SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 29, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15614 In re the State of New York, Index 30012/11
Petitioner-Respondent,

-against-

Kenneth W.,
Respondent-Appellant.

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Marvin Bernstein, Mental Hygiene Legal Service, New York (Margo Flug of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for respondent.

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Order, Supreme Court, New York County (Daniel McCullough, J.), entered on or about January 28, 2014, which, upon a jury verdict that respondent suffers from a mental abnormality, determined, after a dispositional hearing, that he is a dangerous sex offender requiring confinement in a secure treatment facility, unanimously reversed, on the law, without costs, and the petition dismissed.

The verdict that respondent suffers from a mental abnormality is based on legally insufficient evidence. Evidence

of an independent mental abnormality diagnosis is required to establish a mental abnormality within the meaning of Mental Hygiene Law article 10 (*see Matter of State of New York v Donald DD.*, 24 NY3d 174, 190-191 [2014]). Here, we find that based on the trial evidence, a rational factfinder could not conclude that sexual preoccupation is an independent mental abnormality. The State failed to present evidence that sexual preoccupation is a condition that predisposes one to commit a sex offense and results in serious difficulty in controlling the sexually offending conduct (*see Matter of State of New York v Gen C.*, __AD3d__, 2015 NY Slip Op 04041 [1st Dept 2015]; Mental Hygiene Law § 10.03[i]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Manzanet-Daniels, JJ.

15168 Precast Restoration Services, LLC, Index 104029/10
Plaintiff-Respondent,

-against-

Global Precast, Inc.,
Defendant-Appellant,

1240 First Avenue, LLC, et al.,
Defendants.

_____

Sheats & Bailey, PLLC, Brewerton (Edward J. Sheats of counsel), for appellant.

Tesser & Cohen, New York (Stephen Winkles of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 22, 2014, which, among other things, granted plaintiff's motion for summary judgment on its Prompt Payment Act cause of action against defendant Global Precast, Inc., awarded plaintiff damages, plus interest, costs and disbursements, and severed the action as to defendant, unanimously reversed, on the law, without costs, the motion denied, and the award and severance vacated.

In this action alleging, among other things, defendant's violation of the Prompt Payment Act (General Business Law § 756 *et seq.*), defendant did not waive its affirmative defenses by

failing to disapprove plaintiff's invoices (*see Donninger Constr., Inc. v C.W. Brown, Inc.*, 113 AD3d 724, 725 [2d Dept 2014]). Because plaintiff failed to establish an absence of material issues of fact as to the merits of those defenses, its motion should have been denied, without regard to the sufficiency of defendant's proof in opposition to the motion (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Even if plaintiff had met its burden, defendant submitted admissible evidence raising material issues of fact (*see Metro Found. Contrs., Inc. v Marco Martelli Assoc., Inc.*, 78 AD3d 594 [1st Dept 2010]), including whether the two oral agreements at issue provided for certain billing cycles that superseded the provisions of the Act (*see* General Business Law § 756-a[1]), and whether plaintiff improperly billed defendant on a time-and-materials basis in violation of alleged provisions of the agreements requiring price-per-square-foot billing (*see* § 756-a[2][a][ii][4]). Further, an issue of fact exists as to whether plaintiff failed to submit "contractually required documentation"

with the invoices, thereby excusing defendant of its obligation to approve or disapprove the invoices within 12 business days (§ 756-a[2][a][ii]; *see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15700 The People of the State of New York, Ind. 6882/90
Respondent,

-against-

Bernell Gould,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about December 2, 2009, which denied defendant's CPL 440.20 motion to set aside a sentence and for resentencing, unanimously reversed, on the law, the motion is granted, the sentence is vacated and the matter is remanded for further proceedings.

As the People concede, defendant's 1991 sentence was invalid as a matter of law because he was incorrectly adjudicated a second felony offender rather than a second violent felony offender (*see People v Scarbrough*, 66 NY2d 673 [1985], *revg on dissenting mem of Boomer, J.*, 105 AD2d 1107, 1107-1109 [4th Dept 1984]). However, contrary to the People's argument, the error cannot be corrected in this case without a new sentencing

proceeding. The existing predicate felony information sets forth a drug conviction and cannot support a second violent felony offender adjudication, which would require the filing of a new information, followed by proceedings thereon. The issue of whether resentencing in this case would affect the sequentiality of the convictions supporting defendant's 1997 persistent violent felony offender adjudication is not before us on this appeal.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15702 In re Angel D.,
Petitioner-Respondent,

-against-

Nieza S.,
Respondent.

- - - - -

Luis D.,
Nonparty Appellant.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Building Service 32BJ Legal Services Fund, New York (Analiz M. Velazquez of counsel), for respondent.

_____

Order, Family Court, New York County (Marva Burnett, Referee), entered on or about May 7, 2014, which, to the extent appealed from, denied respondent mother's request to relocate with the parties' child to Florida, unanimously affirmed, without costs.

Respondent mother has not appealed from the order denying her request to relocate. To the extent the appellant child is aggrieved by the order (*see Matter of Baxter v Borden*, 122 AD3d 1417 [4th Dept 2014], *lv denied* 24 NY3d 915 [2015]), we find that the court's determination that relocation would not be in the child's best interests has a sound and substantial basis in the record (*see Matter of Tropea v Tropea*, 87 NY2d 727, 741 [1996];

see generally Matter of David J.B. v Monique H., 52 AD3d 414, 415 [1st Dept 2008]). There was valid evidentiary support for the conclusion that relocation would be damaging to the child's relationship with the father (*see Matter of Frederick A. v Lisa C.*, 121 AD3d 495 [1st Dept 2014]). Although a slight economic advantage could be realized by the move to Florida and the child expressed a preference for relocation through his attorney, the referee properly concluded that any benefits of relocation would not outweigh the harm resulting from the disruption to the child's relationship with his father (*see Matter of Charmaine L. v Kenneth D.*, 76 AD3d 910 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15703 [M-4189] The People of the State of New York, Respondent, Ind. 1015/09

-against-

Sahim Lucas,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered May 14, 2012, as amended June 5, 2012, and June 26, 2012, convicting defendant, after a jury trial, of sex trafficking and promoting prostitution in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 12½ to 25 years and 7½ to 15 years, unanimously affirmed.

The removal, as a security measure, of the pro se defendant's pen during a portion of the trial does not provide any basis for reversal. Defendant represented himself at trial with the assistance of a legal advisor. During the prosecutor's summation, a court officer directed the legal advisor to confiscate defendant's pen, based on indications that defendant had become "agitated." After the summation and a recess,

defendant and his advisor objected in general terms to the removal of the pen, which was apparently not returned to defendant throughout the remainder of the trial, except briefly to sign the verdict sheet. Although defendant called the jurors' attention to the confiscation of the pen, the present record does not establish that they were aware of it before he did so.

