SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 8, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7000 The People of the State of New York, Respondent, Ind. 1348/05

-against-

Julio Panchon,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rebekah J. Pazmiño of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered March 14, 2006, as amended April 10, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, unanimously affirmed.

The court properly exercised its discretion when it precluded cross-examination that was cumulative, speculative or of questionable relevance. Defendant was not deprived of his

right to present a defense and to confront the witnesses against him (*see Delaware v Van Arsdall*, 475 US 673, 678–679 [1986]). On the contrary, defendant was permitted to conduct extensive and effective cross-examination, and he was not prejudiced by the limitations imposed by the court. Defendant did not preserve his other claims regarding the court's conduct of the trial, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Arnold*, 98 NY2d 63, 67 [2002]). We nevertheless admonish the trial justice, as we have many times in the past, for her continued penchant for improperly injecting herself into proceedings despite our prior disapproval of the practice (*see e.g. People v Chavis*, 59 AD3d 240 [2009], *lv denied* '12 NY3d 913 [2009]; *People v Simon*, 55 AD3d 378 [2008]; *People v Canto*, 31 AD3d 312 [2006], *lv denied* 7 NY3d 900 [2006]).

The court also properly exercised its discretion when it permitted the People to establish that the police recovered from defendant $207, including 47 single dollar bills (*see e.g. People v Valentine*, 7 AD3d 275 [2004] *lv denied* 3 NY3d 682 [2004]). In this observation sale case, this evidence was relevant to corroborate police testimony about how the sales were transacted, and the amount of money was not unduly prejudicial. Furthermore, evidence that defendant had the means of making change was not

evidence of general propensity to sell drugs, but evidence that at the time and place in question, defendant had equipped himself with the means of committing the charged crimes (*see People v Del Vermo*, 192 NY 470, 481-482 [1908]). Defendant's related claims concerning the People's summation and the absence of a limiting instruction are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

The court properly exercised its discretion when it granted the prosecutor's challenge for cause to a prospective juror. The panelist's response to the prosecutor's question indicated that she was biased against the police and could not be impartial in this case turning on police credibility (*see People v Smith*, 5 AD3d 291 [2004], *lv denied* 3 NY2d 648 [2004]). "It is almost always wise. . .to err on the side of disqualification" because "the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror" (*People v Culhane*, 33 NY2d 90, 108 n 3 [1973]). Accordingly, a court's decision to grant a challenge for cause is entitled to considerable deference.

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];

People v Pavao, 59 NY2d 282, 292 [1983]). The court properly permitted elicitation of matters that were highly relevant to defendant's credibility and were not unduly prejudicial.

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

ENTERED: MARCH 8, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7003 In re Serenity Celene M., etc.,

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

Roy Enrique M.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

Randal S. Carmel, Syosset, for appellant.

Law Office of Quinlan and Fields, Hawthorne (Daniel Gartenstein of counsel), for respondent.

Appeal from order of fact-finding and disposition, Family Court, Bronx County (Fernando Silva, J.), entered on or about June 3, 2011, which, among other things, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child and committed the child's custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously dismissed, without costs, and the motion to relieve assigned counsel granted.

Upon our review of respondent's assigned counsel's motion and the record, we agree that the subject order is nonappealable since it was entered following respondent's default at both the

fact-finding and dispositional hearings (*Matter of Zoraida Marie C.*, 66 AD3d 486 [2009]). In any event, there are no nonfrivolous issues that could be raised on appeal (*id.*; *Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]).

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

ENTERED: MARCH 8, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7005 In re Patria Lopez, Index 401059/10
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

Sonya M. Kaloyanides, New York (Melissa R. Renwick of counsel), for appellant.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 8, 2011, granting the petition to the extent of, among other things, annulling respondent New York City Housing Authority's determination to terminate petitioner's Section 8 rent subsidy, unanimously reversed, on the law, without costs, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed.

