SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 6, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5632 The People of the State of New York, Respondent, Ind. 2904/07

-against-

Timothy Williams,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne Hale of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 29, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony offender whose prior conviction was a violent felony, to concurrent terms of 7½ years, unanimously affirmed.

The court properly denied defendant's request for an agency charge. No reasonable view of the evidence, viewed most favorably to defendant, suggests that he participated in the drug

sale, but nevertheless did so only because he wished to do a favor for the undercover buyer, who was a stranger. On the contrary, defendant's behavior toward the undercover buyer and other prospective drug purchasers was clearly that of a steerer (*see e.g. People v Smith*, 52 AD3d 232 [2008], *lv denied* 11 NY3d 741 [2008]). The court's charge on accessorial liability (*see* Penal Law § 20.00) provided sufficient guidance to the jury regarding the issue of whether defendant was intentionally aiding the person who actually sold the drugs (*see People v Herring*, 83 NY2d 780, 783 [1994]), and there was no need for an additional instruction on the agency defense.

Defendant did not provide a record sufficient to permit review of his claim that the court failed to disclose the contents of a jury note to defense counsel. The record, including the recorded colloquy on a similar note received a short time later, warrants an inference that in an unrecorded conversation, defense counsel was apprised of the contents of the note in question (*see e.g. People v Fishon*, 47 AD3d 591 [2008], *lv denied* 10 NY3d 958 [2008]; *compare People v Tabb*, 13 NY3d 852 [2009]). Accordingly, the court fulfilled its core responsibilities under *People v O'Rama* (78 NY2d 270, 277 [1991]), and there was no mode of proceedings error.

The court lawfully directed a court officer to perform the ministerial act of informing the jury that the court would not provide written instructions (*see People v Jonson*, 27 AD3d 289 [2006], *lv denied* 6 NY3d 895 [2006]).

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5633 Ubaldo Garcia-Rosales, Index 114863/07
Plaintiff-Appellant, 590723/08

-against-

370 Seventh Avenue Associates, LLC,
Defendant-Respondent.
- - - - -
[And A Third-Party Action]

_____

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for appellant.

Farber, Brocks & Zane, LLP, Mineola (Tracy L. Frankel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered July 6, 2010, which, in this personal injury action resulting from a slip and fall on a stairway in a building owned by defendant, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing of entitlement to judgment as a matter of law with evidence that it was an out-of-possession landlord, it was not contractually obligated to make repairs and maintain the premises, and plaintiff's accident was caused by a nonstructural defect, namely, wet and slippery stairs (*see generally Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [2010]).

In opposition, plaintiff failed to raise an issue of fact. Although plaintiff asserted in his bill of particulars that the subject stairs violated Administrative Code of the City of New § 27-375, he failed to provide sufficient evidence to raise an issue as to whether the alleged structural defects caused his accident (*compare Babich*, 75 AD3d at 440). Plaintiff's deposition testimony is bereft of any claim that his fall was caused by the alleged defects of uneven, narrow steps, low handrails, or non-slip treads. Plaintiff's affidavit is insufficient to raise an issue of fact, since it "appears to have been tailored to avoid the consequences" of his testimony (*Gemini v Christ*, 61 AD3d 477, 477 [2009]). Plaintiff's expert affidavit also fails to raise an issue of fact, since it is not based on a physical inspection of the staircase (*see Vazquez v JRG Realty Corp.*, 81 AD3d 555 [2011]).

We reject plaintiff's claim that summary judgment is premature because his expert was denied the opportunity to conduct a physical inspection. The motion court, in a preliminary conference order, permitted plaintiff to have an expert engineer inspect the premises. However, plaintiff never identified an engineer or proposed a date for the inspection.

Accordingly, his claim that further disclosure is needed is unpersuasive given his own inaction (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Glass Check Cashing Corp.*, 177 AD2d 419, 420 [1991]).

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5634 The People of the State of New York, Ind. 69003c/09
Respondent,

-against-

Felix Colome,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered on or about November 30, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 6, 2011

CLERK

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

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5635 The People of the State of New York, Ind. 3858/08
Respondent,

-against-

Mustafa Fagan,
Defendant-Appellant.

_____

Stanley Neustadter, New York (Bobbi Sternheim of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered May 20, 2009, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

After an extensive inquiry, the court properly denied defendant's day-of-trial request for the appointment of substitute counsel. Despite a suitable opportunity to be heard, defendant did not establish good cause for his belated request (*see People v Linares*, 2 NY3d 507, 510-512 [2004]).