Defendant failed to preserve any of his challenges to the removal of his pen, including that he was deprived of his right to represent himself, that the court improperly delegated a judicial function to the court officer, that he was deprived of his right to a fair trial since the confiscation improperly conveyed to the jury that he was violent and dangerous, and that the court should have given a curative instruction (*see People v McLean*, 15 NY3d 117, 121 [2010]). We decline to review these arguments in the interest of justice. As an alternative holding, we reject them on the merits, and further find that any error was harmless (*see People v Crimmins*, 36 NY2d 230, 242 [1975]), in light of the minimal prejudice, if any, resulting from the confiscation of defendant's pen at the late stage of trial, given that the court permitted defendant to dictate any notes to his legal advisor (*see People v Hendy*, 159 AD2d 250 [1st Dept 1990], *lv denied* 76 NY2d 893 [1990]), as well as the overwhelming

evidence of guilt. We have considered and rejected defendant's assertion that harmless error analysis is inapplicable (*see People v Clyde*, 18 NY3d 145, 153 [2011], *cert denied* __ US __, 132 S Ct 1921 [2012]).

M-4189 *People v Sahim Lucas*

Motion to hold appeal in abeyance denied.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15704 The People of the State of New York, Ind. 5935/12
Respondent,

-against-

Stephanie Lynch,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Sharmeen Mazumder of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya-McGinn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered November 25, 2013, convicting defendant, after a jury trial, of grand larceny in the fourth degree, endangering the welfare of a child, and possession of burglar's tools, and sentencing her, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

Defendant was not deprived of a fair trial by the prosecutor's summation comments on defendant's failure to make an exculpatory statement. The prosecutor did not make an improper reference to a defendant's failure to speak or cooperate when confronted by law enforcement officials, which is recognized to be of little probative value and to raise risks of substantial prejudice (*see People v De George*, 73 NY2d 614, 618-19 [1989]).

Rather, it was a reference to defendant's interactions with store employees who had accused her of shoplifting. In any event, the court provided a suitable remedy by cautioning the jury against shifting the burden of proof, and the court properly exercised its discretion in denying defendant's requests for a mistrial or a more elaborate curative instruction.

Defendant was properly adjudicated a second felony offender based on an out of state conviction that was the equivalent of a New York felony conviction. The court properly consulted the accusatory instrument, which establishes that the predicate crime involved the sale of cocaine and not marijuana (*see People v West*, 58 AD3d 483 [1st Dept 2009], *lv denied* 12 NY3d 822 [2009]; *People v Bell*, 259 AD2d 429 [1st Dept 1999], *lv denied* 93 NY2d 922 [1999]).

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15706 In re Ganjel P.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about April 11, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The fact-finding determination was supported by legally sufficient evidence and 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 credibility determinations. The evidence established that appellant was the initial aggressor, and it disproved his justification defense beyond a reasonable doubt.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15707 The People of the State of New York, Ind. 2355/11
Respondent,

-against-

Louis Petithomme,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Claudia B. Flores of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael Obus, J. at suppression hearing; Daniel McCullough, J. at jury trial and sentencing), rendered August 10, 2012, as amended August 22, 2012, convicting defendant of identity theft in the first and second degrees and forgery in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

The court properly denied defendant's motion to suppress a cell phone recovered from his person at the time of his arrest. There is no basis for disturbing the court's credibility determinations. Defendant's pattern of behavior, both before and after being stopped by the police, strongly indicated that he was a participant in his companion's fraudulent credit card purchase,

and provided probable cause for defendant's arrest (*see e.g. People v Arriaga*, 204 AD2d 96 [1st Dept 1994]). In order to establish probable cause, the People were not required to prove accessorial liability under Penal Law § 20.00 beyond a reasonable doubt.

The court properly exercised its discretion in admitting evidence of an uncharged attempted online purchase involving the same fraudulently obtained credit card that was used in the charged crime. This evidence was relevant to establish defendant's participation in the charged crime and his intent to defraud (*see e.g. People v Scott*, 85 AD3d 481 [1st Dept 2011], *lv denied* 17 NY3d 821 [2011]). The probative value of this evidence outweighed any potential for prejudice. Defendant's claim that the court erred in failing to give a limiting instruction is unpreserved, and we decline to review it in the interest of justice. Even if a limiting instruction would have been

appropriate, defendant may have had strategic reasons to avoid highlighting this evidence (*see People v Wilson*, 123 AD3d 626 [1st Dept 2014]).

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15708 The People of the State of New York, Ind. 4896/11
Respondent,

-against-

Leif Lopez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Andrew C. Fine of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered April 17, 2012, as amended April 20, 2012 and May 25, 2012, convicting defendant, after a jury trial, of criminal possession of stolen property in the third degree, grand larceny in the fourth degree (two counts) and scheme to defraud in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion following a single reference, in an unanswered question by the prosecutor, to defendant being visited at "Rikers" by a defense witness. The court provided a sufficient remedy when it struck the reference from the record

and instructed the jury to disregard it (*see e.g. People v Dewitt*, 126 AD3d 579 [1st Dept 2015]). Moreover, this brief mention of pretrial incarceration was not unduly prejudicial under the circumstances of the case.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15710 In re Diamond B.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about January 15, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of criminal trespass in the second and third degrees and false personation, and placed her with the Office of Children and Family Services for a period of 12 months, unanimously modified, on the law, to the extent of vacating the finding as to criminal trespass in the third degree and dismissing that count of the petition, and otherwise affirmed, without costs.

The court properly denied appellant's motion to suppress her statement to the police, in which she gave a false name,

resulting in the false personation charge (Penal Law § 190.23). The police observed appellant, a young teenager, in a stairwell late at night while in the company of an apparent drug addict. Although appellant's activities were not necessarily indicative of criminality, the record shows that the police officer had an objective, credible reason to make a minimally intrusive inquiry into whether appellant lived in the building. The record also demonstrates that a reasonable person in appellant's position would not have thought she was in custody when the officer asked her name and date of birth (*see People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). In any event, these pedigree questions did not require *Miranda* warnings, even though the officer warned appellant, as required by the false personation statute, that providing false information would result in an additional charge (*see People v Ligon*, 66 AD3d 516 [1st Dept 2009], *lv denied* 14 NY3d 889 [2010]).

The court's finding regarding false personation and second-degree criminal trespass was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). However, with regard to third-degree trespass, there was insufficient evidence to support

the element of "conspicuously posted rules or regulations governing entry and use" of a housing project (Penal Law § 140.10[e]; *see Matter of James C.*, 23 AD3d 262 [1st Dept 2005]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15711 In re Damian Esteban, Index 651904/13
Petitioner-Respondent,

-against-

The Department of Education of the City School District of the City of New York,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for appellant.

