicted defendant, upon her plea of guilty, of attempted assault in the first degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

306

KA 06-01051

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MICHAEL D. HOYTE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Stephen K. Lindley, A.J.), rendered February 22, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

307

KA 06-02806

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

PEDRO M. SANTOS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Stephen K. Lindley, A.J.), rendered June 7, 2006. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

309

KA 07-01890

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EDWARD W. HARDY, JR., 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 an order of the Genesee County Court (Robert C. Noonan, J.), entered August 9, 2007. 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 designating him a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant contends that County Court's assessment of 40 additional points at the SORA hearing is not supported by the requisite clear and convincing evidence and thus that he was not properly classified as a level three risk (*see* § 168-n [3]). We reject that contention. The record establishes that the court properly considered the case summary, which constitutes reliable hearsay, in determining defendant's risk level (*see People v Vacanti*, 26 AD3d 732, *lv denied* 6 NY3d 714). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

310

CAF 08-00760

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

IN THE MATTER OF THOMAS C. CAPPETTA,
PETITIONER-APPELLANT,

V

ORDER

JASMINE MALDONADO, RESPONDENT-RESPONDENT.

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

LAWRENCE P. BROWN, BRIDGEPORT, FOR RESPONDENT-RESPONDENT.

STEPHANIE N. DAVIS, LAW GUARDIAN, OSWEGO, FOR AALIYAH C. AND TYSON C.

Appeal from an order of the Supreme Court, Oswego County (David J. Roman, A.J.), entered March 24, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of child custody.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

311

CAF 07-01584

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

IN THE MATTER OF MARIA L. CRUZ,
PETITIONER-APPELLANT,

V

ORDER

PEDRO L. CRUZ, SR., RESPONDENT-RESPONDENT.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, LIVINGSTON COUNTY CONFLICT
DEFENDERS, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR
PETITIONER-APPELLANT.

JOHN T. SYLVESTER, MT. MORRIS, FOR RESPONDENT.

JESSICA REYNOLDS-AMUSO, LAW GUARDIAN, CLINTON, FOR SELENA L.

CHARLES J. PLOVANICH, LAW GUARDIAN, ROCHESTER, FOR RYAN L.

Appeal from an order of the Family Court, Livingston County
(Robert B. Wiggins, J.), entered July 11, 2007 in a proceeding
pursuant to Family Court Act article 6. The order granted joint child
custody to respondent.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

312

CAF 08-00770

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

IN THE MATTER OF DANIEL P. COMPTON,
PETITIONER-RESPONDENT,

V

ORDER

MAUREEN B. FREYN, RESPONDENT-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR RESPONDENT-APPELLANT.

DOUGLAS MICHAEL JABLONSKI, LAW GUARDIAN, WOLCOTT, FOR GIDEON C.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered March 5, 2008 in a proceeding pursuant to Family Court Act article 6. The order granted the petition for a modification of custody.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

314

CAF 07-02411

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

IN THE MATTER OF MORGAN P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTINA P., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

MICHELE A. BROWN, LAW GUARDIAN, BUFFALO, FOR MORGAN P.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, J.), entered December 28, 2007 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that the subject child is a neglected child.

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

Memorandum: Respondent mother contends that Family Court erred in finding that she neglected her daughter. We note at the outset that, although the appeal was improperly taken from Family Court's initial order with respect to custody rather than the subsequent order of fact-finding and disposition, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the subsequent order (*see Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188; *see also* CPLR 5520 [c]). We conclude that petitioner established by a preponderance of the evidence that the mother failed to "exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368). Petitioner established that the mother "coached" the child to allege that the child was sexually abused by her grandfather and thus repeatedly subjected the child to unnecessary medical examinations and extreme anxiety based upon those unfounded allegations of sexual abuse (*see generally Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

315

CA 08-01956

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

P. MARC SAMPSON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

RAINBOW FORD LINCOLN MERCURY, INC.,
DEFENDANT-APPELLANT-RESPONDENT,
DANIEL LANG, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

RAINBOW FORD LINCOLN MERCURY, INC., THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT,

V

P. MARC SAMPSON, DOING BUSINESS AS SAMPSON AUTO
SALES, THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, ALBANY (DOUGLAS R.
KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL F. CHELUS OF
COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

JOHN J. FLAHERTY, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (NORMAN B. VITI, JR., OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court,
Cattaraugus County (Larry M. Himelein, A.J.), entered December 5, 2007
in a personal injury action. The order denied the motion of
defendant-third-party plaintiff for summary judgment and denied the
motion of third-party defendant for summary judgment.

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

Memorandum: We affirm for reasons stated in the decision at
Supreme Court. We write only to note that the contention of
defendant-third-party plaintiff that Workers' Compensation Law § 29
(6) bars plaintiff's action against it is raised for the first time on
appeal, and we therefore do not consider it (*see Oram v Capone*, 206

AD2d 839, 840).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

317

CA 08-01948

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

IN THE MATTER OF ESTRELLITA LLC AND ST. LAWRENCE
GRANDE, INC., AND ALL OTHERS SIMILARLY SITUATED,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF ALEXANDRIA, TOWN OF
ALEXANDRIA, TOWN OF ALEXANDRIA BOARD OF
ASSESSMENT REVIEW, AND ASSESSOR OF TOWN OF
ALEXANDRIA, RESPONDENTS-APPELLANTS.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF
COUNSEL), FOR RESPONDENTS-APPELLANTS.

Appeal, by permission of a Justice of the Supreme Court,
Jefferson County (Joseph D. McGuire, J.), from an order entered
February 28, 2008 in a proceeding pursuant to CPLR article 78. The
order denied the motion of respondents to dismiss the petition.

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

Memorandum: Petitioners commenced this CPLR article 78
proceeding seeking, inter alia, to annul the tax assessment of their
properties in respondent Town of Alexandria. Respondents appeal from
an order denying their motion to dismiss the petition. We reject
respondents' contention that a CPLR article 78 proceeding is not an
appropriate procedural vehicle for challenging the tax assessments and
that RPTL article 7 is the exclusive procedural vehicle for such a
challenge. A challenge to an individual property tax assessment on
the ground that the assessment was illegal, excessive or unequal
should be brought in a certiorari proceeding under RPTL article 7.
Here, however, the challenge is to " 'the method employed in the
assessment of *several properties* rather than the overvaluation or
undervaluation of [a] specific propert[y]. . .,' " and thus a
proceeding pursuant to CPLR article 78 is not inappropriate (*Matter of
Cayuga Grandview Beach Coop. Corp. v Town Bd. of Town of Springport*,
51 AD3d 1364, 1364, lv denied 11 NY3d 702; *Matter of Board of Mgrs. of
Greens of N. Hills Condominium v Board of Assessors of County of
Nassau*, 202 AD2d 417, 419, lv denied 83 NY2d 757; *Matter of Averbach v
Board of Assessors of Town of Delhi*, 176 AD2d 1151, 1152). Also
contrary to respondent's contention, the petition does not fail to
state a cause of action. Indeed, the petition sufficiently states "a
cause of action against respondents for purportedly utilizing an

unconstitutional reassessment methodology" (*Averbach*, 176 AD2d at 1153).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

324

KA 08-00418

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

KENNETH E. MROZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 2, 2008. The judgment convicted defendant, upon his plea of guilty, of offering a false instrument for filing in the first degree and unauthorized use of a vehicle in the third degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

325

KA 07-02486

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JEFFREY L., 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 an adjudication of the Erie County Court (Thomas P. Franczyk, J.), rendered November 19, 2007. Defendant was adjudicated a youthful offender upon his plea of guilty to attempted criminal possession of a controlled substance in the third degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

326

KA 08-00846

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

IDA RICKARD, 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 March 14, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

327

KA 06-01606

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SEAN BECKER, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MICHELLE CROWLEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered May 23, 2006. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

328

KA 08-00125

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DAVON HUNT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County
(Christopher J. Burns, J.), rendered January 9, 2008. The judgment
convicted defendant, upon his plea of guilty, of criminal possession
of a weapon in the second degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

329

KA 08-00126

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DAVON HUNT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County
(Christopher J. Burns, J.), rendered January 9, 2008. The judgment
convicted defendant, upon his plea of guilty, of attempted criminal
possession of a weapon in the second degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

330

KA 08-00482

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT A. PETERSEN, DEFENDANT-APPELLANT.

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

SUSAN H. LINDENMUTH, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered September 18, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Although the challenge by defendant to the voluntariness of the plea survives his valid waiver of the right to appeal (*see People v DeJesus*, 248 AD2d 1023, *lv denied* 92 NY2d 878), defendant failed to preserve that challenge for our review (*see People v Collins*, 45 AD3d 1472, *lv denied* 10 NY3d 861; *DeJesus*, 248 AD2d 1023). This case does not fall within the narrow exception to the preservation doctrine (*see People v Lopez*, 71 NY2d 662, 666). Although defendant initially denied that he possessed the cocaine with the intent to sell it, County Court conducted the requisite further inquiry, whereupon defendant admitted his commission of that element of the crime (*see id.; People v Pane*, 292 AD2d 850, *lv denied* 98 NY2d 653; *People v Brow*, 255 AD2d 904, 905). To the extent that the further contention of defendant that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal (*see generally People v Fifield*, 24 AD3d 1221, 1222, *lv denied* 6 NY3d 775), we conclude that it lacks merit. Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). Finally, the valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

331

KA 07-01782

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM G. WAGNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered April 4, 2005. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of rape in the second degree (Penal Law former § 130.30) and rape in the third degree (§ 130.25 [2]) and sentencing him to a term of incarceration. We reject the contention of defendant that County Court violated his due process rights in determining that he had violated the conditions of his probation. At the violation hearing, the People presented the testimony of defendant's counselor in the sex offender treatment program establishing that defendant violated the program's rules when he minimized and justified the acts underlying the conviction, blamed the victim for his commission of those acts and thereby denied responsibility for his actions, and denied that he had harmed the victim. "[C]ontrary to the contention of defendant, the testimony of his . . . counselor . . . provided the requisite nonhearsay evidence establishing that he failed to comply with 'all rules and requirements' of his sex offender treatment program in accordance with the terms and conditions of his probation" (*People v Michael J.F.*, 15 AD3d 952, 953). The People thereby established that defendant was properly discharged from the sex offender treatment program, and thus met their burden of establishing by a preponderance of the evidence that defendant violated the conditions of his probation (*see generally People v Bergman*, 56 AD3d 1225).