Defendant's evidentiary claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5637 In re Brittany Annette M.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Danielle McC.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

Patricia W. Jellen, Eastchester, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

_____

Order, Family Court, New York County (Jody Adams, J.), entered on or about May 3, 2010, which denied respondent mother's motion to vacate a prior dispositional order entered on or about February 4, 2010, which, inter alia, upon the mother's default in appearing at the fact-finding and dispositional hearings, terminated her parental rights on the ground of neglect and transferred custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The mother's motion to vacate her default was properly

denied because she failed to present a reasonable excuse for her failure to appear for the fact-finding and dispositional hearings and a meritorious defense to the petition to terminate her parental rights (*see Matter of Gloria Marie S.*, 55 AD3d 320 [2008], *lv dismissed* 11 NY3d 909 [2009]; *Matter of Kristen Simone V.*, 30 AD3d 174 [2006]). The mother did not present an affidavit in support of her claimed excuses for failing to appear for the hearings, after a pattern of missing prior court appearances, nor did she present any evidence to refute the agency's showing of permanent neglect. She also failed to refute the evidence establishing that termination of parental rights is in the child's best interests (*see Matter of Gloria Marie S.* at 321).

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5638 The People of the State of New York, Ind. 5782/07
Respondent,

-against-

Orestes Montes,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about February 21, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 6, 2011

CLERK

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

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5642 The People of the State of New York, Respondent, Ind. 2685/09

-against-

Craig Magnum, t/n Craig Mangum, etc., Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David E. A. Crowley of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered June 10, 2010, as amended June 24, 2010, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 22 years, unanimously affirmed.

The court properly declined to submit robbery in the third degree as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to defendant, that he committed the lesser offense but not the greater. The victim was certain that defendant displayed what appeared to be a pistol, and there was no identifiable record basis upon which the jury might have reasonably differentiated

between segments of the victim's testimony (*see People v Negron*, 91 NY2d 788, 792-793 [1998]; *see also People v James*, 11 NY3d 886 [2008]). Defendant's alternative theory as to how the victim might have been robbed is entirely speculative.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5643 Ana Maria Vazquez, et al., Index 305715/09
Plaintiffs-Appellants,

-against-

Genovese Drug Stores, Inc.,
Defendant-Respondent.

_____

Rosenberg, Minc, Falkoff & Wolff LLP, New York (Arthur O. Tisi of counsel), for appellants.

Jeffrey Samel & Partners, New York (David Samel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered March 2, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiffs allege that Ana Maria Vazquez was injured when she tripped and fell over a raised portion of a rug in the entranceway of defendant's drugstore. At her deposition, she testified that everything looked "normal," and that she did not see the raised portion until she looked at the rug after her fall.

On summary judgment, defendant demonstrated prima facie entitlement to judgment as a matter of law by showing that it neither created nor had actual notice of any hazardous condition concerning the rug or its placement or that the alleged defect

had been visible and apparent for sufficient time to permit defendant to discover and remedy it. Since there was no evidence of a defective condition concerning the rug, defendant, on summary judgment, was not required to offer evidence as to when it last inspected the rug (*see e.g. Wellington v Manmall, LLC*, 70 AD2d 401 [2010]). In opposition, plaintiffs failed to adduce evidence raising any genuine triable issue of fact (*see Kwitny v Westchester Towers Owners Corp.*, 47 AD3d 495 [2008]). Plaintiff husband's affidavit as to the condition of the rug and its placement was insufficient to do so, inasmuch as his observations at the accident scene were made only after the accident occurred.

We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5644 The People of the State of New York, Respondent, Ind. 6257/09

-against-

Evelyn Laporte, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about March 9, 2010, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5648 The People of the State of New York, Respondent, Ind. 4005/08

-against-

Richard Mullikin, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about March 18, 2009, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5650 The People of the State of New York, SCI 5439/02
Respondent,

-against-

Jamel Burgess,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered June 30, 2009, resentencing defendant to an aggregate term of 8 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). Defendant may not challenge the voluntariness of his underlying guilty plea on this appeal (*see People v Jordan*, 16 NY3d 845 [2011]).

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5651 The People of the State of New York, Respondent, Ind. 1964/09

-against-

Trumaine Turane, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Lawrence K. Marks, J. at suppression hearing; Ruth Pickholz, J. at nonjury trial and sentencing), rendered November 20, 2009, convicting defendant of two counts of criminal sale of a controlled substance in the third degree and two counts of criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony drug offender, to an aggregate term of 2 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The arresting officers' recollections were sufficient to establish that a nontestifying officer observed defendant selling drugs, thereby providing probable cause for defendant's arrest (*see People v Ketcham*, 93 NY2d 416, 419-420 [1999]; *People v Washington*, 87 NY2d 945 [1996]).

Defendant did not preserve his challenge to the legal sufficiency of the evidence and we decline to review it in the interest of justice. As an alternative holding, we find that the court's verdict was based on legally sufficient evidence. We also find that it was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

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

ENTERED: OCTOBER 6, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5652 In re Latif E.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about January 12, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted grand larceny in the fourth degree, and placed him on probation for a period of 9 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and

imposing a term of probation. In light of the violent nature of the underlying offense and appellant's poor school performance, this was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: OCTOBER 6, 2011

CLERK