Eisner & Associates, P.C., New York (Benjamin N. Dictor of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered September 20, 2013, granting the petition to vacate the portion of the arbitrator's determination that imposed the penalty of termination of petitioner's employment as a public school teacher, and remanding for imposition of an appropriate lesser penalty, unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

Petitioner, a school teacher employed by respondent Department of Education (DOE), entered a courthouse in possession of a quantity of heroin, which led to his arrest and widespread negative publicity. DOE brought disciplinary charges against

petitioner, which were submitted for determination to an arbitrator pursuant to Education Law § 3020-a. The arbitrator sustained certain of the specifications and determined that the appropriate penalty for petitioner's misconduct was dismissal. Supreme Court granted the petition to vacate the arbitrator's penalty determination. Upon DOE's appeal, we reverse.

An arbitration award determining an employment dispute in public education may not be vacated unless "it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003], quoting *Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). Here, it cannot be said that it was irrational, against public policy, or ultra vires for the arbitrator to determine that petitioner's public possession of heroin warranted the penalty of dismissal. Nor is the termination of employment as a penalty for such misconduct "so disproportionate to the offense[] as to be shocking to the court's sense of fairness" (*Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 569 [1st Dept 2008]). Petitioner's reliance on *City School Dist. of City of*

N.Y. v Lorber (50 AD3d 301 [1st Dept 2008]) is unavailing, as the order we affirmed in that case confirmed the arbitrator's penalty determination.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15712 Katarina Storfer, Index 350237/07
Plaintiff-Respondent,

-against-

Doron Storfer,
Defendant-Appellant.

_____

Jonathan E. Kroll & Associates PLLC, Garden City (Jonathan Kroll of counsel), for appellant.

Kaminer, Kouzi & Associates LLP, New York (Jennifer Kouzi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about January 13, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motions to modify custody and for an award of counsel fees, unanimously affirmed, without costs.

There is no dispute that the child is being raised in the Jewish faith. The motion court properly found, however, that it could not determine the meaning and intention of the parties' agreement to raise their child in "accordance with the tenets of the Modern Orthodox Jewish faith." The trial court correctly determined that this cannot be decided by neutral principles of law or without reference to religious doctrine and was thus prohibited from entertaining the defendant father's enforcement

application (*see Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007]; *see also Madireddy v Madireddy*, 66 AD3d 647, 648 [2d Dept 2009], *appeal dismissed* 14 NY3d 765 [2010]).

Defendant failed to make an evidentiary showing sufficient to warrant a hearing on his custody modification request (*see Matter of Monaco v Monaco*, 116 AD3d 452, 453 [1st Dept 2014]). He offered no evidence that a change from the joint custody, including equal parenting time and alternating weekends, to which the parties had agreed, would be in the best interests of their child. To the extent the parties may have voluntarily veered from the parenting plan outlined in their agreement on some occasions, this is not a basis for modifying the agreed upon custody arrangement.

The court providently exercised it discretion in denying an award of counsel fees (see Domestic Relations Law §§ 237[b], 238).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15713 The People of the State of New York, Ind. 2308/08
Respondent,

-against-

Ross Campbell,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Andrew J. Dalack of counsel), and Leavitt & Kerson, Forest Hills (Paul E. Kerson of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Wayne Ozzi, J.), rendered November 23, 2010, convicting defendant, after a jury trial, of sex trafficking, promoting prostitution in the second degree, rape in the first degree, criminal sexual act in the first degree, and kidnapping in the second degree, and sentencing him to an aggregate term of 25 years and a $2500 fine, unanimously modified, on the law, to reduce the crime victim assistance fee from $25 to $20, and otherwise affirmed.

The verdict was based on legally sufficient evidence and 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 jury's credibility determinations. The evidence supported all of

the elements of each crime at issue, including the requisite forcible compulsion.

Defendant did not preserve his Confrontation Clause and related arguments concerning events that occurred during lineups, and we decline to review them in the interest of justice. As an alternative holding, we find that although a reference to an identification by a nontestifying victim should have been excluded, the error was harmless beyond a reasonable doubt (*see People v Eastman*, 85 NY2d 265, 276-278 [1995]) in light of the overwhelming evidence of guilt and the fact that identity was not a fundamental issue in the case.

Defendant's ineffective assistance of counsel claims are generally unreviewable on direct appeal because they involve matters of strategy not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant

has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence. The record does not support defendant's contention that the court believed it was obligated to impose a fine. We reduce the crime victim assistance fee in conformance with the statute in effect when the crimes were committed.

The arguments contained in the supplemental brief filed by additional counsel are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find them to be without merit.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15714 In re Jonathan Jacobs, Index 401303/13
Petitioner-Respondent,

-against-

New York State Division of
Human Rights,
Respondent-Petitioner,

Lillie Davis Staton, et al.,
Respondents.

_____

Michael H. Zhu, New York, for petitioner-respondent.

Caroline J. Downey, State Division of Human Rights, Bronx (Michael K. Swirsky of counsel), for respondent-petitioner.

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Order of respondent New York State Division of Human Rights (DHR), dated July 17, 2013, which found that petitioner (Jacobs) engaged in housing discrimination against respondent Lillie Davis Staton based on her age and disability in violation of the State Human Rights Law, directed Jacobs and Jacobs RE LLC to pay $10,000 in compensatory damages for mental pain and suffering and $10,000 in punitive damages to Staton, and $55,000 in civil fines and penalties to the State of New York (the proceeding having been transferred to this Court by order of Supreme Court, New York County [Donna M. Mills, J.], entered November 14, 2013), unanimously confirmed, without costs, Jacobs's petition for

judicial review of the order dismissed, and DHR's cross petition to enforce the order granted.

As a threshold matter, Supreme Court properly transferred the proceeding to this Court (*see* Executive Law § 298; *see e.g. Matter of New York State Div. of Human Rights v Neighborhood Youth & Family Servs.*, 102 AD3d 491 [1st Dept 2013]; *Matter of State Div. of Human Rights v 1368 E. 94th St. Corp.*, 293 AD2d 752, 753 [2d Dept 2002]). In any event, as Jacobs recognizes, we may retain jurisdiction in the interest of judicial economy (*see e.g. Matter of New York State Div. of Human Rights v Village Plaza Family Rest., Inc.*, 59 AD3d 1038, 1038 [2d Dept 2009]).

DHR's findings are supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). Jacobs, who did not appear at the adjourned hearing in this proceeding, failed to rebut a prima facie showing that he created a hostile housing environment (*see Matter of State Div. of Human Rights v ARC XVI Inwood, Inc.*, 17 AD3d 239 [1st Dept 2005]). He failed to show good cause for setting aside his default (Executive Law § 297[4][b]; 9 NYCRR 465.11[e]).