The further contention of defendant that the requirements of the sex offender treatment program violated his right against self-

incrimination is without merit. "[D]efendant has already been prosecuted for the offenses that he claims he is being required to admit, and is therefore protected by the double jeopardy clause from further prosecution" for those offenses (*People v Palladino*, 46 AD3d 864, 865-866, *lv denied* 10 NY3d 704). Finally, the sentence imposed upon the violation of probation is not unduly harsh or severe.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

332

KA 05-02007

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOB Z. SMITH, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 22, 2005. The judgment convicted defendant, upon a jury verdict, of rape in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the second degree (Penal Law § 130.30 [2]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at the alleged error" asserted on appeal (*People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the testimony of the victim was not incredible as a matter of law (*see People v Ptak*, 37 AD3d 1081, *lv denied* 8 NY3d 949). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

333

KAH 08-00685

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
WALTER J. ROACHE, PETITIONER-APPELLANT,

V

ORDER

S.A. CONNELL, SUPERINTENDENT, ONEIDA CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

DAVID M. GIGLIO, UTICA, FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Robert F. Julian, J.), entered December 11, 2007. The order denied the application of petitioner for leave to reargue the dismissal of his petition for a writ of habeas corpus.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see *Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

334

CAF 08-00280

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF TERESA A. GIARDINA,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TERRY L. CAMPBELL, SR., RESPONDENT-APPELLANT.

TULLY RINCKEY PLLC, ALBANY (GREG T. RINCKEY 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 (Joseph W. Latham, J.), entered January 3, 2008 in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection, effective through January 3, 2010.

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

Memorandum: Respondent appeals from an order that granted petitioner an order of protection against him, effective for two years. Contrary to respondent's contention, Family Court Act § 842, as amended in 2003, allows an order of protection to be effective for up to two years without a finding of aggravating circumstances (see L 2003, ch 579, § 1).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

335

CA 08-00918

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

JOSEPH P. HYLANT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MANUFACTURERS AND TRADERS TRUST COMPANY,
DEFENDANT-RESPONDENT.

JOSEPH P. HYLANT, PLAINTIFF-APPELLANT PRO SE.

HODGSON RUSS LLP, BUFFALO (RYAN K. CUMMINGS OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered January 17, 2008. The order granted defendant's motion for summary judgment and dismissed the third amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for the alleged breach of his employment agreement (agreement) with defendant. According to plaintiff, he was terminated without cause by defendant under the terms of the agreement. Pursuant to the agreement, plaintiff was entitled to a compensation package worth more than \$1,000,000 in the event that defendant terminated his employment without cause, and he was entitled to, inter alia, salary and unpaid vacation time up to the date of termination in the event that he was terminated either for cause or due to a disability. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the third amended complaint. Defendant met its initial burden by establishing that plaintiff was terminated for cause, and plaintiff failed to raise an issue of fact to defeat the motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). In view of our determination, we do not address defendant's alternative grounds for affirmance.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

339

CA 08-00927

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

TAG MECHANICAL SYSTEMS, INC., PLAINTIFF,

V

ORDER

P.S. GRISWOLD CO., INC. AND
RELIANCE INSURANCE COMPANY,
DEFENDANTS-APPELLANTS.

P.S. GRISWOLD CO., INC., THIRD-PARTY
PLAINTIFF-APPELLANT,

V

HOWLETT HILL FIRE DEPARTMENT, INC., THIRD-PARTY
DEFENDANT-RESPONDENT,
ET AL., THIRD-PARTY DEFENDANTS.

WALTER D. KOGUT, P.C., SYRACUSE (WALTER D. KOGUT OF COUNSEL), FOR
DEFENDANT-APPELLANT P.S. GRISWOLD CO., INC. AND THIRD-PARTY PLAINTIFF-
APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (THEODORE M. BAUM OF COUNSEL), FOR
DEFENDANT-APPELLANT RELIANCE INSURANCE COMPANY.

ROBERT F. RHINEHART, SYRACUSE, FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County
(Anthony J. Paris, J.), entered January 24, 2008 in a breach of
contract action. The order, among other things, denied defendants'
motions for summary judgment.

Now, upon reading and filing the stipulation discontinuing
appeals signed by the attorneys for the parties on February 5 and 6,
2009,

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

340

CA 08-01445

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

MICHAEL HOTALING AND RICHARD H. SYKES,
PLAINTIFFS-RESPONDENTS,

V

ORDER

EXCELLUS HEALTH PLAN, INC., DEFENDANT-APPELLANT.

ISEMAN, CUNNINGHAM, RIESTER & HYDE, LLP, ALBANY (ROBERT H. ISEMAN OF
COUNSEL), AND BOND SCHOENECK & KING, PLLC, FAIRPORT, FOR
DEFENDANT-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (CARTER H. STRICKLAND OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(Deborah H. Karalunas, J.), entered April 2, 2008 in a breach of
contract action. The order denied the motion of defendant to
disqualify counsel for plaintiffs.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

343

CA 08-02040

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

EILEEN KUNSMAN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RONALD BAROODY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GARY J. GIANFORTI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOSEPH D. CALLERY, SYRACUSE (JAMES C. BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered May 12, 2008 in a personal injury action. The judgment dismissed the complaint against defendant Ronald Baroody upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on the ice-covered rear steps of a building owned by Ronald Baroody (defendant). On appeal from the judgment entered on the jury's verdict of no cause of action, plaintiff contends that Supreme Court erred in denying her post-trial motion seeking judgment notwithstanding the verdict on the issue of defendant's negligence. We reject that contention. Plaintiff failed to surmount "the lofty hurdle of showing that 'there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Adamy v Ziriakus*, 92 NY2d 396, 400, quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499). The court also properly denied the post-trial motion of plaintiff seeking, in the alternative, to set aside the verdict with respect to defendant's alleged negligence as against the weight of the evidence and for a new trial on that issue. Such relief "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" (*Dannick v County of Onondaga*, 191 AD2d 963, 964), and that is not the case here.

Plaintiff further contends that the jury's verdict was inconsistent insofar as the jury found that the absence of a handrail

for the walkway and steps where she fell constituted an unsafe and dangerous condition but that defendant was not negligent in failing to provide such a handrail. Plaintiff failed to preserve that contention for our review inasmuch as she failed to raise it before the jury was discharged (see *Rivera v MTA Long Is. Bus.*, 45 AD3d 557). In any event, "[a] contention that a verdict is inconsistent and irreconcilable must be reviewed in the context of the court's charge[] and[,] where it can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*id.* at 558; see *Skowronski v Mordino*, 4 AD3d 782, 783). Here, the jury could have reasonably found, in view of the court's charge, that the absence of a handrail constituted an unsafe and dangerous condition but that defendant's conduct did not demonstrate a lack of reasonable care.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

345

KA 06-03416

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CARLTON ALLEN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Elma A. Bellini, J.), rendered August 18, 2006. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

346

KA 08-00517

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM M. BRADIGAN, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM M. BRADIGAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered May 10, 2007. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]). Defendant contends in his pro se supplemental brief that the appeal must be "voided" and the case remitted for "prosecut[ion] through another District Attorney" because defense counsel was elected District Attorney of the county in which defendant was prosecuted before the notice of appeal was filed. We reject that contention. " 'The courts, as a general rule, should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence' " (*People v Martin*, 2 AD3d 1336, 1337, lv denied 1 NY3d 630, quoting *Matter of Schumer v Holtzman*, 60 NY2d 46, 55). Here, defendant fails to allege that he was actually prejudiced by any conflict of interest of the newly-elected District Attorney and, on the record before us, there is no indication of a substantial risk of an abuse of confidence. Defendant further contends that he was denied effective assistance of appellate counsel. Although that contention may be raised on direct appeal from a judgment of conviction when it is based on an adequate record (*see People v McKinney*, 302 AD2d 993, 995), here defendant's contention involves matters that are dehors the record on appeal and is therefore not reviewable on direct appeal (*see generally People v Casey*, 37 AD3d 1113, 1117, lv denied 8 NY3d 983).

Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

347

KA 07-02287

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JUACQUIS K. SIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered March 4, 2005. 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: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

348

KA 06-03657

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

BILLY VAZQUEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ROSEANN B. MACKECHNIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered October 23, 2006. The judgment convicted defendant, upon his plea of guilty, of conspiracy 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: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

349

KA 06-00550

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JEFFERY C. SAPP, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JESSICA BIRKAHN HOUSEL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered December 9, 2005. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

350

CAF 08-00967

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

IN THE MATTER OF BOBBIE S.B.

ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

SUSAN L.B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MARCEL J. LAJOY, ALBANY, FOR RESPONDENT-APPELLANT.

DANIEL J. GUINEY, COUNTY ATTORNEY, BELMONT (CARISSA M. HEALY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLYN KELLOGG JONAS, LAW GUARDIAN, WELLSVILLE, FOR BOBBIE S.B.

Appeal from an order of the Family Court, Allegany County (James E. Euken, J.), entered April 25, 2008 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody and care of petitioner until the completion of the next permanency hearing.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

352

CAF 07-02292

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

IN THE MATTER OF MAKAIIO L.B. AND CHRISTIAN T.B.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

MICHAEL B., RESPONDENT-APPELLANT.

FREDERICK P. LESTER, PITTSFORD, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (PAUL N. HUMPHREY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

ARDETH L. HOUDE, LAW GUARDIAN, ROCHESTER, FOR MAKAIIO L.B. AND
CHRISTIAN T.B.

Appeal from an order of the Family Court, Monroe County (Gail A. Donofrio, J.), entered October 5, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

354

CAF 08-00695

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

IN THE MATTER OF BOBBIE S.B.

ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

SUSAN B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MARCEL J. LAJOY, ALBANY, FOR RESPONDENT-APPELLANT.

DANIEL J. GUINEY, COUNTY ATTORNEY, BELMONT (CARISSA M. HEALY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLYN KELLOGG JONAS, LAW GUARDIAN, WELLSVILLE, FOR BOBBIE S.B.

Appeal from an order of the Family Court, Allegany County (James E. Euken, J.), entered February 25, 2008 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child is a neglected child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

356

CA 08-02071

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

DAVID YOUNIS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NORMAN J. MARTIN, ET AL., DEFENDANTS,
AND CHARLES FARRELL, DEFENDANT-APPELLANT.

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

BURKE AND BURKE, ROCHESTER (PATRICK J. BURKE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 1, 2008 in a legal malpractice action. The order, insofar as appealed from, denied that part of the motion of defendant Charles Farrell to dismiss the legal malpractice claim against him.