Pursuant to paragraph 22(f) of the first partial consent judgment in *Williams v New York City Hous. Auth.* (US Dist Ct, SD NY, 81 Civ 1801, Ward, J., 1984), the four-month statute of limitations of CPLR 217 began to run on the date of receipt of respondent's letter notifying petitioner that her Section 8 subsidy would be terminated in 45 days if she did not request a hearing (*Matter of Fernández v NYCHA Law Dept.*, 284 AD2d 202 [2001]). The record shows that the letter was mailed on June 16,

2008, raising a rebuttable presumption under the *Williams* consent judgment that petitioner received it five days later on June 21, 2008. This proceeding was not commenced until April 2010.

Accordingly, the petition should have been denied and the proceeding dismissed as time-barred (*Fernández*, 284 AD2d at 202).

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

ENTERED: MARCH 8, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7008 The People of the State of New York, Ind. 2994/09
Respondent,

-against-

Stacy Soltys,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt 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 (Richard D. Carruthers, J.), rendered on or about April 7, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: MARCH 8, 2012

CLERK

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

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7009 Abubakar Kamara, an Infant by His Father and Natural Guardian, Abubakar Kamara, Sr., et al., Plaintiffs-Respondents, Index 350490/09

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Michael Shender of counsel), for appellants.

Burns & Harris, New York (Christopher J. Donadio of counsel), for respondents.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered August 31, 2010, which, in this action alleging, inter alia, negligent supervision, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiff student was injured during a lunchtime basketball game when another student pushed him while he was in the air attempting to get the ball. The game took place in the school's gymnasium, and a school guidance counselor watched from the bleachers.

The complaint should have been dismissed as against

defendant City of New York because it is not a proper party to the action. "[T]he 2002 amendments to the Education Law (L 2002, ch 91), do not provide a basis to hold defendant liable for the personal injuries sustained by plaintiff" (*Corzino v City of New York*, 56 AD3d 370, 371 [2008]; *see Perez v City of New York*, 41 AD3d 378 [2007], *lv denied* 10 NY3d 708 [2008]).

Summary judgment should also have been granted to defendants New York City Board of Education and New York City Department of Education (collectively, DOE). The record demonstrates that the spontaneous act of the other student pushing plaintiff as they attempted to rebound a basketball is the type of incident that "occurred in such a short span of time that it could not have been prevented by the most intense supervision" (*Paca v City of New York*, 51 AD3d 991, 993 [2008]; *see Lizardo v Board of Educ. of the City of N.Y.*, 77 AD3d 437 [2010]). Although plaintiff presented evidence that school personnel had notice that the other student had bullied him in the past, such evidence was not sufficiently specific to alert DOE that the student would push plaintiff during a basketball game (*see Siegell v Herricks Union Free School Dist.*, 7 AD3d 607, 609 [2004]).

We have considered plaintiffs' remaining contentions, including that defendants negligently supervised the game by failing to prohibit the other student from playing while wearing boots, and find them unavailing.

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

ENTERED: MARCH 8, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7010 The People of the State of New York, Respondent, Ind. 3492/07

-against-

Nicholas Sorrentino, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered July 17, 2009, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress the fruits of an allegedly unlawful arrest. Defendant contends that New York police officers arrested him in New Jersey without statutory authorization, and in any event without following statutory procedures concerning arrests made in New Jersey by out-of-state officers. However, there is no basis for disturbing the hearing court's factual determination that, rather than being arrested in New Jersey, defendant voluntarily agreed to accompany the officers to New York for an interview in connection with an ongoing investigation (*see People v Morales*, 42 NY2d 129, 137-138

[1977], *cert denied* 434 US 1018 [1978]; *People v Ortiz*, 59 AD3d 350, 351 [2009], *lv denied* 12 NY3d 857 [2009]). The police did not engage in any conduct that could be considered an arrest until they arrived in New York. Furthermore, the hearing court also correctly determined that even assuming there was a violation of the statutory guidelines for interstate arrests, it would not warrant suppression of any evidence (*see People v Sampson*, 73 NY2d 908 [1989]).