The award of compensatory damages for mental anguish is proper (*see* Executive Law § 297[4][c][iii]; *see Matter of New York State Div. of Human Rights v Neighborhood Youth*, 102 AD3d

491 [1st Dept 2013]). Substantial evidence supports the award of punitive damages (*see* Executive Law § 297[4][c][iv]) and the assessment of civil fines and penalties for "an unlawful discriminatory act which is found to be willful, wanton or malicious" (*see id.* § 297[4][c][vi]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15716 The People of the State of New York, Respondent, Ind. 5850/07 4346/08

-against-

Natavia Lowery, Defendant-Appellant.

_____

Paul S. Brenner, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 3, 2010, convicting defendant, after a jury trial, of murder in the second degree, three counts of grand larceny in the third degree, two counts of identity theft in the first degree, six counts of petit larceny, three counts of forgery in the second degree and six counts of grand larceny in the fourth degree, and sentencing her to an aggregate term of 27⅓ years to life, with restitution in the amount of $31,500, unanimously affirmed.

The court properly denied defendant's motion to suppress statements. There is no basis for disturbing the court's credibility determinations. The evidence did not support defendant's assertion that when she made statements, an attorney

had entered the case, thereby causing the attachment of defendant's right to counsel (*see People v West*, 81 NY2d 370, 378-379 [1993]; *People v Rosa*, 65 NY2d 380 [1985]; *People v Henriquez*, 214 AD2d 485, 486 [1st Dept 1995], *lv denied* 86 NY2d 873 [1995]; *see also People v Grice*, 100 NY2d 318, 323-24 [2003]). On the contrary, the evidence established that defendant unambiguously rejected her stepfather's efforts to provide her with legal representation.

The court properly exercised its discretion denying defendant's midtrial request to retain new counsel, as she made no showing of compelling circumstances to justify such a request (*see e.g. People v Hansen*, 37 AD3d 318 [1st Dept 2007]). Defendant's complaints about her team of attorneys essentially amounted to differences over strategy. Furthermore, the request was made after the trial had already proceeded for several weeks

and numerous witnesses had testified. The court was appropriately skeptical of the proposed substitute attorney's prediction that he could be ready to take over this complex trial after only a few days of delay.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15717 The People of the State of New York, Ind. 3035/00
Respondent,

-against-

Damon Bonnemere,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered May 29, 2012, resentencing defendant to an aggregate term of 22 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 (*People v Lingle* (16 NY3d 621 [2011]; *see also People v Brinson*, 21 NY3d 490 [2013]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15718 In re Renaldo R.,
Petitioner-Appellant,

-against-

Chanice R.,
Respondent-Respondent.

_____

Bruce A. Young, New York, for appellant.

Carol L. Kahn, New York, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

_____

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about May 28, 2014, which, after a fact-finding hearing, dismissed the custody petition for lack of jurisdiction, and vacated the stay of the petition granted April 21, 2014, unanimously affirmed, without costs.

The Referee properly determined that New York State lacks subject matter jurisdiction to decide the custody petition, since petitioner failed to show that the children had been living in this State for at least six consecutive months immediately before the commencement of the proceeding or that a New York court had previously made a custody determination as to the children (*see* Domestic Relations Law §§ 76[1]; 76-a[1]). The conflicting

testimony about the exact date on which the children arrived in New York was an issue of fact for the Referee to resolve, and the Referee's findings are entitled to deference (*see Matter of Irene O.*, 38 NY2d 776 [1975]; *Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]). The fact that the Referee issued temporary orders of custody to petitioner for educational purposes is of no moment, since the issue of subject matter jurisdiction may be raised at any time (*see Langdon v Mohr*, 99 AD2d 957 [1st Dept 1984], *affd* 64 NY2d 819 [1985]).

The Referee's determination that in any event Family Court would decline to exercise its jurisdiction because Virginia is the more appropriate forum is supported by the record, which shows that two of the children have visited New York only once in their lifetimes, in 2009, that evidence as to the children's care, well-being, and personal relationships is more readily available in Virginia, and that respondent is employed in that State and it would be unduly burdensome for her to travel with the children to New York to litigate the custody petition (*see* Domestic Relations Law § 76-f[2]; *Matter of Eric R. v Celena P.*, 121 AD3d 524 [1st Dept 2014]). Petitioner's contention that the Referee failed to provide him with notice that it would be

considering the issue of inconvenient forum is unavailing, since inconvenient forum is an aspect of the jurisdictional inquiry (*see* Domestic Relations Law §§ 76[1]; 76-f).

Petitioner's contention that the Referee violated Domestic Relations Law § 76-f(3) is belied by the record, which establishes that, after the Referee stayed these proceedings on condition that respondent promptly commence child custody proceeding in Virginia, as required by the statute, respondent commenced proceedings in that State.

Petitioner's contention that the Referee was biased against him is unpreserved and, in any event, unsupported by the record.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15719 The People of the State of New York, Ind. 4922/12
Respondent,

-against-

Thomas Woodvens,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about July 10, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant'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: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15720 In re Karl Geiger, etc., et al., Petitioners,

-against-

New York State Department of Labor, et al., Respondents.

Index 100296/14

_____

John D. Rapoport, Yonkers, for petitioners.

Eric T. Schneiderman, Attorney General, New York (Haeya Yim of counsel), for respondents.

_____

Determination of respondent New York State Industrial Board of Appeals (IBA), dated January 16, 2014, which, after a hearing, among other things, affirmed respondent New York State Department of Labor's (DOL) orders insofar as they found that petitioners failed to pay an employee overtime wages, failed to furnish true and accurate payroll records, and failed to provide each employee with a complete wage statement with every payment of wages for a certain time period, and insofar as the orders imposed interest and civil penalties for the violations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan B. Lobis, J.], entered May 9, 2014), dismissed, without costs.

IBA's determination is supported by substantial evidence, including the testimony of petitioners' employee and DOL's investigators concerning overtime that was not reflected in petitioners' payroll records (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). There is no basis to disturb IBA's credibility determinations (*id.*). Although the union contract provided that overtime was required to be authorized, petitioners' testimony indicated an awareness of the apparently unauthorized overtime, which IBA properly found was compensable to the employee (*see Chao v Gotham Registry, Inc.*, 514 F3d 280, 288-290 [2d Cir 2008]).

We have considered petitioners' other arguments and find them unavailing.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15721 In re Miriam Davidson, Index 500017/13
Petitioner,

-against-

Hon. Laura Visitación-Lewis,
etc., et al.,
Respondents.

_____

Tesser, Ryan & Rochman, LLP, New York (Lewis Tesser of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for Hon. Laura Visitación-Lewis, respondent.