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

Memorandum: We affirm for reasons stated at Supreme Court. We add only that, contrary to the contention of Charles Farrell (defendant), the court applied the appropriate standard of review in denying that part of the motion to dismiss the claim for legal malpractice against him pursuant to CPLR 3211 (a) (7). In determining such a motion, "[t]he facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although . . . factual claims flatly contradicted by the record are not entitled to any such consideration" (*Gershon v Goldberg*, 30 AD3d 372, 373; see *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022). Although we agree with defendant that some factual claims by plaintiff in the complaint were contradicted by evidentiary material that he appended to the complaint, the record establishes that the court's decision to deny the motion was not predicated upon those factual claims.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

360

CA 08-01115

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

GERALD HAY AND CHRISTINE HAY, BOTH AS
INDIVIDUALS AND AS PARENTS AND NATURAL
GUARDIANS OF ROBIN HAY, AMANDA HAY,
BARBARA HAY AND JOSHUA HAY, MINORS,
PLAINTIFFS-APPELLANTS,

V

ORDER

GORDON JAY AND RAYMOND HENRY WIERZBIC, JR.,
INDIVIDUALLY AND DOING BUSINESS AS BEMUS
CONSTRUCTION, DEFENDANTS-RESPONDENTS.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (GREG MAXWELL OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

BROWN & KELLY, LLP, BUFFALO (TARA E. WATERMAN OF COUNSEL), FOR
DEFENDANT-RESPONDENT GORDON JAY.

BENDER, CRAWFORD & BENDER, LLP, BUFFALO (JOANNEKE K.M. BRENTJENS OF
COUNSEL), FOR DEFENDANT-RESPONDENT RAYMOND HENRY WIERZBIC, JR.,
INDIVIDUALLY AND DOING BUSINESS AS BEMUS CONSTRUCTION.

Appeal from an order the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered February 1, 2008 in an action for personal injury and property damage. The order granted the motions of defendants for summary judgment and dismissed the complaints.

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: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

362

CA 08-01399

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

DANIEL J. BONAFEDE, CLAIMANT-APPELLANT,

V

ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 110353.)

COLLINS & MAXWELL, LLP, BUFFALO (LUKE A. BROWN OF COUNSEL), FOR
CLAIMANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (DANIEL J. CAFFREY OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered March 27, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the claim.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

368

KA 05-00425

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAMON J. MCKOY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered February 10, 2005. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree (two counts), sodomy in the first degree, and assault 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 reversing that part convicting defendant of assault in the second degree and dismissing count 14 of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him as a juvenile offender upon his plea of guilty of two counts of murder in the second degree (Penal Law § 125.25 [1]), and one count each of sodomy in the first degree (former § 130.50 [1]) and assault in the second degree (§ 120.05 [6]), defendant contends that his plea was not voluntarily entered; that he was denied effective assistance of counsel; and that County Court abused its discretion in denying his motion to withdraw the plea without conducting a hearing or assigning defendant new counsel. We reject those contentions. With respect to the contentions of defendant concerning the voluntariness of the plea, i.e., that he is innocent but entered the plea as the result of duress and coercion, and the alleged denial of effective assistance of counsel, we conclude that those contentions are belied by his statements during the plea colloquy (*see People v Brown [Homer]*, ___ AD3d ___ [Feb. 6, 2009]; *People v Kimmons*, 39 AD3d 1180; *People v Farley*, 34 AD3d 1229, 1230, *lv denied* 8 NY3d 880). The record also does not support the contention of defendant that defense counsel took a position adverse to that of defendant during argument of his pro se motion to withdraw the plea (*see People v Klumpp*, 269 AD2d 798, 799, *lv denied* 94 NY2d 922), and thus it was not necessary for defense

counsel to seek to withdraw as defendant's attorney or for the court to assign new counsel for the motion (*cf. People v Hunter*, 35 AD3d 1228; *People v Singletary*, 233 AD2d 849). The sentence is not unduly harsh or severe.

Finally, although not raised by defendant on appeal, we conclude that the court was not authorized to accept a plea of guilty to count 14 of the indictment, assault in the second degree. As a juvenile offender, defendant cannot be held criminally responsible for that crime in accordance with paragraph (2) of CPL 1.20 (42) (*see Penal Law § 30.00 [2]; People v Boye*, 175 AD2d 924; *see also People v Holmes*, 220 AD2d 109, 112, *affd* 89 NY2d 838; *People v Stowe*, 15 AD3d 597, 598, *lv denied* 5 NY3d 770). We conclude, however, that the plea to that count of the indictment is not "an integral part of a nonseverable plea bargain . . .[, and thus only count 14 of the indictment] must . . . be set aside and deemed a nullity" (*Boye*, 175 AD2d 924). We therefore modify the judgment accordingly.

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

369

KA 06-02487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

WILLIAM PULLUAIM, DEFENDANT-APPELLANT.

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

WILLIAM PULLUAIM, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JESSICA BIRKAHN HOUSEL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered April 27, 2006. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

370

KA 06-02854

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DARRELL J. CHESHER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Stephen K. Lindley, A.J.), rendered June 14, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

371

KA 06-00555

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TIMOTHY WILLIAMS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered November 22, 2005. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree and menacing in the second degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

373

KA 06-01602

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOSHUA D. SCHIPPER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered March 21, 2006. The judgment convicted defendant, upon his plea of guilty, of 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: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

374

KA 07-02431

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT J. MERRILL, DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (DAVID M. PARKS 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 (Dennis M. Kehoe, J.), rendered August 28, 2007. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts) and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of two counts of sexual abuse in the first degree (Penal Law § 130.65 [1], [3]) and one count of endangering the welfare of a child (§ 260.10 [1]), defendant contends that County Court erred in allowing the 10-year-old victim to testify under oath. We reject that contention. Pursuant to CPL 60.20 (2), any witness over the age of nine may testify under oath "unless the court is satisfied that such witness cannot . . . understand the nature of an oath." Thus, a 10-year-old child "is presumed competent to testify" (*People v Mann*, 41 AD3d 977, 980, *lv denied* 9 NY3d 924), and the court need not ascertain whether he or she understands the nature of an oath in the absence of any evidence to the contrary.

Defendant failed to preserve for our review his contention that the court erred in failing to give a missing witness charge (*see People v Russell*, 209 AD2d 650), 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 made only a general motion for a trial order of dismissal and thus also failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence

(see generally *People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

377

KA 05-01759

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GOLDDE DOUGLAS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 18, 2005. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct on summation (see *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849) and, in any event, that contention is without merit. The majority of the prosecutor's comments on summation to which defendant objects on appeal were within the " 'broad bounds of rhetorical comment permissible in closing argument' " (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854, quoting *People v Galloway*, 54 NY2d 396, 399), and those comments that were arguably beyond those bounds were not so egregious as to deprive defendant of a fair trial (see *People v Rivera*, 281 AD2d 927, 928, *lv denied* 96 NY2d 906; *People v Walker*, 234 AD2d 962, 963, *lv denied* 89 NY2d 1042). We further conclude that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147). The alleged instances of ineffective assistance concerning defense counsel's failure to make various objections "are based largely on his hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Morrison*, 48 AD3d 1044, 1045, *lv denied* 10 NY3d 867; see *People v Benevento*, 91 NY2d 708, 712-713). Further, "[t]here can be no denial of effective assistance of . . . counsel

arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, rearg denied 3 NY3d 702; see *People v Odom*, 53 AD3d 1084, 1087, lv denied 11 NY3d 792). Finally, although we agree with defendant that County Court erred in admitting a newspaper article concerning the number of local homicides, we conclude that the error is harmless (see generally *People v Crimmins*, 36 NY2d 230, 241-242).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

378

KA 08-00375

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WALLACE R. SCHROM, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, ALBION, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered March 6, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]). Defendant failed to preserve for our review his contention that County Court erred in setting the duration of the order of protection pursuant to the version of CPL 530.13 (4) in effect at the time the judgment was rendered rather than the version in effect at the time of his commission of the crime, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Ruz*, 70 NY2d 942; *People v Whitfield*, 50 AD3d 1580, lv denied 10 NY3d 965).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

379

KA 08-01045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOHN KLEM, DEFENDANT-APPELLANT.

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

SUSAN H. LINDENMUTH, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered October 24, 2006. The judgment convicted defendant, upon his plea of guilty, of possession of sexual performance by a child in the first degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

381

CA 08-00304

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

JAMES MCILROY, PLAINTIFF-RESPONDENT,

V

ORDER

MUSKOKA TRANSPORT, LTD., RUSSELL D. WOODS,
DEFENDANTS-APPELLANTS,
SIMON J.F. LIM AND BEN J. LIM,
DEFENDANTS-RESPONDENTS.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, WHITE PLAINS (BRIAN
DEL GATTO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DIMATTEO LAW OFFICE, WARSAW (DAVID M. ROACH OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

CHEVEN KEELY & HATZIS, ESQS., NEW YORK CITY (WILLIAM B. STOCK OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered December 19, 2007. The order denied the motion of defendants Muskoka Transport, Ltd. and Russell D. Woods for summary judgment and directed those defendants to respond to plaintiff's outstanding demands for disclosure.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

383

CA 08-02104

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

IN THE MATTER OF ANA RODGERS,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF NORTH TONAWANDA,
RESPONDENT-RESPONDENT.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (GREG MAXWELL OF COUNSEL), FOR
PETITIONER-APPELLANT.

SHAWN P. NICKERSON, CITY ATTORNEY, NORTH TONAWANDA, FOR
RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 28, 2008 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied the petition in part.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to enjoin respondent from requiring the demolition of her boathouse, which is located on property owned by respondent. The demolition was required for the purpose of implementing the Gateway Point Park Project, which included the replacement of a storm sewer outlet and the construction of a park and building complex. According to plaintiff, respondent failed to comply with the requirements of article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]) prior to entering into a contract with New York State for a grant to fund the Gateway Point Park Project. Supreme Court granted the petition only in part, enjoining respondent from proceeding with construction of the park and building complex and referring the eviction matter to City Court. We affirm.

We reject petitioner's contention that the court erred in segmenting the storm sewer outlet replacement project from the other aspects of the Gateway Point Park Project. The storm sewer outlet replacement project is specifically exempted from review under SEQRA as a Type II action (see 6 NYCRR 617.5 [a], [c] [2]; *Kaplan v Incorporated Vil. of Lynbrook*, 12 AD3d 410, 411; *Matter of Civic Assn. of Utopia Estates v City of New York*, 258 AD2d 650). Thus, that

project was properly segmented from the remainder of the Gateway Point Park Project that is subject to SEQRA review (see generally *Matter of Settco, LLC v New York State Urban Dev. Corp.*, 305 AD2d 1026, 1026-1027, *lv denied* 100 NY2d 508; *Matter of Forman v Trustees of State Univ. of N.Y.*, 303 AD2d 1019, 1019-1020). Contrary to the further contention of petitioner, she failed to establish that the storm sewer outlet replacement project is an action subject to referral to a county planning agency pursuant to General Municipal Law § 239-m (3) (a).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

384

CA 08-01352

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

JAMIE RAAB, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

KALEIDA HEALTH, THE CHILDREN'S HOSPITAL OF
BUFFALO, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

DAMON & MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

GAIR, GAIR, CONASON, STEIGMAN & MACKAUF, NEW YORK CITY (RHONDA E. KAY
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered May 19, 2008 in a medical malpractice action. The order granted the motion of plaintiff for leave to reargue and, upon reargument, denied without prejudice plaintiff's cross motion for judgment as a matter of law with respect to the vicarious liability of defendants Kaleida Health and The Children's Hospital of Buffalo.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries she sustained during surgery at defendant The Children's Hospital of Buffalo, which is owned by defendant Kaleida Health (collectively, Kaleida defendants). Supreme Court granted the motion of Ronald Alberico (defendant), a neuroradiologist seeking to dismiss the complaint against him and denied as moot plaintiff's cross motion seeking judgment as a matter of law determining that the Kaleida defendants are vicariously liable for the conduct of the neuroradiologist. Plaintiff subsequently moved for leave to reargue the cross motion and to vacate the court's prior determination that the cross motion was moot. The court granted the motion for leave to reargue and, upon reargument, denied the cross motion without prejudice, pending completion of discovery. We affirm.