The court properly denied defendant's motion to suppress historical cell site location information for calls made over his cell phone. The People properly obtained these records by court order under 18 USC § 2703(d), and there was no violation of the Federal or State Constitutions (*see People v Hall*, 86 AD3d 450, 451 [2011]). In any event, the record also supports the court's finding of probable cause (*see generally Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]). Thus, given the People's evidentiary showing, the order was effectively a warrant.

The court properly exercised its discretion in denying defendant's mistrial motion made after the medical examiner made a brief reference to opinion expressed by his colleagues. The offending testimony consisted, essentially, of a single use of the word "We" instead of "I." The court's proposed curative

instruction would have sufficed, but defendant declined that remedy, insisting only on the unwarranted remedy of a mistrial (*see People v Santiago*, 52 NY2d 865 [1981]; *People v Young*, 48 NY2d 995 [1980]). In any event, the challenged testimony could not have caused any prejudice given the overwhelming evidence of defendant's guilt.

The court providently exercised its discretion in admitting the deceased's statements to his friends about his deteriorating relationship with defendant, including his intention to terminate the relationship and stay away from defendant (*see e.g. People v Kimes*, 37 AD3d 1, 17-19 [2006], *lv denied* 8 NY3d 881 [2007]; *People v Bierenbaum*, 301 AD2d 119, 144-146 [2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]; *People v Martinez*, 257 AD2d 410, 411 [1999], *lv denied* 93 NY2d 876 [1999]). In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining claims.

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

ENTERED: MARCH 8, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7017 The People of the State of New York, Respondent, Ind. 3157/05

-against-

Michael Lewis, 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 (Eleanor J. Ostrow of counsel), for respondent.

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about November 14, 2008, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed.

The court properly assessed 10 points for defendant's inadequate acceptance of responsibility for the underlying sex offense. In any event, regardless of whether defendant's correct score was 120 or 110 points, the court properly exercised its discretion in declining to grant defendant a downward departure from his presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Factors indicating a high risk of reoffense included the seriousness of the underlying crime, defendant's criminal

history, and his prison disciplinary infractions involving lewd conduct directed at female personnel. There were no mitigating factors not taken into account by the risk assessment instrument that would warrant a downward departure.

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

ENTERED: MARCH 8, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7019 Salt Aire Trading LLC, et al., Index 603799/07
Plaintiffs-Appellants,

-against-

Sidley Austin Brown & Wood, LLP, etc., et al.,
Defendants,

Katten Muchin Rosenman LLP,
Defendant-Respondent.

Malecki Law, New York (Jenice L. Malecki of counsel), for appellants.

Ellenoff Grossman & Schole LLP, New York (Ted Poretz of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 8, 2011, which granted the motion of defendant Katten Muchin Rosenman LLP for summary judgment dismissing the complaint as to it with prejudice, unanimously modified, on the law, to grant the motion for summary judgment without prejudice as to the first and second causes of action asserted by plaintiffs other than Salt Aire Investment Trust, and otherwise affirmed, without costs.

This action was commenced by filing a summons with notice, which was signed on behalf of the entity plaintiffs and Joelle Kelly by two lawyers in Washington State who were not admitted to practice law in the State of New York. The lawyers also affixed

the signature of plaintiff Brian Kelly, designating him as a pro se plaintiff who had given permission for them to sign on his behalf. In response to defendant Katten's demand for a complaint, those lawyers provided an unsigned complaint, adding Salt Aire Investment Trust as a plaintiff. That complaint was promptly rejected by Katten, which expressed concern that the Washington lawyers appeared to be engaging in unauthorized practice of law. Subsequently, plaintiffs served a complaint signed by a New York lawyer. After unsuccessfully moving to dismiss the complaint on various grounds, Katten answered, asserting that the summons with notice was a nullity because it was not signed by an attorney properly admitted to practice law in the State of New York and, accordingly, plaintiffs had not properly commenced an action against it. Katten then moved for summary judgment dismissing the complaint on that ground, and on the grounds, inter alia, that all claims were time-barred.