Miller and Malone, P.C., Garden City (Tammy R. Lawlor of counsel), for Stephen W. Schlissel, respondent.

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Petition pursuant to CPLR article 78 to annul an order, Supreme Court, New York County (Laura Visitación-Lewis, J.), entered December 12, 2014, in *Matter of Application of Stephen W. Schlissel, Esq., for the Appointment of a Guardian of Janet Cox Rearick Hitchcock, an Alleged Incapacitated Person* (Index No. 500017/13), which found petitioner guilty of two citations of criminal contempt of court, and ordered her, among other things, to pay a fine of $500 for each citation by January 7, 2015, unanimously granted, without costs, and the contempt citations annulled.

During a one-day hearing pursuant to Mental Hygiene Law article 81, respondent ordered petitioner to be quiet, and warned petitioner that if she continued interrupting the court, she would be found in contempt. Later in the hearing, respondent issued the two contempt citations when petitioner spoke before the court had completed its statements. These summary contempt findings were not supported by sufficient evidence; counsel's perceived misconduct can be best described as petty transgressions, in which counsel prematurely sought to explain her client's position or dispute a factual assertion by the court. Counsel's conduct did not rise to the level contemplated by 22 NYCRR § 604.2(a)(1). Since the record fails to support the finding, there is no basis to direct any additional proceedings; we need only annul the contempt citations. Notably, however, even if the nature of counsel's conduct had justified a contempt finding under 22 NYCRR § 604.2(a)(1), respondent failed to comply with 22 NYCRR § 604.2(a)(3), which requires that a person accused of contempt be afforded "a reasonable opportunity to make a statement in his defense or in extenuation of his conduct." "The record before us is devoid of 'the essential proffer in open court' to the accused prior to imposition of the sanction" (*Matter of Roajas v Recant*, 249 AD2d 95, 96 [1st Dept 1998],

quoting *Matter of Katz v Murtagh*, 28 NY2d 234, 238 [1971]). We also agree with petitioner's assertion that she was deprived of her constitutional right to due process by the lack of an opportunity to be heard on this matter affecting her reputation (*see Wisconsin v Constantineau*, 400 US 433, 437 [1971]). However, we reject petitioner's request to annul the order on the grounds that the contempt findings were unsupported by sufficient evidence and constituted an abuse of discretion. Moreover, petitioner's assertion that she purged her contempt by sending a letter of apology to respondent several months afterwards is unavailing (*see People v Williamson*, 136 AD2d 497, 498 [1st Dept 1988]; *cf. Matter of Kuriansky v Ali*, 176 AD2d 728 [2d Dept 1991], *lv dismissed* 79 NY2d 848 [1992]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15722 The People of the State of New York Ind. 5925/08
Respondent,

-against-

Janethza Cruz,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Lorraine Maddalo of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered October 21, 2010, convicting defendant, after a jury trial, of assault in the first degree, and sentencing her to a term of five years, unanimously affirmed.

Defendant did not preserve her challenge to the sufficiency of the evidence supporting the element of serious physical injury, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The element of serious physical injury was satisfied by evidence supporting the conclusion that the wound inflicted by defendant caused serious disfigurement to the victim's face (*see People v*

McKinnon, 15 NY3d 311, 315-316 [2010]). Photographs, medical testimony, testimony from the victim, and reasonable inferences to be drawn from the evidence support the conclusion that at the time of trial, years after the crime, the victim still had a prominent and distressing facial scar (*see e.g. People v Matos*, 121 AD3d 545 [1st Dept 2014], *lv denied* 24 NY3d 1121 [2015]).

Defendant's challenges to evidence concerning a knife found at the scene of the crime, to evidence of her consciousness of guilt, to the prosecutor's summation, and to the court's charge are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits, except that we find that while a jury charge on consciousness of guilt would have been appropriate, any error was harmless (*see People v Valtin*, 284 AD2d 203 [1st Dept 2001], *lv denied* 97 NY2d 643 [2001]).

Defendant's ineffective assistance of counsel claims are generally unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including matters of strategy, such as counsel's decision to introduce into evidence the knife that defendant now claims to be inadmissible (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant

has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. While defendant faults her attorney for failing to make various objections, we conclude that those objections would have been futile.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15723 In re Community Related Services, Inc., Petitioner-Respondent, Index 113740/09

-against-

New York State Department of Health, et al., Respondents-Appellants.

_____

Eric T. Schneiderman, Attorney General, New York (Bethany A. Davis Noll of counsel), for appellants.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 16, 2014, which denied respondents' motion to vacate an order, same court and Justice, entered January 30, 2014, confirming a special referee's report, and a judgment, entered February 4, 2014, same court and Justice, as amended on or about May 5, 2014, in petitioner's favor in the amount of $7,458,017.98, unanimously modified, on the law, to grant so much of the motion as sought to vacate the portion of the January 30, 2014 order that directs the entry of a money judgment, replace that language with an order directing respondents to reimburse petitioner for improperly denied Medicaid claims, in the amount of $7,458,017.98, to grant so much

of the motion as sought to vacate the amended judgment, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Although the reimbursement of monies withheld as a result of respondents' denial of Medicaid claims is incidental to the primary relief sought by petitioner and granted by the court (*see* CPLR 7806; *Matter of Gross v Perales*, 72 NY2d 231 [1988]), the court exceeded its jurisdiction in directing the entry of a money judgment against respondents (*see* Court of Claims Act § 9[4]; *see also* CPLR 5207). Accordingly, we modify the order on appeal to provide petitioner with the appropriate relief.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15724 In re Omar B.,
Petitioner-Respondent,

-against-

Shantell E.,
Respondent-Appellant.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about January 13, 2014, which granted sole custody of the subject child to petitioner father, unanimously affirmed, without costs.

The record overwhelmingly supports modification of the prior custody order to insure the child's best interests (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). The child is well bonded with petitioner and has been thriving under his care for the past three years. Respondent, who has repeatedly put the child in

harm's way, failed to establish that she will be able to place the child's needs before her own and provide for his welfare and happiness.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15725 The People of the State of New York, Ind. 1406/13
Respondent,

-against-

Byron White,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Claudia B. Flores of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 17, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the second degree and assault in the first degree, and sentencing him to concurrent terms of 4 to 12 years and 10 years, respectively, unanimously modified, on the law, to the extent of vacating the sentence on the assault conviction only, and remanding for resentencing on that conviction, and otherwise affirmed.

As the People concede, defendant is entitled to resentencing for an express consideration of a youthful offender determination on his assault conviction (*see People v Rudolph*, 21 NY3d 497 [2013]).