The court dismissed the complaint against defendant based on his affirmative defense that plaintiff failed to comply with Public Authorities Law § 3567, which applies to actions against defendant's employer, i.e., the Roswell Park Cancer Institute Corporation. That affirmative defense is thus unavailable to the Kaleida defendants, and "the dismissal of a complaint as against one party need not be given

res judicata effect as against another vicariously liable for the same conduct when the dismissal was based upon a defense that was personal to that party" (see *Fuentes v Brookhaven Mem. Hosp.*, 10 AD3d 384, 385). Contrary to the contention of the Kaleida defendants, the dismissal of the complaint against defendant does not preclude a finding that the Kaleida defendants are vicariously liable for defendant's conduct (see *id.* at 385-386; see also *Shapiro v Good Samaritan Regional Hosp. Med. Ctr.*, 55 AD3d 821, 823-824; *Trivedi v Golub*, 46 AD3d 542).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

389

KA 07-00620

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CURTIS CLOSURE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered January 11, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

390

KA 07-00621

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CURTIS CLOSURE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (John
J. Ark, J.), rendered January 11, 2007. The judgment convicted
defendant, upon his plea of guilty, of burglary in the third degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

391

KA 08-00346

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON J. ALEJANDRO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 4, 2007. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the seventh degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) and unlawful possession of marihuana (§ 221.05). Defendant made only a general motion for a trial order of dismissal, and thus failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, defendant's challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495), and we therefore reject the further contention of defendant that defense counsel was ineffective for failing to preserve that challenge for our review (*see People v Caban*, 5 NY3d 143, 152; *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

394

KA 08-00680

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LUIGI CAPOCETTA, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ROBERT R. REITTINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered August 9, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). County Court properly denied defendant's motion to withdraw the plea. The record of the plea proceeding establishes that the plea was knowingly, voluntarily and intelligently entered and, contrary to defendant's contention, "a plea agreement is not inherently coercive or invalid simply because it affords a benefit to a loved one, as long as the plea itself is knowingly, voluntarily and intelligently made" (*People v Etkin*, 284 AD2d 579, 580, *lv denied* 96 NY2d 862). We reject the further contention of defendant that he is entitled to withdraw his plea based upon his unilateral mistake with respect to the sentence that his brother, a codefendant, would receive. "A defendant will not be heard to challenge his guilty plea when the minutes of the plea [proceeding] are unequivocal and refute any contention of an off-the-record promise" (*People v Frederick*, 45 NY2d 520, 526). The valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

396

KA 08-00146

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SHAWN L. BRAND, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered November 2, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

397

KA 08-00657

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

ORDER

ANDREW E. BISHOP, DEFENDANT-RESPONDENT.

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, HANCOCK & ESTABROOK, LLP (STEWART F. HANCOCK, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered March 25, 2008. The order granted in part defendant's omnibus motion and suppressed physical evidence and dismissed counts two and three of the indictment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court, and the indictment is dismissed in its entirety.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

398

KA 06-02142

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JERRY L. GARCIA-SANTIAGO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS 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 30, 2005. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of manslaughter in the first degree (Penal Law § 125.20), defendant contends that Supreme Court erred in determining that a police officer was qualified to testify as an expert witness concerning the behavior of an individual with a blood alcohol content of .03%. Defendant failed to object to the testimony of the officer on that ground and thus failed to preserve that contention for our review (see CPL 470.05 [2]; see generally *People v Delatorres*, 34 AD3d 1343, 1344, *lv denied* 8 NY3d 921; *People v Smith*, 24 AD3d 1253, *lv denied* 6 NY3d 818). 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 admitting the officer's testimony in evidence because it lacked a proper foundation (see generally *People v Jones*, 73 NY2d 427, 430), and was irrelevant (see generally *People v Scarola*, 71 NY2d 769, 777). The sentence is not unduly harsh or severe.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

399

KA 07-02352

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROOSEVELT APPLETON, DEFENDANT-APPELLANT.

BIANCO LAW OFFICE, SYRACUSE (RANDI J. BIANCO OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Drury, J.), rendered June 27, 2007. The judgment convicted defendant, upon a jury verdict, of reckless endangerment in the first degree, assault in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, reckless endangerment in the first degree (Penal Law § 120.25) and assault in the second degree (§ 120.05 [2]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of reckless endangerment and assault (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant also failed to preserve for our review his contentions that he was denied a fair trial by the improper bolstering of the victim's identification (*see People v Simms*, 244 AD2d 920, *lv denied* 91 NY2d 897), that Supreme Court erred in admitting in evidence photographs of the victim's vehicle (*see People v Craven*, 48 AD3d 1183, 1184-1185, *lv denied* 10 NY3d 861), and that the court further erred in permitting the jurors to take notes without proper instructions (*see People v Green*, 35 AD3d 1197, *lv denied* 8 NY3d 922). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*).

The court properly denied defendant's motion to set aside the verdict pursuant to CPL 330.30 (3). The newly discovered evidence proffered in support of such a motion must be "of such nature that a different verdict probably would occur and, further, such [evidence] must not be cumulative or merely impeaching or contradicting of the trial evidence . . . Here, the proffered evidence does not create the probability of a different result if a new trial were granted and clearly constitutes evidence contradictory to certain of the trial evidence, thus tending to impeach the testimony of a trial witness" (*People v Hayes*, 295 AD2d 751, 752, lv denied 98 NY2d 730). Finally, we reject the contentions of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147), and that he was denied a fair trial by the cumulative effect of the alleged errors raised by defendant on appeal (*see People v McKnight*, 55 AD3d 1315, 1317).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

401

CAF 08-00251

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

IN THE MATTER OF ISIS S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

STEVEN R., RESPONDENT-APPELLANT.

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

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC.,
BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR ISIS S.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered January 22, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent father appeals from an order terminating his parental rights on the ground that he abandoned his child. Contrary to the contention of the father, petitioner established by the requisite clear and convincing evidence that he "evinced an intent to forego his . . . parental rights and obligations as manifested by his . . . failure to visit the child and communicate with the child or [petitioner], although able to do so" (Social Services Law § 384-b [5] [a]; see *Matter of Tonasia K.*, 49 AD3d 1247; *Matter of Timothy H.*, 37 AD3d 1119, lv denied 8 NY3d 813). The record before us establishes that the father visited the child on only one occasion during the relevant time period, failed to pay child support despite his ability to do so, and had contact with petitioner only at court appearances. Family Court was entitled to discredit the testimony of the father that he attempted to contact petitioner by telephone (see *Matter of Amin Enrique M.*, 52 AD3d 316). Although the record establishes that the father was denied the opportunity to visit with the child on one occasion when he accompanied the child's mother to one of her supervised visits, the record further establishes that neither the agency supervising the mother's visitation nor the caseworker for petitioner who was contacted by that agency at that time was aware that the father was in fact the child's parent, and the caseworker subsequently advised the agency conducting the visitation

of that fact.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

402

CAF 08-00990

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

IN THE MATTER OF ELEGANT R.C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RICHARD C., RESPONDENT-APPELLANT.

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

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC.,
BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR ELEGANT R.C.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered April 4, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to his daughter upon a finding that he abandoned her. We agree with the father that petitioner failed to meet its burden of establishing by clear and convincing evidence that he failed to visit his daughter or to communicate with her or petitioner, although able to do so, "for the period of six months immediately prior to the date on which the petition [was] filed" (Social Services Law § 384-b [4] [b]; see § 384-b [5] [a]; cf. *Matter of Annette B.*, 4 NY3d 509, 513-515, rearg denied 5 NY3d 783). The petition was filed on September 19, 2007, but petitioner presented evidence concerning the failure of the father to maintain contact with his daughter beginning only on March 26, 2007, which was less than six months prior to the filing of the petition. We thus conclude that reversal is required.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

403

CA 08-00662

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

THERESA MILEA AND EARL MILEA, INDIVIDUALLY,
AND THERESA MILEA, AS PARENT AND NATURAL
GUARDIAN OF ANTHONY MILEA, AN INFANT,
PLAINTIFFS-APPELLANTS,

V

ORDER

CITY OF SYRACUSE, CITY OF SYRACUSE DEPARTMENT
OF PUBLIC WORKS AND NELSON F. DERBY, JR.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

RORY A. MCMAHON, CORPORATION COUNSEL, SYRACUSE (NANCY J. LARSON OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(Deborah H. Karalunas, J.), entered October 30, 2007 in a personal
injury action. The order denied the cross motion of plaintiffs to
dismiss as untimely the motion of defendants for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988;
Chase Manhattan Bank, N.A. v Roberts & Roberts, 63 AD2d 566, 567; *see*
also CPLR 5501 [a] [1]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

404

CA 08-00663

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

THERESA MILEA AND EARL MILEA, INDIVIDUALLY,
AND THERESA MILEA, AS PARENT AND NATURAL
GUARDIAN OF ANTHONY MILEA, AN INFANT,
PLAINTIFFS-APPELLANTS,

V

ORDER

CITY OF SYRACUSE, CITY OF SYRACUSE DEPARTMENT
OF PUBLIC WORKS AND NELSON F. DERBY, JR.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

RORY A. MCMAHON, CORPORATION COUNSEL, SYRACUSE (NANCY J. LARSON OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(Deborah H. Karalunas, J.), entered January 17, 2008 in a personal
injury action. The order granted the motion of defendants for summary
judgment.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

410

CA 08-01485

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

LILLIAN SOFIEN, PLAINTIFF,
AND JUDITH DIANE NOEL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CHARLES PHILIP NOEL, DEFENDANT-RESPONDENT.

RICE, REID, BRODERICK & WATTENGEL, NIAGARA FALLS (PAUL H. REID, JR.,
OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (BRIDGET M. O'CONNELL OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 25, 2008. The order denied the request of plaintiff Judith Diane Noel for maintenance.