In signing the pleading, the two out-of-state lawyers acted in violation of Judiciary Law § 478, which makes it unlawful for a person to appear as an attorney in this State without having been licensed and having taken the constitutional oath (*see Whitehead v Town House Equities, Ltd.*, 8 AD3d 369, 370 [2004]). In addition, the pleading was not signed by an attorney or by a party acting pro se as required by 22 NYCRR 130-1.1A, and

plaintiffs did not promptly correct the defect after defendant objected.

Although plaintiff Brian Kelly had a right to represent himself, generally an individual who exercises the right to act pro se cannot then appear through an attorney-in-fact or other person not authorized to practice law (*see Powerserve Intl., Inc. v Lavi*, 239 F3d 508, 514 [2001]; *Whitehead* at 370). Further, in opposition to the motion for summary judgment, he submitted an unsworn affidavit which, even if considered, fails to demonstrate that he authorized the signing of the summons with notice, leaving unchallenged defendant's assertion that the pleading was signed in that manner to circumvent the rule prohibiting the unauthorized practice of law.

Although defendant did not reject the pleading or raise the issue in its initial moving papers due to the defect in the signature, the court properly determined that the defect could not be waived by defendant or by application of CPLR 2101(f), since it involves violation of the law by attorneys practicing before the court without a license (*see Empire HealthChoice Assur., Inc. v Lester*, 81 AD3d 570 [2011]; *see generally Whitehead*, 8 AD3d at 370-371). The proper remedy for violation by an attorney of a provision of the Judiciary Law is to strike the pleading "without prejudice" (*see Kinder Morgan Energy*

Partners, LP v Ace Am. Ins. Co., 51 AD3d 580 [2008]; *Neal v Energy Transp. Group*, 296 AD2d 339 [2002]; *see* CPLR 205[a]).

The claims brought by Salt Aire Trust and the third, fifth and seventh causes of action, were properly dismissed with prejudice.

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

ENTERED: MARCH 8, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7021 In re Social Service Employees Union, Local 371 on behalf of its member, Sherrie Brown, Petitioner-Appellant, Index 100208/10

-against-

New York City Board of Correction, Respondent-Respondent.

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Michael D. Stallman, J.), entered October 19, 2010, which denied petitioner's motion for leave to reargue respondent's cross petition to vacate an interim arbitration award and disqualify the arbitrator, unanimously dismissed, without costs, as taken from a nonappealable order.

The challenged order could not be interpreted as effectively granting reargument and, upon reargument, adhering to the original determination so as to render it an appealable order. Indeed, the court not only unequivocally "denied" the motion for reargument, but expressly ruled that it did not overlook or misapprehend any facts or law when determining the prior motion (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d

22, 27 [1992], *lv denied in part, dismissed in part* 80 NY2d 1005 [1992]); nor did it adhere to its prior determination on a different ground (*compare Judlau Contr., Inc. v Westchester Fire Ins. Co.*, 46 AD3d 482, 483 [2007]). Accordingly, the order denying the motion to reargue is nonappealable (*Cillo v Resjefal Corp.*, 300 AD2d 146 [2002]). In any event, even if the challenged order could be considered a grant of reargument, we would find that the court properly adhered to its original determination.

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

ENTERED: MARCH 8, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7023 & [M-240] In re Richard Fowler, Petitioner, Ind. 1063/11

-against-

Hon. Edward McLaughlin, etc., et al., Respondents.

Richard Fowler, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Edward McLaughlin, respondent.

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

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7024 The People of the State of New York, Respondent, Ind. 95093/05

-against-

Ann Landsman, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered August 7, 2007, as amended January 16, 2008, convicting defendant, after a jury trial, of scheme to defraud in the first degree, sentencing her to a conditional discharge for a period of three years, and ordering her to pay $50,000 in restitution, 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]). Defendant's conduct satisfied the elements of scheme to defraud in the first degree (Penal Law § 190.65).