However, with respect to the conspiracy conviction,

defendant is not a "youth" under the statute (CPL 720.10[1]), because the plea allocution establishes that defendant remained part of the conspiracy after he turned 19 (*see People v Parks*, 23 AD3d 153, 154 [1st Dept 2005]), and his arguments to the contrary are unavailing. Defendant made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]), which forecloses his claim that his sentence on this conviction is excessive. In any event, regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the sentence on the conspiracy conviction.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15726 The People of the State of New York, Ind. 6053/10
Respondent,

-against-

Kerry Rainey,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 19, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

As the People concede, defendant is entitled to resentencing

for an express consideration of a youthful offender determination (*see People v Middlebrooks*, 25 NY3d 516 [2015]; *People v Rudolph*, 21 NY3d 497 [2013]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15727 SB Coughlin, Inc., Index 603866/09
Plaintiff-Appellant,

-against-

Ivonne Cabrera, et al.,
Defendants-Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Paul Wooten, J.), entered on or about April 16, 2014,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated September 8, 2015,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15728 In re Mildred R.,
Petitioner-Appellant,

-against-

Elizabeth R.,
Respondent-Respondent.

_____

Richard L. Herzfeld, New York, for appellant.

Larry S. Bachner, Jamaica, for respondent.

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about August 12, 2014, which, after a fact-finding hearing, dismissed the petition for an order of protection against respondent, unanimously affirmed, without costs.

Family Court properly determined that petitioner failed to establish a prima facie case that respondent, her daughter, committed any of the family offenses alleged in the petition to warrant issuance of an order of protection. Petitioner testified in conclusory fashion that her daughter entered her home without permission, stole property, and broke the door, but she did not

testify she personally observed her daughter do so, or how she otherwise knew that her daughter committed the alleged offenses (*see Matter of Charles E. v Frank E.*, 72 AD3d 1439 [3d Dept 2010]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15729 The People of the State of New York, Ind. 2177/12
Respondent,

-against-

Andre Johnson,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John Vang of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered September 3, 2013, convicting defendant, after a jury trial, of assault in the second degree, attempted assault in the first degree and two counts of attempted assault in the second degree, and sentencing him to an aggregate term of 7 years, unanimously modified, on the law, to the extent of vacating the conviction of attempted second-degree assault under the second count of the indictment and dismissing that count, and otherwise affirmed.

The court properly declined to give an adverse inference charge as to part of the surveillance video footage taken more than five minutes before the beginning of the subject incident, which occurred in a hotel. A police detective testified that the

hotel staff cued the videotape to the beginning of the incident for him, but he rewound the tape to about 10 or more minutes earlier, started watching from that point, and found no footage of the two victims or defendant until about 5 minutes before the incident began. Consequently, the police obtained a copy of the video beginning at that point, and a defense investigator who subsequently sought an earlier portion of the video was informed by hotel personnel that it no longer existed. The police had no affirmative duty to seek potentially exculpatory evidence earlier in the video (*see People v Hayes*, 17 NY3d 46, 51 [2011], *cert denied* __ US __ 132 S Ct 844 [2011]), and the evidence was not destroyed by anyone in law enforcement. Moreover, any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]), particularly since the portion of the video at issue would not have supported a justification defense even if it had been consistent with defendant's account (*see* Penal Law § 35.15[2][a]). It should also be noted that the court gave advance permission for the defense to cross-examine the detective on this matter, and to argue in summation that the police should have preserved the video.

Defendant's contention that the court should have given an adverse inference charge as to other evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing (*see People v Plummer*, 95 AD3d 647 [1st Dept 2012], *lv denied* 19 NY3d 976 [2012]).

Defendant was not deprived of a fair trial by the prosecutor's argument in summation that the two victims had been candid in admitting to their drug histories and criminal records. This argument was properly responsive to the defense summation, which attacked the victims' credibility based on their past (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). Contrary to defendant's argument, the prosecutor's comments did not run afoul of the trial court's *Sandoval* ruling, which permitted the People to elicit the number and dates of defendant's felony and misdemeanor convictions, but precluded the People from asking defendant about the specific offenses or underlying facts. The prosecutor's summation did not refer to defendant's criminal history, even implicitly. Defendant's remaining challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for

reversal (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Moreover, any error regarding the prosecutor's summation was harmless in light of the overwhelming evidence of defendant's guilt (*see Crimmins*, *supra*; *see also D'Alessandro*, 184 AD2d at 120).

To the extent the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

As the People concede, one of the attempted second-degree assault counts (count two) must be dismissed as an inclusory concurrent count of the attempted first-degree assault count.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15730 The People of the State of New York, Ind. 4176/10
Respondent,

-against-

Walter Perry,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Sara Gurwitch of counsel), for appellant.

Walter Perry, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered December 1, 2011, convicting defendant, after a nonjury trial, of grand larceny in the second degree, and sentencing him to a term of two to six years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the court's finding that defendant stole the funds at issue and its rejection of defendant's explanations.

Defendant did not preserve his claims that the court's questioning of witnesses was excessive and shifted the burden of

proof. We do not find any mode-of-proceedings error exempt from preservation requirements (*see People v Thomas*, 50 NY2d 467, 472 [1980]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the questioning was permissible (*see People v Yut Wai Tom*, 53 NY2d 44, 56-57 [1981]), and that the risk of prejudice was minimal or nonexistent because there was no jury to be improperly influenced (*see People v Mays*, 197 AD2d 361 [1st Dept 1993]). The questions had no burden-shifting effect, and, in any event, a trial judge is presumably aware of the burden of proof in a criminal case.

The testimony of the District Attorney's financial investigator, who was called to testify as a fact witness regarding her review of the relevant bank records, did not constitute improper opinion testimony. The challenged testimony did not express an opinion, but merely stated what the witness

observed in reviewing the documents, and defendant's argument to the contrary misreads the trial record.

We have considered the arguments raised by defendant in his pro se brief and find them to be without merit.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15731 Commercial Tenant Services, Inc., Index 652820/11
Plaintiff-Respondent,

-against-

Northern Leasing Systems, Inc.,
Defendant-Appellant.

_____

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Matthew C. Daly of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Robert S. Smith of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 10, 2014, in favor of plaintiff, unanimously modified, on the law and the facts, to allow the period of plaintiff's entitlement to fees to run only through June 23 (instead of December 31) 2013, and otherwise affirmed, without costs.

Contrary to the motion court's finding, defendant did not raise certain arguments for the first time in reply. However, those arguments are unavailing on the merits.