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

Memorandum: Contrary to the contention of Judith Diane Noel (plaintiff), Supreme Court did not abuse its discretion in adopting the report and decision of the Matrimonial Referee declining to award her maintenance (*see generally Holmes v Holmes*, 25 AD3d 931, 932). The Matrimonial Referee properly determined, after considering the pre-divorce standard of living as well as the other factors set forth in Domestic Relations Law § 236 (B) (6) (a), that an award of maintenance to plaintiff was not warranted (*see Boardman v Boardman*, 300 AD2d 1110).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

414

KA 07-00239

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT A. HORTON, 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered October 4, 2006. The judgment convicted defendant, upon his plea of guilty, of absconding from temporary release in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the DNA databank fee and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of absconding from temporary release in the first degree (Penal Law § 205.17), defendant contends that Supreme Court erred in imposing a DNA databank fee pursuant to Penal Law § 60.35 (former [1] [e]). We agree. That fee may be imposed only "where the offender has been convicted within the previous five years of one of the other felonies specified in this subdivision," i.e., Executive Law § 995 (7) (§ 995 [7] [a]; see Penal Law § 60.35 [former (1) (e)]), and defendant's prior conviction of forgery in the second degree is not one of those specified felonies. Although defendant failed to preserve his contention for our review (see CPL 470.05 [2]; *People v King*, 57 AD3d 1495), we exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]), and we therefore modify the judgment accordingly.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

415

KA 08-00516

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ELWOOD L. RAYMOND, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 21, 2008. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that County Court erred in permitting the six-year-old victim to give unsworn testimony (*see People v Bitting*, 224 AD2d 1012, *lv denied* 88 NY2d 845). In any event, the record establishes that the victim "possesse[d] sufficient intelligence and capacity to justify" her unsworn testimony (CPL 60.20 [2]; *see People v Wacht*, 261 AD2d 932; *Bitting*, 224 AD2d 1012). Defendant also failed to preserve for our review his challenge to the court's charge on corroboration and his contention that the victim's unsworn testimony was not corroborated (*see* CPL 470.05 [2]). In any event, we conclude that the court's charge was proper and that the victim's unsworn testimony was sufficiently corroborated by "evidence tending to establish the crime and connecting defendant with its commission" (*People v Groff*, 71 NY2d 101, 104; *see People v Petrie*, 3 AD3d 665, 667), including defendant's statement to the police (*Petrie*, 3 AD3d at 667-668; *People v Thomas*, 267 AD2d 949, 950, *lv denied* 95 NY2d 805; *People v Pullman*, 234 AD2d 955, *lv denied* 89 NY2d 1099).

Defendant failed to renew his motion for a trial order of dismissal after presenting evidence and thus failed to preserve for our review his contention that the evidence is legally insufficient (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People*

v Diefenbacher, 21 AD3d 1293, 1294, *lv denied* 6 NY3d 775). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the unsworn testimony of the victim was not incredible as a matter of law (see *People v Johnson*, 56 AD3d 1172, 1173, *lv denied* 11 NY3d 926; *People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982), and it cannot be said that the jury failed to give her testimony the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495). We reject the further contention of defendant that he was denied effective assistance of counsel. Rather, we conclude that the evidence, the law and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147). The sentence is not unduly harsh or severe. Defendant failed to preserve his remaining contentions for our review (see CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

416

KA 07-00455

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIE GARRETT, 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 9, 2006. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [3]). Defendant failed to preserve for our review his challenge to the voluntariness of the plea inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (see *People v Kuras*, 49 AD3d 1196, 1197, *lv denied* 10 NY3d 866; *People v Lacey*, 49 AD3d 1259, *lv denied* 10 NY3d 936). Defendant contends that this case falls within the narrow exception to the preservation doctrine set forth in *People v Lopez* (71 NY2d 662, 666) because County Court failed to conduct a sufficient inquiry on the issues whether defendant was on medication at the time of the plea and whether he had an intoxication defense, to ensure that the plea was knowingly, voluntarily, and intelligently entered. We conclude, however, that the court had no duty to conduct such an inquiry inasmuch as "nothing in the plea allocution cast significant doubt on defendant's guilt or otherwise called into question the voluntariness of the plea," and thus the narrow exception to the preservation doctrine does not apply (*Lacey*, 49 AD3d at 1259; see generally *Lopez*, 71 NY2d at 666; *People v Maysonet*, 38 AD3d 1330, *lv denied* 9 NY3d 844, 847). When the court asked defendant during the plea colloquy if he had any physical or mental problems, defendant responded "[n]ah." As the court noted, defendant's responses during the plea allocution established that defendant understood the terms and consequences of the plea (see generally *People v Forshey*, 298 AD2d 962, 963, *lv denied* 99 NY2d 558, 100 NY2d 561). On appeal, defendant relies solely on information in the presentence report that he was prescribed an antidepressant four

years before his commission of the offense in question, and that he reported to the probation officer that he was high on marihuana at the time of the offense. We note, however, that there was no statement in the presentence report that defendant's marihuana use at the time of the offense rendered defendant unable to form the intent necessary for the commission of the offense (*see People v Jordan*, 292 AD2d 860, 1v *denied* 98 NY2d 698).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

423

KA 08-00639

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JAKE WINTERS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 18, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

425

KA 05-02505

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ORLANDO RIVERA, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered August 17, 2005. The judgment convicted defendant, upon his plea of guilty, of, inter alia, criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]), defendant contends that the police conducted an illegal inventory search of his vehicle and thus that County Court erred in refusing to suppress the drugs found during that search. We reject defendant's contention. "Following a lawful arrest of the driver of an automobile that must be then impounded, the police may conduct an inventory search of the vehicle" pursuant to established police policy (*People v Johnson*, 1 NY3d 252, 255). Contrary to defendant's contention, the applicable order of the Rochester Police Department concerning inventory searches sets forth "a standard procedure that was rationally designed to meet the objective justifying the search and that limited the . . . discretion" of the police in conducting the search (*People v Cooper*, 48 AD3d 1055, 1056, lv denied 10 NY3d 861; see *People v Galak*, 80 NY2d 715, 719; *People v Wilburn*, 50 AD3d 1617, 1618, lv denied 11 NY3d 742). Here, the People met their burden of establishing that the police followed the procedure set forth in that order in conducting the inventory search (cf. *People v Elpenord*, 24 AD3d 465, 467; *People v Acevedo-Sanchez*, 212 AD2d 1023, lv denied 85 NY2d 935). Contrary to defendant's further contention, the record establishes that the police prepared a "meaningful inventory list"

(*Johnson*, 1 NY3d at 256).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

427

KA 08-00124

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RASHAD SCISSION, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered December 12, 2007. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Defendant made only a general motion for a trial order of dismissal and thus failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The further contention of defendant that he was denied a fair trial by prosecutorial misconduct is based primarily on alleged instances of prosecutorial misconduct that are unpreserved for our review (*see CPL 470.05 [2]*) and, in any event, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Cox*, 21 AD3d 1361, 1364, lv denied 6 NY3d 753 [internal quotation marks omitted]).

Defendant contends that County Court erred in denying his motion for a mistrial based on a police officer's reference to an eight-year-old boy as a "witness." The officer had spoken with that boy following the incident. We reject that contention. The record

establishes that the court issued a curative instruction, and we thus conclude that the court thereby "alleviated any prejudice to defendant resulting from that testimony" (*People v Colon*, 13 AD3d 1198, 1198, lv denied 4 NY3d 829, 5 NY3d 760; see *People v DeCarlis*, 37 AD3d 1040, lv denied 8 NY3d 945). The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

431

CA 08-01668

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

JOHN GREY AND JENNIFER GREY,
PLAINTIFFS-APPELLANTS,

V

ORDER

FIRST BAPTIST CHURCH OF OLEAN, ALSO KNOWN AS
FIRST BAPTIST CHURCH, DEFENDANT-APPELLANT,
CHRISTIAN C. HENZEL AND CATHERINE M. MALEY,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

FRANCIS M. LETRO, ESQ., BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE WESTERMAN OF
COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF J. MICHAEL SHANE, ALLEGANY (J. MICHAEL SHANE OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeals from an order of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered October 2, 2007 in a personal injury action. The order granted the motion of defendants Christian C. Henzel and Catherine M. Maley for summary judgment and dismissed the amended complaint against them.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

432

CA 08-01636

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

JOHN S. GREY AND JENNIFER L. GREY,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

ORDER

FIRST BAPTIST CHURCH OF OLEAN, ALSO KNOWN AS
FIRST BAPTIST CHURCH,
DEFENDANT-APPELLANT-RESPONDENT,
CHRISTIAN C. HENZEL AND CATHERINE M. MALEY,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE WESTERMAN OF
COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

FRANCIS M. LETRO, ESQ., BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS-APPELLANTS.

LAW OFFICES OF J. MICHAEL SHANE, ALLEGANY (J. MICHAEL SHANE OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an amended order of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered November 13, 2007 in a personal injury action. The amended order granted the motion of defendants Christian C. Henzel and Catherine M. Maley for summary judgment, granted in part and denied in part the motion of plaintiffs for partial summary judgment, and granted in part and denied in part the motion of defendant First Baptist Church of Olean, also known as First Baptist Church, for summary judgment.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

433

CA 08-01008

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

DANIEL M. CONTI AND DEBRA A. CONTI,
PLAINTIFFS-APPELLANTS,

V

ORDER

WYOMING COUNTY AND WYOMING COUNTY DEPARTMENT
OF SOCIAL SERVICES, DEFENDANTS-RESPONDENTS.

ANGELO T. CALLERI, P.C., ROCHESTER (ANGELO T. CALLERI OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL S. CERRONE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County
(Timothy J. Walker, A.J.), entered April 15, 2008 in an action for,
inter alia, malicious prosecution. The order granted the motion of
defendants to dismiss the complaint.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

437

KA 08-02070

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

IN THE MATTER OF THE SEVENTH REPORT OF
THE SENECA COUNTY SPECIAL GRAND JURY OF
JANUARY 2007.

MEMORANDUM AND ORDER

FIRST NAMED PUBLIC OFFICIAL, APPELLANT;

R. MICHAEL TANTILLO, SPECIAL DISTRICT
ATTORNEY OF SENECA COUNTY, RESPONDENT.

GEIGER AND ROTHENBERG, LLP, ROCHESTER (DAVID ROTHENBERG OF COUNSEL),
FOR APPELLANT.

R. MICHAEL TANTILLO, SPECIAL DISTRICT ATTORNEY OF SENECA COUNTY,
CANANDAIGUA, RESPONDENT PRO SE.

Appeal from an order of the Seneca County Court (Dennis F. Bender, J.), dated February 15, 2008. The order accepted Report Number 7 of the January 2007 Seneca County Special Grand Jury and directed the filing of the report as a public record.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the report is sealed.