Defendant, a physician's assistant, worked for different hospitals during the same time slots and was paid for each of the simultaneous shifts. The defense, in essence, was that defendant

earned the money that she was paid because she provided the required services at each hospital. She asserted that she did so by obtaining her work assignments, having a driver repeatedly drive her the five miles back and forth between hospitals to perform her assigned duties, and responding when paged.

To establish first-degree scheme to defraud, the People were required to prove that defendant either had an "intent to defraud," or an intent "to obtain property by false or fraudulent pretenses, representations or promises," or both (Penal Law § 190.65[1][b]; *see also People v Wolf*, 284 AD2d 102, 103 [2001], *mod on other grounds*, 98 NY2d 105 [2002]). The evidence established defendant's guilt under either alternative.

Defendant deliberately concealed the fact that she was simultaneously working at more than one hospital, showing that she intended to defraud each hospital. She never requested permission to work overlapping shifts. Defendant nevertheless asserts that even though she kept her unusual schedule secret, she did not defraud the hospitals because she in fact performed the work required by both jobs.

However, by the nature of her duties, this simply was not possible. Defendant acknowledged in her testimony that a physician's assistant is required to be available to treat patients on a moment's notice. Accordingly, she could not be

simultaneously treating patients or responding to medical emergencies in two hospitals located five miles apart at the same time. Under these circumstances, defendant's intent to defraud was "inferable from the overall and protracted pattern of [her] conduct" (*see People v Houghtaling*, 14 AD3d 879, 881 [2005], *lv denied* 4 NY3d 831 [2005]), and her pattern of conduct "had no reasonable explanation other than guilt" (*see People v Coscia*, 279 AD2d 352, 352 [2001]).

Additionally, the evidence established the second alternative prong of scheme to defraud, that defendant intended "to obtain property from more than one person by false or fraudulent pretenses, representations or promises" (Penal Law § 190.65[1][b]). First, from her overlapping shifts, she was able to earn an income far in excess of her salary for either single shift, and thus "obtain property." Second, she obtained this property by "false or fraudulent pretenses, representations or promises." Defendant deliberately scheduled herself for simultaneous shifts at two hospitals. Defendant falsely represented to each hospital that she was available and would continuously be present in the respective hospitals to perform her duties at a moment's notice (*see* Penal Law § 155.05[2][a][larceny by, among other things, false pretenses]).

Furthermore, when she knowingly scheduled shifts at two

different hospitals, she falsely promised each hospital her undivided presence and attention during her shift (*see* Penal Law § 155.05[2][d][larceny by false promises]). At a minimum, it could be found that she disregarded the truth or falsity of the representations that she made to the hospitals (*see People v Ford*, 88 AD2d 859, 861 [1982]).

Turning to defendant's arguments for a new trial, we find that the court properly exercised its discretion in receiving testimony concerning the quality of the care defendant provided to her patients. This evidence tended to refute defendant's claim that she did not defraud the hospitals or make false promises because she was able to provide the services for which she was paid. Defendant opened the door to this testimony (*see generally People v Massie*, 2 NY3d 179 [2004), and it was not unduly prejudicial. In addition, there was nothing in the prosecutor's summation or the court's charge that warrants reversal.

The court's restitution order was proper. The People met

their burden of proof in establishing that Montefiore Medical Center was entitled to $50,000 in restitution to compensate it for its losses in services not performed by defendant (*see People v Tzitzikalakis*, 8 NY3d 217, 220 [2007]).

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7025 Charles Boone, Index 118087/09
Plaintiff-Appellant,

-against-

M & G Carting, LLC, etc.,
Defendant-Respondent.

_____

Steven L. Barkan P.C., Melville (Steven L. Barkan of counsel), for appellant.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about October 26, 2010, which denied plaintiff's motion for a default judgment against defendant and directed entry of a judgment dismissing the action, unanimously affirmed, without costs.