First, defendant contends that the parties' contract violates Real Property Law §§ 440(1) and 440-a. However, article 12-A of the Real Property Law, which includes sections 440 and 440-a, "should be strictly construed" (*Reiter v Greenberg*, 21

NY2d 388, 391 [1968]). Strictly construing section 440(1), we find that offering or attempting to negotiate *a rental of an estate or interest in real estate* does not include negotiating escalation adjustments or settling disagreements with a landlord about overcharges. Plaintiff's services, which primarily consisted of finding overcharges, "fall outside the scope of real estate brokerage services" (*Eaton Assoc. v Highland Broadcasting Corp.*, 81 AD2d 603, 604 [2d Dept 1981]; *see also Kreuter v Tsucalas*, 287 AD2d 50, 51, 56 [2d Dept 2001]).

Second, defendant contends that the exclusivity provision in the parties' contract was impossible of performance due to (1) a stipulation in a *Yellowstone* action between defendant and its former landlord and (2) defendant's contract with its real estate broker. However, impossibility has "been applied narrowly" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]), and the case at bar does not satisfy the requirements of this doctrine (*see id.*).

Due to the exclusivity provision, plaintiff did not have to prove that it was the procuring cause of the porters' wage savings, i.e., that defendant did not know about the overcharge

before plaintiff told defendant about it (*see e.g. Sioni & Partners, LLC v Vaak Props., LLC*, 93 AD3d 414, 417 [1st Dept 2012]).

Defendant contends that the IAS court's decision on plaintiff's motion for summary judgment on damages conflicts with its decision on plaintiff's earlier cross motion for summary judgment on liability and, therefore, violates law of the case. However, law of the case does not apply when a court alters its own ruling, as opposed to the ruling of "another court of coordinate jurisdiction" (*Kleinser v Astarita*, 61 AD3d 597, 598 [1st Dept 2009]).

The parties' contract states, "Where a Refund to or on behalf of [defendant] is obtained or achieved for charges that have previously been billed or are billed for the current lease and fiscal years for which [plaintiff] conducts its review, and through the year in which the date of final settlement with [defendant]'s landlord [sic], and for two ... years subsequent to such settlement, [defendant] agrees to pay [plaintiff] thirty-two percent . . . of such Refund." The final settlement between defendant and its landlord took place on June 23, 2011 (not January 21, 2011 as found by the motion court).

Relying on "for two . . . years subsequent to such settlement," defendant contends that plaintiff is not entitled to fees after June 23, 2013. Relying on "through the year in which the date of the final settlement," and reading "for two . . . years subsequent to such settlement" as "for two years subsequent to such year," plaintiff contends that it is entitled to fees through December 31, 2013.

The contract is internally inconsistent with respect to the duration of plaintiff's fees. Since the contract was drafted by plaintiff (it takes the form of a letter from plaintiff to defendant), we construe the ambiguity in defendant's favor (*see e.g. 150 West Assoc. v Printsiples Fabric Corp.*, 61 NY2d 732, 734 [1984]) and find that plaintiff is entitled to fees only through June 23, 2013, not December 31, 2013.

We have considered defendant's remaining arguments and find them unavailing.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15732 In re Malik P.,

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.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for presentment agency.

_____

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about August 8, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of petit larceny and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and 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 credibility determinations, including its evaluation of any inconsistencies in testimony.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15733 Lacher & Lovell-Taylor, Index 652163/11
Plaintiff-Appellant, 653237/11

-against-

Ezra Chowaiki, et al.,
Defendants-Respondents.

- - - - -

Chowaiki & Co. Fine Art, Ltd., et al.,
Plaintiffs-Respondents,

-against-

Michael A. Lacher,
Defendant-Appellant.

_____

Kenneth J. Gorman, P.C., New York (Kenneth J. Gorman of counsel), for appellants.

Kaplan Kravet & Vogel P.C., New York (Steven M. Kaplan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 25, 2013, which denied plaintiff-appellant Lacher & Lovell-Taylor and defendant-appellant Michael A. Lacher's motion for summary judgment as to liability for legal fees, and to dismiss the claims and counterclaim asserted against them, unanimously affirmed, with costs.

The record establishes that Ezra Chowaiki timely objected in writing to Lacher & Lovell-Taylor's last invoice for $358,924.70

in legal fees, which remains unpaid. Based on the parties' conflicting affidavits, material issues of fact preclude summary judgment as to the respondents' liability for the unpaid fees (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Issues of fact also preclude summary judgment as to the legal fees already paid, for which respondents seek disgorgment, based on allegations of counsel's unethical behavior requiring respondents to immediately pay bills without an opportunity to review the appropriateness of the fees (*see Campagnola v Mullholland, Minion & Roe*, 76 NY2d 38, 44 [1990] [an attorney discharged for cause is entitled to no compensation]; *Williams v Hertz Corp.*, 75 AD2d 766 [1st Dept 1980] [same]; *Tabner v Drake*, 9 AD3d 606, 611 [3d Dept 2004]).

References included in the appellate record to matters stricken from the pleadings by the motion court, without

prejudice, are stricken from the record on this appeal and have been disregarded by this Court.

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15734 625 Ground Lessor LLC, et al., Index 161882/13
Plaintiffs-Appellants,

-against-

Continental Casualty Company,
Defendant-Respondent.

_____

Wechsler & Cohen, LLP, New York (Mitchell S. Cohen of counsel), for appellants.

Colliau Carluccio Keener Morrow Peterson & Parsons, New York (Lisa Shreiber of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Ellen M. Coin, J.), entered January 5, 2015, declaring that defendant has no duty to defend or indemnify plaintiffs in the underlying personal injury actions, unanimously affirmed, without costs.

The motion court correctly determined that the accident in which an individual was injured in the lobby of a building while en route to her employment with a tenant that leased space on the seventh through eleventh floors occurred outside the leased premises, and therefore that the landlord was not entitled to coverage as an additional insured under the employer's commercial general liability policy (*see Axelrod v Maryland Cas. Co.*, 209 AD2d 336 [1st Dept 1994]; *Prestige Props. & Dev. Co., Inc. v*

Montefiore Med. Ctr., 36 AD3d 471 [1st Dept 2007]). This is not a case where the tenant was afforded special or exclusive use of the building lobby or the elevator that the injured individual allegedly was entering when she slipped or where the lobby provided incidental use necessary to the operation of the leased premises (*compare e.g. 1515 Broadway Fee Owner, LLC v Seneca Ins. Co., Inc.*, 90 AD3d 436, 437 [1st Dept 2011]; *Jenel Mgt. Corp. v Pacific Ins. Co.*, 55 AD3d 313 [1st Dept 2008]). As the motion court observed, the lobby and the elevator were available to all employees of all tenants in the building and "were no more necessary to the operation of [the tenant's] business than they were to that of every commercial tenant in the building."

Since their claims are precluded by the additional insured endorsement, plaintiffs are not entitled to defense costs (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 38, 42 [1st Dept 2005]). Equally unavailing are plaintiffs' claims for consequential damages for attorneys' fees (*see Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12 [1979]) and alleged bad faith.