Memorandum: We agree with appellant, a public official of Seneca County, that County Court erred in directing that a grand jury report be filed as a public record for the same reasons as those set forth in our decision in *Matter of Second Report of Seneca County Special Grand Jury of Jan. 2007* (___ AD3d ___ [Feb. 6, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

438

KA 07-01045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES BUSCH, JR., 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 Supreme Court, Erie County (Christopher J. Burns, J.), rendered April 30, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). To the extent that defendant challenges the factual sufficiency of his plea allocution, that challenge is encompassed by his valid waiver of the right to appeal (*see People v Morgan*, ___ AD3d ___ [Feb. 6, 2009]; *People v Phillips*, 56 AD3d 1163, 1164; *People v Spikes*, 28 AD3d 1101, 1102, *lv denied* 7 NY3d 818). Although the further contention of defendant that his plea was involuntary survives his waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 10; *People v Elardo*, 52 AD3d 1272, *lv denied* 11 NY3d 787, 788), defendant failed to preserve that contention for our review (*see People v Neal*, 56 AD3d 1211; *People v Collins*, 45 AD3d 1472, *lv denied* 10 NY3d 861). This case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666; *Neal*, 56 AD3d 1211; *People v Sharp*, 56 AD3d 1230, *lv denied* 11 NY3d 900).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

439

KA 07-01683

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTONIO R. CARVALHO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 27, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree and grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the third degree (Penal Law § 160.05) and grand larceny in the third degree (§ 155.35). Contrary to the contention of defendant, County Court properly refused to suppress tape-recorded statements that he made to his ex-wife. Although the People may not elicit incriminating statements from a defendant who is represented by counsel, "statements induced by nongovernmental entities, acting privately, do not fall within the ambit of this exclusionary rule" (*People v Velasquez*, 68 NY2d 533, 537). Here, according to the evidence at the suppression hearing, defendant's ex-wife was not acting as an agent of the police, and her statements were not otherwise induced by governmental entities (*see id.*; *People v Jean*, 13 AD3d 466, 467, *lv denied* 5 NY3d 764, 807; *People v Shabani*, 203 AD2d 142, *lv denied* 84 NY2d 832).

We further conclude that the court properly allowed a prosecution witness to testify with respect to her identification of defendant from a photo array. "Defendant opened the door to the testimony of that witness" by attacking the validity of the photo array during his opening statement (*People v Williams*, 273 AD2d 824, 826, *lv denied* 95 NY2d 893). Furthermore, defendant was not denied effective assistance of counsel based on defense counsel's strategic attempt to discredit the pretrial identification of the witness by using the photo array (*see People v Ofield*, 280 AD2d 978, *lv denied* 96 NY2d 832).

Contrary to the further contention of defendant, he has "no constitutional right to a jury trial to establish the facts of his prior felony convictions" (*People v Rosen*, 96 NY2d 329, 335; see *People v Rivera*, 5 NY3d 61, 67, cert denied 546 US 984). Furthermore, we conclude that the court did not abuse its discretion in sentencing defendant as a persistent felony offender based upon defendant's criminal history (see *People v O'Connor*, 6 AD3d 738, 740-741, lv denied 3 NY3d 639, 645).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

440

KA 07-02334

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GEORGE SWAN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 30, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal mischief in the third degree (Penal Law § 145.05 [2]). We reject the contention of defendant that County Court failed to comply with the procedural requirements for adjudicating him a second felony offender pursuant to CPL 400.21. Even assuming, arguendo, that the People failed to file the predicate felony statement prior to sentencing (see CPL 400.21 [2]), we conclude that defendant was properly afforded notice of the predicate felony inasmuch as the record establishes that he received the predicate felony statement before he was sentenced (see generally *People v Sampson*, 30 AD3d 623, lv denied 7 NY3d 817). Furthermore, although the court failed to ask defendant at sentencing if he wished to controvert his second felony offender status pursuant to CPL 400.21 (3), defendant had contested his status at a prior hearing and raised the same contentions concerning his status in a written motion to vacate his plea. We conclude on the record before us that the court substantially complied with the requirements of CPL 400.21 (see *People v Mateo*, 53 AD3d 1111, 1112, lv denied 11 NY3d 791; *People v Beu*, 24 AD3d 1257, lv denied 6 NY3d 809; see also *Sampson*, 30 AD3d 623).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

441

KA 07-02677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRANCE JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered August 31, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). Contrary to the contention of defendant, we conclude that his waiver of the right to appeal is valid (*see People v Lopez*, 6 NY3d 248, 256). That valid waiver of the right to appeal encompasses the challenges by defendant to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737), and to Supreme Court's denial of his request for youthful offender status (*see People v Porter*, 55 AD3d 1313, lv denied 11 NY3d 899).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

444

KA 08-00792

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GREG A. SCOTT, DEFENDANT-APPELLANT.

EOANNOU, LANA & D'AMICO, BUFFALO (THOMAS J. EOANNOU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered April 9, 2008. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of three counts of grand larceny in the third degree (Penal Law § 155.35). Defendant failed to move for a trial order of dismissal and thus failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "The inconsistencies between the testimony of [the prosecution] witness[es] and the testimony of defendant's witnesses involved credibility issues that were resolved by the jury, and we accord great deference to the jury's credibility determinations" (*People v Harris*, 56 AD3d 1267, 1268; *see People v Lawrence*, 28 AD3d 1123, 1124, lv denied 6 NY3d 896).

Defendant consented to the supplemental instruction given by County Court in response to the jury's note concerning the claim of right defense and thus has waived his present challenge to the instruction (*see People v Bush*, 57 AD3d 1119, 1120; *see generally People v Barner*, 30 AD3d 1091, lv denied 7 NY3d 809; *People v Hicks*,

12 AD3d 1044, *lv denied* 4 NY3d 799). Defendant's further contention that the court failed to enforce a judicial subpoena is without merit. "[D]efendant failed to put forth a factual predicate to support the contention that the documents sought in the subpoena will bear relevant and exculpatory evidence" (*People v Bagley*, 279 AD2d 426, 426, *lv denied* 96 NY2d 711; see *Matter of Constantine v Leto*, 157 AD2d 376, *affd for reasons stated* 77 NY2d 975; see generally *People v Gissendanner*, 48 NY2d 543, 550-551). To the extent that defendant may be deemed to contend that the court erred in failing to enforce an additional subpoena, that contention is based upon matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (see generally *People v Carlisle*, 50 AD3d 1451, *lv denied* 10 NY3d 957; *People v Kopp*, 33 AD3d 153, 159, *lv denied* 7 NY3d 849, *cert denied* 549 US 1227).

Finally, the sentence is not unduly harsh or severe.

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

445

KA 08-00337

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL PAUL BELANGER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Ontario County Court (William F. Kocher, J.), entered January 14, 2008. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

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.). We reject the contention of defendant that County Court erred in assessing points against him based on his unsatisfactory conduct while under probation supervision. Defendant pleaded guilty to violating the terms of his probation, and the court thus properly concluded that the assessment of 10 points was warranted (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 16 [2006]). Contrary to the further contention of defendant, the court properly assessed 15 points against him based on his release without any parole or probation supervision (see Risk Assessment Guidelines and Commentary, at 17; *People v Brown-McKnight*, 45 AD3d 1334, lv denied 10 NY3d 701; *People v Donhauser* [appeal No. 1], 37 AD3d 1053, lv denied 8 NY3d 815).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

450

CA 08-01452

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

IN THE MATTER OF JOANNE OUTLEY,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

UPSTATE MEDICAL UNIVERSITY,
RESPONDENT-APPELLANT.

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

GEORGE S. MEHALLOW, NORTH SYRACUSE, FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County
(James P. Murphy, J.), entered April 10, 2008 in a proceeding pursuant
to CPLR article 78. The judgment granted the second amended petition.

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

Memorandum: Respondent contends that Supreme Court erred in
granting the CPLR article 78 second amended petition seeking to annul
its determination to terminate petitioner from her employment. We
agree. Following petitioner's excessive absences and disciplinary
notifications, petitioner entered into a settlement agreement pursuant
to which she was placed on probation for a specified period of time
and was allowed no unauthorized absences. The record establishes that
petitioner violated the settlement agreement with an unauthorized
absence, thus providing respondent with a legally sufficient basis for
terminating her employment that was neither arbitrary nor capricious
(see *Matter of Davis v New York State Div. of Military & Nav. Affairs*,
291 AD2d 778). Petitioner failed to establish that she " 'was
dismissed in bad faith or for an improper or impermissible reason' "
(*Matter of Taylor v State Univ. of N.Y.*, 13 AD3d 1149, 1149).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

463

KA 08-01127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHEN M. HOLBERT, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 29, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that the sentence of a determinate term of incarceration of 15 years constitutes cruel and unusual punishment. We reject that contention, inasmuch as it cannot be said that the sentence is "grossly disproportionate to the crime" (*People v Broadie*, 37 NY2d 100, 111, cert denied 423 US 950; see generally *People v Thompson*, 83 NY2d 477, 484). Also contrary to defendant's contention, the bargained-for sentence is not unduly harsh or severe. Defendant failed to preserve for our review his further contention that the prosecutor's sentencing recommendation was "illusory" (see *People v Harris*, 4 AD3d 770, lv denied 2 NY3d 762) and, in any event, defendant's contention is without merit. The record establishes that the prosecutor complied with the plea agreement in recommending that defendant be sentenced to a determinate term of incarceration of 15 years (see *People v Hannig* [appeal No. 1], 258 AD2d 908, lv denied 93 NY2d 853).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

464

KA 08-00444

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOSEPH M. SANTORO, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Orleans County Court (James P. Punch,
J.), entered December 6, 2007. 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.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

465

KA 08-01047

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

PETER A. ARMITAGE, DEFENDANT-APPELLANT.