Plaintiff failed to allege facts that would establish that the alleged assault on him by defendant's employee was "within the scope of the employment" and was "generally foreseeable and a

natural incident of the employment" (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]; *see e.g. White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243 [2006]; CPLR 3215[f]).

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7026 In re Autumn P.,

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

Justin P.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Carol Kahn, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about February 16, 2011, which, inter alia, upon a fact-finding determination that respondent father neglected and abused the subject child, placed the child in the custody and guardianship of the Commissioner of Social Services until completion of the next scheduled permanency hearing, unanimously affirmed, without costs.

The findings that the father neglected and abused his daughter were supported by a preponderance of the evidence (*see* Family Court Act § 1012[e],[f]; § 1046[b][i]). The medical evidence showed that the six-month old infant had sustained three

leg fractures, a subdural hematoma and a cut to her mouth. The parents offered no explanation for the majority of the injuries. Petitioner demonstrated that the child's pattern of serious and unexplained injuries would ordinarily not occur absent acts or omissions of the parents, and that the father was the child's primary caretaker when the injuries occurred (*see Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]).

We have considered the father's remaining contentions and find them unavailing.

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7028 Franklin Wilson Delgado, Index 100339/09
Plaintiff-Respondent,

-against-

Papert Transit, Inc., et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 23, 2011, which denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

In this action for personal injuries in which plaintiff, a pedestrian, was struck by a taxi, defendants made a prima facie showing of entitlement to judgment as a matter of law with respect to plaintiff's injury to his left knee by submitting the affirmed report of an orthopedist, who concluded, after examination and testing of ranges of motion, that plaintiff had no range-of-motion limitations (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Singer v Gae Limo Corp.*, __ AD3d __, 2012 NY Slip Op 00303 [1st Dept 2012]). Plaintiff, however, raised an

issue of fact with respect to that injury by submitting the affirmed report of his treating orthopedist and surgeon, who attested to qualitative limitations observed at the time of the accident and continuing through July 2010, which findings were based upon objective tests and personal observations made during arthroscopic surgery (*see Mitchell v Calle*, 90 AD3d 584 [2011]; *Suazo v Brown*, 88 AD3d 602 [2011]; *DeJesus v Cruz*, 73 AD3d 439 [2010]).

We need not address plaintiff's additional injuries since he raised a triable question of fact as to whether he suffered a serious injury that was causally related to the accident. Once a serious injury has been established, it is unnecessary to address additional injuries to determine whether the proof is sufficient to withstand defendants' motion for summary judgment (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [2010]).

Defendants failed to establish entitlement to judgment as a matter of law with respect to plaintiff's 90/180-day claim. Their conclusory assertions and mischaracterization of plaintiff's testimony regarding a conversation with his treating surgeon more than 1½ years after the accident is insufficient and

well beyond the relevant statutory period (*see* Insurance Law § 5102 [d]; *Singer v Gae Limo Corp.*, __ AD3d __, 937 NYS2d 39 [1st Dept 2012], *supra*).

We have considered defendants' remaining contentions, and find them unavailing.

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7031 The People of the State of New York, Ind. 4249/09
Respondent,

-against-

Jermaine Simmons,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 (Renee A. White, J.), rendered on or about January 19, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: MARCH 8, 2012

CLERK

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

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7035 The People of the State of New York, Ind. 1780/06
Respondent,

-against-

Freddy Medina,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), and Paul, Hastings, Janofsky & Walker LLP, New York (Christopher Hurd of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Marcy L. Kahn, J. at jury trial and sentencing), rendered July 1, 2008, as amended November 21, 2008, convicting defendant of manslaughter in the first degree, and sentencing him, as a second violent felony offender, to a term of 20 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant argues that his videotaped statement was tainted by a brief conversation he had with the arresting detective that allegedly constituted custodial interrogation prior to the administration of *Miranda* warnings. However, defendant did not preserve this argument (*see People v Tutt*, 38 NY2d 1011, 1013 [1976]). Defendant made entirely different arguments at the

hearing, and his motion papers were inadequate to raise the specific claim he makes on appeal. Moreover, even if the motion papers could be viewed as raising this claim, defendant abandoned the issue by failing to alert the hearing court to that aspect of his motion (*see e.g. People v Henriquez*, 246 AD2d 427 [1998], *lv denied* 91 NY2d 942 [1998]).