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

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15735 The People of the State of New York, Ind. 2501/08
Respondent,

-against-

Sean Green,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Richard Joselson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered July 29, 2009, convicting defendant, after a jury trial, of assault in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 22 years to life, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). The court imposed reasonable limits on the People's elicitation of defendant's very extensive history of convictions and bad acts. The matters permitted were highly probative of defendant's credibility, and none was unduly remote. We have

considered and rejected defendant's arguments concerning the People's alleged deviation from the ruling, as well as those concerning the circumstances of the court's revision of the *Sandoval* ruling it had issued before defendant's first trial, which ended in a mistrial.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15736 In re Lillian A.,
Petitioner-Appellant,

-against-

Nicholas A.,
Respondent-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

_____

Order, Family Court, New York County (Christopher W. Coffey, Referee), entered on or about May 22, 2014, which, after a fact-finding hearing, among other things, dismissed the petition for an order of protection, unanimously affirmed, without costs.

The Family Court properly dismissed the petition, because petitioner failed to establish by a fair preponderance of the evidence that respondent, her brother, had committed any acts warranting an order of protection in her favor (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). No basis

exists to disturb the Family Court's findings that respondent and two nonparty witnesses were more credible than petitioner (*id.*).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15737 Wlodzimierz Golubowski, Index 402150/11
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants,

150 Williams Street Associates, L.P.,
et al.,
Defendants-Appellants.

_____

Carol R. Finocchio, New York, for appellants.

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered November 28, 2014, which, insofar as appealed from, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim as against defendant 150 Williams Street Associates, L.P., and denied 150 Williams Street and defendants Braun Management, Inc. and Braun Management Services, Inc.'s (collectively, defendants) cross motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff, a plumber, sustained personal injuries when he slipped from the third rung of a six-foot ladder that had become

wet and slippery from residual water leaking from an overhead sprinkler system that he was dismantling in a building owned by defendant 150 William Street Associates, L.P. and managed by defendant Braun Management Inc. Plaintiff and his coworker had both a scaffold and a ladder for reaching the overhead pipes.

Defendants contend that plaintiff was the sole proximate cause of his accident because he knew he was expected to use a scaffold and one was available. However, the record demonstrates that plaintiff was provided with a ladder for his work and that no scaffold was available to him because his coworker was using it (*see Rivera v Ambassador Fuel & Oil Burner Corp.*, 45 AD3d 275, 276 [1st Dept 2007]).

The motion court correctly declined to address defendants' untimely motion insofar as it sought to dismiss the Labor Law § 200 and common-law negligence claims, since those claims raise issues of control over the work, while the Labor Law §§ 240(1) and 241(6) claims that are the subject of plaintiff's timely motion are premised on absolute liability (*see Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014]).

We decline plaintiff's invitation to search the record and grant him summary judgment on his Labor Law § 241(6) claim; the grant of summary judgment as to liability on his § 240(1) claim

renders alternative theories of liability academic (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15740-
15740A Paul Spagnoletti, et al.,
Plaintiffs-Appellants,

-against-

Howard Chalfin,
Defendant-Respondent,

Allison Chalfin,
Defendant.

Index 154570/13

Davis Polk & Wardwell LLP, New York (Craig M. Reiser of counsel), for appellants.

The Kimmel Law Firm, New York (Brian Kimmel of counsel), for respondent.

Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 6, 2014, which, inter alia, denied plaintiffs' motion for a default judgment, and denied plaintiffs' motion for partial summary judgment on their cause of action for conversion, unanimously affirmed, without costs.

Denial of the motion for a default judgment was proper since plaintiffs waived their objections to defendants' untimely answers by accepting them without objection. Furthermore, plaintiffs' motion for partial summary judgment indicates a willingness to waive any issue of untimeliness, as the motion presupposes that issue has been joined (*see e.g. Wittlin v*

Schaprio's Wine Co., 178 AD2d 160 [1st Dept 1991]).

Plaintiffs' motion for partial summary judgment on their conversion claim was also properly denied since the record presents triable issues as to whether the deposit funds that plaintiffs seek the return of were properly segregated. Even if such funds were not properly segregated in the first instance, defendants had the ability to cure that defect during the term of the lease (*see e.g. Shandwick USA v Exenet Techs.* 192 Misc 2d 280 [Sup Ct, NY County 2002]). There are also questions as to whether the deposit funds are required to be returned to plaintiffs.

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

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15741 The People of the State of New York, Ind. 1581/09
Respondent,

-against-

Herbert Henriquez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (C. Scott McAbee of counsel), for appellant.

_____

Appeal from judgment, Supreme Court, New York County (Charles Solomon, J.), rendered April 20, 2010, convicting defendant, upon his plea of guilty, of grand larceny in the second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of four to eight years, held in abeyance, the motion by assigned counsel to be relieved denied without prejudice to renewal, and counsel directed to attempt to communicate with defendant forthwith concerning any issues that may be raised concerning defendant's failure to be apprised that he might be deported as a consequence of his guilty plea to a felony and the possible consequences of pursuing an appeal raising such issues, and advising defendant that he has 60 days from the date of this order to file a pro se supplemental brief if he so chooses.

Counsel's letter to defendant, with a copy of the brief filed with this Court, does not meet the requirements of *People v Saunders*, 52 AD2d 833 [1976]. Counsel has not sufficiently established that defendant has been made aware of any potential issues under *People v Peque* (22 NY3d 168 [2013]), that he has made an informed decision not to raise any such issues, and that he has been informed that he has a right to raise such issues in a pro se brief if he so chooses.

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

ENTERED: SEPTEMBER 29, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15742N Lassana Kenneh, et al., Index 300630/13
Plaintiffs-Respondents,

-against-

Jey Livery Service, et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for appellants.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Gregory C. McMahon of counsel), for respondents.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered February 3, 2015, which, to the extent appealed from as limited by the briefs, denied defendants' motion to compel plaintiff Lassana Kenneh to provide HIPAA-compliant authorizations for production of medical records relating to his preexisting diabetic condition, unanimously affirmed, without costs.

By bringing this action to recover damages for serious injuries allegedly suffered to his right knee, shoulders and spine as the result of a motor vehicle accident, plaintiff waived the physician-patient privilege as to all medical records

pertinent to those conditions (*see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983]; CPLR 3121[a]; CPLR 4504[a]). The motion court providently exercised its discretion in determining that plaintiff did not place his diabetic condition in issue by asserting those serious injury claims, or by alleging that he continued to suffer anxiety and other symptoms following the accident (*see Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573 [1st Dept 2014]; *Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470 [1st Dept 2012]; *cf. Vodoff v Mehmood*, 92 AD3d 773 [2d Dept 2012]).

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

ENTERED: SEPTEMBER 29, 2015

CLERK