SCHLATHER, GELDENHUYS, STUMBAR & SALK, ITHACA (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Ontario County Court (Frederick G. Reed, J.), entered December 18, 2007. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

466

KA 07-00907

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

BRANDON D. YOUNG, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JESSICA BIRKAHN HOUSEL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered January 19, 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: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

467

KA 08-00381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEVON JONES, 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 February 14, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [2]), defendant contends that his waiver of the right to appeal was not knowingly, intelligently and voluntarily entered. We reject that contention. "Defendant's responses to County Court's questions unequivocally established that defendant understood the proceedings and was voluntarily waiving the right to appeal" (*People v Gilbert*, 17 AD3d 1164, 1164, lv denied 5 NY3d 762; see *People v Lopez*, 6 NY3d 248, 256). The valid waiver by defendant of the right to appeal encompasses his challenge to the court's denial of his request for youthful offender status (see *People v Porter*, 55 AD3d 1313, lv denied 11 NY3d 899; *People v Kearns*, 50 AD3d 1514, lv denied 11 NY3d 790; *People v Williams*, 38 AD3d 1232, lv denied 8 NY3d 992, 9 NY3d 927), as well as his challenge to the severity of the bargained-for sentence (see *Lopez*, 6 NY3d at 255-256; *People v Washington*, 53 AD3d 1120, lv denied 11 NY3d 796; *People v Williams*, 49 AD3d 1280).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

469

KA 07-00692

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NOAH R. GLADDING, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 6, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the first degree, murder in the second degree (two counts), and kidnapping 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, murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and kidnapping in the first degree (§ 135.25 [3]). We reject defendant's contention that the indictment was insufficient because the victim's death was improperly "double counted" as an element of both murder in the first degree and kidnapping in the first degree. "It is of no moment that a factual circumstance other than defendant's intent—in this case, the victim's death—is an element of both the murder and the predicate felony" (*People v Lucas*, 11 NY3d 218, 222). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that County Court erred in refusing to suppress his statements to the police made while he was attempting to locate the victim's body. According to defendant, his arraignment was unreasonably delayed, depriving him of his right to counsel and rendering his statements involuntary. We reject that contention. A delay in an arraignment does not automatically cause the right to counsel to attach but, instead, "such a delay bears on the

voluntariness of the confession, and is a factor to be considered in that regard" (*People v Ramos*, 99 NY2d 27, 34). As this Court has noted, "[a]n undue delay in an arraignment alone does not render a confession involuntary" (*People v Prude*, 2 AD3d 1318, 1319, *lv denied* 3 NY3d 646). Here, we conclude that the record of the suppression hearing supports the court's determination that the statements made by defendant were voluntary.

We reject the further contention of defendant that the court erred in denying his challenge for cause to a prospective juror. Although the prospective juror initially expressed "a state of mind that [was] likely to preclude [her] from rendering an impartial verdict based upon the evidence adduced at the trial" (CPL 270.20 [1] [b]), she ultimately stated unequivocally that she could follow the law and be fair and impartial (*see People v Chambers*, 97 NY2d 417, 419; *People v McLaurin*, 27 AD3d 1117, 1118, *lv denied* 7 NY3d 759). We have reviewed defendant's remaining contentions and conclude that they are without merit.

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

470

CAF 08-00309

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

IN THE MATTER OF LIONEL T. VIEIRA,
PETITIONER-RESPONDENT,

V

ORDER

DIANE P. HUFF, RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

LIONEL T. VIEIRA, PETITIONER-RESPONDENT PRO SE.

ROBERT L. GOSPER, LAW GUARDIAN, CANANDAIGUA, FOR BENJAMIN H.

Appeal from an order of the Family Court, Ontario County (Maurice E. Strobridge, J.H.O.), entered February 6, 2008 in a proceeding pursuant to Family Court Act article 6. The order modified a prior order of custody and visitation.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Paoli v Paoli*, 29 AD3d 804; *Matter of Carella v Ferrara*, 9 AD3d 605).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

471

CAF 08-01322

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

IN THE MATTER OF CHRISTOPHER J., III AND
RICHARD J.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTOPHER J., RESPONDENT,
AND DIANE J., RESPONDENT-APPELLANT.

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

CARACCIOLI & NELSON, PLLC, MEXICO (KATHRYN G. WOLFE OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (David J. Roman, J.), entered May 16, 2008 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, revoked a suspended judgment and terminated the parental rights of respondent Diane J. with respect to two of her children.

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

Memorandum: Respondent mother appeals from an order revoking a suspended judgment and terminating her parental rights with respect to two of her children. The mother failed to preserve for our review her contention that Family Court erred in considering her alleged acts and omissions that occurred either prior to the issuance of the suspended judgment or subsequent to petitioner's motion seeking revocation of the suspended judgment (*see Matter of Brittany K.*, ___ AD3d ___ [Feb. 6, 2009]). The court's determination that the mother violated the terms of the suspended judgment is supported by a preponderance of the evidence (*see Matter of Seandell L.*, 57 AD3d 1511) and, contrary to the mother's further contention, the court was not required to conduct a separate dispositional hearing "inasmuch as '[a] hearing on a petition alleging the violation of a suspended judgment is part of the dispositional phase of a permanent neglect proceeding'" (*id.* at 1511; *see Matter of Christyn Ann D.*, 26 AD3d 491, 493). We conclude that the evidence supports the court's determination that the termination of the mother's parental rights with respect to the two children in question is in the best interests of those children (*see Matter of Ronald O.*, 43 AD3d 1351). Finally, the mother did not ask the court to consider post-termination contact with the children in question or

to conduct a hearing on that issue, and we conclude in any event that she "failed to establish that such contact would be in the best interests of the children" (*Matter of Diana M.T.*, 57 AD3d 1492, 1493; see *Matter of Jeremiah BB.*, 11 AD3d 763, 766).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

474

CAF 08-01710

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

IN THE MATTER OF IYONA G.,
RESPONDENT-APPELLANT.

ONEIDA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

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

LINDA M.H. DILLON, COUNTY ATTORNEY, UTICA (RAYMOND F. BARA OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Family Court, Oneida County (James R. Griffith, J.), entered October 10, 2007 in a proceeding pursuant to Family Court Act article 3. The order found that respondent committed an act that, if committed by an adult, would constitute the crime of resisting arrest.

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

Memorandum: This Court granted respondent permission to appeal from a fact-finding order (see Family Ct Act § 1112 [a]), which found that she committed an act that, if committed by an adult, would constitute the crime of resisting arrest (Penal Law § 205.30). We agree with respondent that the petition is facially insufficient and thus that reversal is required. Pursuant to Penal Law § 205.30, "[a] person is guilty of resisting arrest when he [or she] intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself[, herself] or another person." "It is an essential element of the crime of resisting arrest that the arrest be authorized" (*People v Alejandro*, 70 NY2d 133, 135). The petition and supporting depositions filed with the petition allege that respondent resisted arrest while being placed under arrest for "fighting," i.e., disorderly conduct (§ 240.20 [1]). Disorderly conduct is a violation, and "[a] warrantless arrest of a juvenile is authorized only in cases where an adult could be arrested 'for a crime'" (*Matter of Victor M.*, 9 NY3d 84, 87, quoting Family Ct Act § 305.2 [2]). A crime is defined in Penal Law § 10.00 (6) as a misdemeanor or a felony, not a violation (see *Anonymous v City of Rochester*, 56 AD3d 139, 144). Because there is no evidence in the petition or supporting depositions that the police officers who attempted to arrest the 12-year-old respondent believed or had reason

to believe that she was at least 16 years old, the petition and supporting depositions fail to allege that the arrest was "authorized" (*Victor M.*, 9 NY3d at 87; *cf. Matter of Carlton F.*, 25 AD3d 610, 611-612). Thus, the petition and supporting depositions fail to allege that respondent committed an act that would constitute the crime of resisting arrest if committed by an adult (*see People v Peacock*, 68 NY2d 675, 677; *People v Perez*, 47 AD3d 1192, 1993).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

476

CA 08-01946

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

ARTHUR BERRY, PLAINTIFF-APPELLANT,

V

ORDER

UTICA NATIONAL INSURANCE GROUP,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

MICHELLE DETRAGLIA, UTICA, FOR PLAINTIFF-APPELLANT.

STEPHEN J. RANSFORD, PLLC, SYRACUSE (STEPHEN J. RANSFORD OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 21, 2008. The order and judgment granted the motion of defendant Utica National Insurance Group to dismiss the complaint against it.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

477

CA 08-01626

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

BARBARA BENNETT, JANICE MARTINEZ, AND PHYLLIS
DELIA, PLAINTIFFS-RESPONDENTS,

V

ORDER

ELIS J. DELIA, DEFENDANT-APPELLANT.

GETNICK LIVINGSTON ATKINSON GIGLIOTTI & PRIORE, LLP, UTICA (MICHAEL E.
GETNICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (John W.
Grow, J.), entered April 28, 2008. The order granted plaintiffs'
motion for summary judgment on the first cause of action.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs for reasons stated in the decision
at Supreme Court (*Bennett v DeLia*, 19 Misc 3d 1123[A], 2008 NY Slip Op
50827[U]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

480

CA 08-00295

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

JOHN E. MILLER AND OLGA J. MILLER,
PLAINTIFFS-RESPONDENTS,

V

ORDER

JOHN J. LARGETT, TIMOTHY J. KECK AND
DORIS R. KECK, DEFENDANTS-APPELLANTS.

SLYE & BURROWS, WATERTOWN (CHRISTINA E. STONE OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

MCCLUSKY LAW FIRM LLC, ADAMS (TIMOTHY M. MCCLUSKY OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered January 3, 2008 in an action pursuant to RPAPL article 15. The judgment, after a nonjury trial, inter alia, adjudged that the survey prepared by plaintiffs' surveyor accurately establishes the boundary lines of the parties' lands.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

481

CA 06-02384

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

MAGDALEN RICHARDS, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF WILLIAM J.
RICHARDS, DECEASED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ANGELA BARTHOLOMEW, DEFENDANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, SYRACUSE (LOUISE A. BOILLAT OF
COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (SUZANNE MESSER OF COUNSEL),
FOR PLAINTIFF-RESPONDENT MAGDALEN RICHARDS, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF WILLIAM J. RICHARDS, DECEASED.

HARRIS BEACH PLLC, SYRACUSE (LAUREN H. SEITER OF COUNSEL), FOR
PLAINTIFF-RESPONDENT ESTATE OF WILLIAM J. RICHARDS, DECEASED, ON THE
COUNTERCLAIM.

Appeal from an order of the Supreme Court, Cayuga County (Peter E. Corning, A.J.), entered July 25, 2006 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: This action was commenced by plaintiff and plaintiff's decedent, who died during the pendency of the action, whereupon plaintiff was substituted as executrix of decedent's estate. Plaintiff, individually and on behalf of decedent, seeks damages for injuries they sustained when the vehicle operated by decedent in which plaintiff was a passenger collided with a vehicle operated by defendant. Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint. Even assuming, arguendo, that defendant met her initial burden of establishing that she was operating her vehicle in a lawful and prudent manner when the vehicle operated by decedent unexpectedly entered her lane and that there was no evasive action that she could have taken to avoid the accident (see *Frantangelo v Benson*, 294 AD2d 880, 881; *Pilarski v Consolidated Rail Corp.*, 269 AD2d 821), we conclude that plaintiff's expert raised a triable issue of fact on the issue whether defendant could have taken evasive action to avoid the accident (see *Esposito v Wright*, 28 AD3d

1142, 1143-1144).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

483

KA 08-00828

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CHRISTIAN M. BUTLER, 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 (Peter L. Broderick, Sr., J.), rendered August 22, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

485

KA 06-01926

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AARON J. MCCURTY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered October 5, 2005. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

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

Same Memorandum as in *People v McCurty* ([appeal No. 2] ___ AD3d ___ [Mar. 20, 2009]).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

486

KA 06-01927

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AARON J. MCCURTY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered October 5, 2005. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). In appeal No. 2, he appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (§ 160.15 [3]). Addressing first the judgment in appeal No. 2, we reject defendant's contention that the photo array identification by the robbery victim was unduly suggestive. The individuals depicted in the photo array have physical characteristics similar to those of defendant, and "the viewer's attention is not drawn to defendant's photo in such a way as to indicate that the police were urging a particular selection" (*People v Rogers*, 245 AD2d 1041, 1041; see *People v Kirkland*, 49 AD3d 1260, 1261, lv denied 10 NY3d 958, 961). Contrary to defendant's further contention, the People did not present evidence at the *Wade* hearing that the robbery victim had observed defendant while he was handcuffed in the back of a police car prior to viewing the photo array, and "[t]estimony subsequently elicited at trial may not be considered in connection with a challenge to a pretrial suppression determination" (*People v Taylor*, 206 AD2d 904, 904, lv denied 84 NY2d 940; see *People v Williams*, 55 AD3d 1449, 1450). Further, this case does not fall within the "narrow exception to the general rule against challenging a suppression determination based on evidence adduced at trial . . . because 'there was no showing that the additional facts

relied upon could not have been discovered with reasonable diligence before determination of the [suppression] motion' " (*Williams*, 55 AD3d at 1450-1451). We reject the contention of defendant that he was denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147).