Accordingly, we decline to review this claim in the interest of justice. Further, even assuming a *Miranda* violation in that initial conversation there was sufficient attenuation so that defendant's videotaped statement was not tainted (*see People v White*, 10 NY3d 286, 291 [2008], *cert denied* 555 US 897 [2008]).

The trial court properly concluded that the People established a sufficient foundation for admitting defendant's videotaped statement into evidence. The arresting detective had testified at the suppression hearing, but the People represented that he had apparently been deployed overseas as a military reservist and was unavailable for trial. The People introduced the videotape through the authenticating testimony of a technician. Defendant argued that this was insufficient, and asserted that the detective's testimony was necessary to establish the circumstances leading up to the videotaped statement so that the jury could assess the statement's voluntariness.

When a defendant moves to suppress a statement, the People have the burden of proving the statement was voluntarily made at a pretrial hearing (*People v Witherspoon*, 66 NY2d 973, 974 [1985]). If that burden is met, the statement becomes admissible at trial. At a trial, the voluntariness of the statement is not at issue unless a defendant raises that issue, and "evidence sufficient to raise a factual dispute has been adduced either by direct or cross-examination" (*People v Cefaro*, 23 NY2d 283, 288-289 [1968]). In that case, the court is required to instruct the jury to disregard the statement if it finds the statement was involuntarily made (CPL 710.70[3]).

Even assuming, without deciding, that the People were required to go forward at trial with evidence of the statement's voluntariness, we conclude that they met that burden. The videotape depicts defendant unequivocally waiving his *Miranda* rights, and there is nothing to cast doubt on the statement's voluntariness. Accordingly, defendant was not entitled, as a precondition to admission of the statement, to demand that the People prove its voluntariness in any particular way (*cf*. *Witherspoon*, 66 NY2d at 974-975).

The trial court also properly declined to give a jury instruction regarding the voluntariness of the videotaped statement, because there was insufficient evidence to present a

factual dispute on the issue (*see Cefaro*, 23 NY2d at 285-289). Contrary to defendant's argument, the videotape does not support competing inferences as to the statement's voluntariness.

The court properly declined to give a missing witness charge regarding the victim's brother, because there was no evidence that he could have provided material, noncumulative testimony. The trial evidence failed to establish that this witness was in a position to see who stabbed the victim (*see People v Dianda*, 70 NY2d 894 [1987]; *compare People v Kitching*, 78 NY2d 532, 538 [1991]). Defendant's argument rests on speculative inferences from the evidence.

We have reviewed certain sealed minutes in camera, and based on that review we reject defendant's challenge to the re-presentation of the case to a second grand jury.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7036 Christopher Walton, Index 13259/06
Plaintiff-Appellant,

-against-

Mercy College, et al.,
Defendants-Respondents.

Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge (Scott G. Christesen of counsel), for appellant.

Wade Clark Mulcahy, New York (Paul F. Clark of counsel), for Mercy College, respondent.

Shafer Glazer, LLP, New York (Howard Shafer of counsel), for Allied Security, LLC, respondent.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered February 14, 2011, which, in an action for personal injuries sustained by plaintiff student as a result of an assault in his college dormitory room, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly awarded summary judgment in favor of defendants since the assault upon plaintiff was not foreseeable. The evidence of prior crimes at and near the subject dormitory did not make the assault of plaintiff foreseeable. These prior crimes were unlike the subject crime in that they did not include any crimes involving a gun, a home

invasion, or violence related to drug trafficking *(see Maria T. v New York Holding Co. Assoc.,* 52 AD3d 356, 357-359[2008], *lv denied* 11 NY3d 708 [2008]). Moreover, it was undisputed that the perpetrators of the attack were the signed-in invitees of another dormitory resident. Accordingly, as a matter of law, defendants cannot be held liable (*see Burgos v Aqueduct Realty Corp.,* 92 NY2d 544, 550-551 [1998]; *Schuster v Five G. Assoc., LLC*, 56 AD3d 260 [2008]).