Based on our determination in appeal No. 2, we reject defendant's contention that the plea in appeal No. 1 should be vacated (*cf. People v Fuggazzatto*, 62 NY2d 862, 863).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

488

KA 08-00857

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JUSTIN VASQUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 14, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

490

CAF 08-01279

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

IN THE MATTER OF ATHENA MULHOLLAND,
PETITIONER-APPELLANT,

V

ORDER

TODD A. BOSS, RESPONDENT-RESPONDENT.

MATTHEW D. NAFUS, SCOTTSVILLE, FOR PETITIONER-APPELLANT.

WENDY S. SISSON, GENESEO, FOR RESPONDENT-RESPONDENT.

JEFFREY T. MALLABER, LAW GUARDIAN, CALEDONIA, FOR AMY B. AND OWEN B.

BONITA J. STUBBLEFIELD, LAW GUARDIAN, PIFFARD, FOR JENNA B.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered September 28, 2007 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

491

CAF 07-01826

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

IN THE MATTER OF AMONI P., DARREN P.,
FATIMA P., JAMYRAH P., KAJUAN B., AND
TAMEIKA P.

MEMORANDUM AND ORDER

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

DARRYL P., RESPONDENT-APPELLANT.

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

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

ABBIE GOLDBAS, LAW GUARDIAN, UTICA, FOR TAMEIKA P.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered July 20, 2007 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, found that respondent had neglected Tameika P.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed in its entirety.

Memorandum: Petitioner commenced this proceeding alleging, inter alia, that respondent father neglected one of his children. " 'To support a finding of neglect petitioner must prove both parental misconduct and harm or potential harm to a child' by a preponderance of the evidence" (*Matter of Kenneth V.* [appeal No. 2], 307 AD2d 767, 768). Although petitioner established that the father's behavior fell below a minimum standard of care and reasonableness with respect to that child, we agree with the father and the Law Guardian that Family Court erred in determining that petitioner established by a preponderance of the evidence that the father's behavior placed the child's physical, mental or emotional well-being in imminent danger of becoming impaired (see Family Ct Act § 1012 [f] [i] [B]; *Nicholson v Scopetta*, 3 NY3d 357, 368; *Matter of Tajani B.*, 49 AD3d 876, lv denied 11 NY3d 703). The evidence presented at the hearing established that the child resided with suitable relatives while outside of the home and continued to attend school, and there is no evidence that the father prevented the child's return to the home. Moreover, there is no evidence that the child was out of the home for a significant period of time. We therefore reverse the order insofar

as appealed from and dismiss the petition in its entirety.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

492

CAF 08-00038

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

IN THE MATTER OF EDDIE S. AND JOSE T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

EMMA C., RESPONDENT-APPELLANT.

BERNADETTE M. HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC.,
BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR EDDIE S. AND JOSE T.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered December 3, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

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

493

CAF 07-02493

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

IN THE MATTER OF DAKOTA W.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

CHERYL L., RESPONDENT-APPELLANT.

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

JOHN L. RIZZO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF
COUNSEL), FOR PETITIONER-RESPONDENT.

LINDA M. JONES, LAW GUARDIAN, BATAVIA, FOR DAKOTA W.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered October 30, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court

MOTION NO. (0594-A/96) KA 08-02494. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DALE KAHLEY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, whether the court complied with the statutory mandates of CPL 310.30. Upon our review of the trial court proceedings, we conclude that the issue may have merit. Therefore, the order of May 31, 1996 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046 [1989]). Defendant is directed to file and serve his records and briefs with this Court on or before July 17, 2009. PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (625/99) KA 98-08223. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERNEST DUNHAM, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, CENTRA, AND PINE, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (860/01) KA 00-00075. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARIO WOODS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1046/01) KA 99-05118. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONALD COOK, DEFENDANT-APPELLANT. -- Motion for writ of error

coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, CENTRA, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1663/05) KA 03-01672. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LUCAS RODRIQUEZ, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, PERADOTTO, AND PINE, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (53/07) KA 04-01131. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RODERICK FITZGERALD PARDNER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1080/07) KA 04-01819. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER MARTINEZ, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, FAHEY, AND PINE, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1151/07) KA 04-02175. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JESSE JAMISON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (996/08) CA 07-02215. -- SIDNEY D. HOLBROOK, PLAINTIFF-RESPONDENT-APPELLANT, V NATIONAL FUEL GAS DISTRIBUTION CORPORATION, NATIONAL FUEL GAS COMPANY, COMPENSATION COMMITTEE OF BOARD OF

DIRECTORS OF NATIONAL FUEL GAS COMPANY, NATIONAL FUEL GAS COMPANY DEFERRED COMPENSATION PLAN, AND NATIONAL FUEL GAS COMPANY EXECUTIVE RETIREMENT PLAN, DEFENDANTS-APPELLANTS-RESPONDENTS. -- Motion for reargument denied.

PRESENT: SCUDDER, P.J., HURLBUTT, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1238/08) CA 08-01078. -- MARIE STIDHAM, AS TEMPORARY ADMINISTRATRIX OF THE ESTATE OF MATILDA STIDHAM, DECEASED, PLAINTIFF-RESPONDENT, V HARNATH CLERK, M.D., DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1381/08) CA 08-00718. -- DARIA K. PRYSTAJKO, PLAINTIFF-RESPONDENT-APPELLANT, V WESTERN NEW YORK PUBLIC BROADCASTING ASSOCIATION, DEFENDANT-APPELLANT-RESPONDENT, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1444/08) CA 08-00810. -- RONALD BENDERSON, RANDALL BENDERSON AND DAVID H. BALDAUF, AS TRUSTEES OF THE BENDERSON 85-1 TRUST, PLAINTIFFS-APPELLANTS, V ULRICH/34 CHESTNUT STREET, LLC AND NATURE'S WAY ENVIRONMENTAL CONSULTANTS & CONTRACTORS, INC., DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1490/08) CA 08-00487. -- LOUIS E. THYROFF AND VALERIE P. THYROFF, PLAINTIFFS-RESPONDENTS, V NATIONWIDE MUTUAL INSURANCE COMPANY, SHARON EASTMAN, RANDY FERRARO AND DUANE WELDON, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1491/08) CA 08-01299. -- MATTHEW D. ELLIS AND ZAN P. ELLIS, PLAINTIFFS-RESPONDENTS, V CRAIG ALAN EMERSON AND POSTLEWAIT LOGGING COMPANY, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1538/08) TP 08-01256. -- IN THE MATTER OF CLAUDIA CHILDS, PETITIONER, V NEW YORK STATE DIVISION OF HUMAN RIGHTS AND BUFFALO POLICE DEPARTMENT, RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, PERADOTTO, AND GREEN, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1603/08) TP 08-01172. -- IN THE MATTER OF HARPER'S AUTO SERVICE, INC. AND LOUIS SUTTLES, PETITIONERS, V NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, AND GORSKI, JJ. (Filed Mar. 20, 2009.)

MOTION NO. (1632/08) KA 04-00585. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LUIS MARTINEZ, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Mar. 20, 2009.)

KAH 08-01694. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. TROY ALEXANDER, PETITIONER-APPELLANT, V NYS DIVISION OF PAROLE, RESPONDENT-RESPONDENT. -- Order unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Onondaga County, John J. Brunetti, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Mar. 20, 2009.)

KAH 08-00446. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHARLES A. DINGLE, PETITIONER-APPELLANT, V JAMES T. CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Order unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Mar. 20, 2009.)

KA 07-02497. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V IAN HUNTER, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a

guilty plea of burglary in the second degree (Penal Law § 140.25 [2]), and was sentenced to a determinate term of imprisonment of six years and a three-year period of postrelease supervision. Defendant was also ordered to pay restitution in the amount of \$5287.38. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38), and has submitted an affirmation in which he concludes that there are no nonfrivolous issues meriting this Court's consideration. The record reveals that restitution was not part of the plea agreement. This fact raises the issue of whether County Court erred in ordering defendant to pay restitution without affording him an opportunity to withdraw his plea (see *People v Ponder*, 42 AD3d 880, lv denied 9 NY3d 925). Therefore, we relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Livingston County Court, Dennis S. Cohen, J. - Burglary, 2nd Degree).
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Mar. 20, 2009.)

KAH 08-00807. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. SHANNON JONES, PETITIONER-APPELLANT, V WAYNE COUNTY SHERIFF, RESPONDENT-RESPONDENT. -- Order unanimously affirmed. Counsel's motion to be relieved of assignment granted (see *People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Wayne County, John B. Nesbitt, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Mar. 20, 2009.)

KA 08-00622. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC

JONES, 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 Burglary, 3rd Degree). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Mar. 20, 2009.)

KA 07-02070. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HORACE JONES, JR., DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Livingston County Court, Dennis S. Cohen, J. - Criminal Possession Controlled Substance, 4th Degree). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Mar. 20, 2009.)

KA 08-01665. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V VICTOR PETT, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a guilty plea of robbery in the second degree (Penal Law § 160.10 [1]). He was sentenced to a determinate term of imprisonment of nine and one-half years and a five-year period of postrelease supervision. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38), and has submitted an affirmation in which he concludes that there are no nonfrivolous issues meriting this Court's consideration. The record establishes that the trial court failed to advise the defendant of the postrelease supervision component of his sentence during the plea allocution. This fact raises the issue of

whether defendant's plea was knowing, voluntary and intelligent (see *People v Louree*, 8 NY3d 541). Therefore, we relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Herkimer County Court, Patrick L. Kirk, J. - Robbery, 2nd Degree). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Mar. 20, 2009.)