Dismissal of the complaint as against defendant Allied Security, which contracted to provide security services, was also proper because it owed no duty directly to plaintiff. Allied's contract was for limited services, and expressly disavowed any obligation to third parties *(see Dabbs v Aron Sec., Inc.,* 12 AD3d 396, 397 [2004]).

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7037-
7038 In re James S.,

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

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

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

Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about May 25, 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 robbery in the second degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The placement was a proper exercise of the court's discretion, and it constituted the least restrictive alternative consistent with appellant's needs and best interests and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The disposition was justified by the seriousness of the offense and appellant's escalating criminal

conduct. Appellant committed new offenses while at liberty awaiting trial, and again while in custody after being remanded. In addition, he had a poor attendance record at school, along with behavior problems. For the same reasons, the length of the placement was not excessive.

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7039 Jeffery Brewer, et al., Index 107477/08
Plaintiffs-Respondents,

-against-

Stonehill & Taylor Architects,
Defendant-Respondent-Appellant,

R.P. Brennan,
Defendant-Appellant-Respondent.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for appellant-respondent.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondent-appellant.

Purcell & Ingrao, P.C., Mineola (Corey J. Pugliese of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered March 30, 2011, which denied defendants Stonehill & Taylor Architects' and R. P. Brennan's motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

Defendants established prima facie that they did not create the allegedly dangerous condition that precipitated plaintiff's injuries, i.e., a piece of molding on the floor near the freight elevator, or have actual or constructive notice of it (*see Smith*

v Costco Wholesale Corp., 50 AD3d 499, 500 [2008]). Stonehill's president and Brennan's project manager both testified that Brennan completed the work it had been hired by Stonehill to do on December 13, 2007, about two weeks before plaintiff's accident, and that an inspection performed at that time found no loose molding or other material on the premises. Stonehill's president was present on the day of plaintiff's accident and observed nothing on the floor near the freight elevator. Indeed, plaintiff himself had been working in the area for 1½ hours before he fell, and it was only after the accident that he saw the molding for the first time. There is no evidence in the record as to how long the molding had been there.

Plaintiff's testimony that he saw workers in the area of the freight elevator before his accident but did not know who they were or what they were doing is insufficient to defeat defendants' motions.

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7043 The People of the State of New York, Respondent, Ind. 2456/08

-against-

Tyroy Peterkin, Defendant-Appellant.

_____

The Bhatta Law Firm, P.C., New York (Licelle R. Cobrador of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered November 17, 2009, as amended January 12 and 13, 2010, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of nine years, unanimously affirmed.

The court properly declined to suppress lineup and in-court identifications. As the People conceded and the court correctly concluded, the photographic identification procedure was unduly suggestive. However, it was still sufficiently reliable to provide probable cause for defendant's arrest, particularly since the victim saw defendant entering a building, and police records showed that building to be defendant's residence.

The lineup identification was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833

[1990]), and it was attenuated from the improper photographic procedure. In any event, any error in receiving evidence of the lineup at trial was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Regardless of the suggestiveness of the photo or lineup identifications, the record supports the hearing court's finding that the victim's in-court identification of defendant was based on an independent source (*see Neil v Biggers*, 409 US 188, 199-200 [1972]; *People v Williams*, 222 AD2d 149 [1996], *lv denied* 88 NY2d 1072 [1996]). The victim had an extensive opportunity to view defendant, both during and immediately after the crime.

Defendant has not established any basis for suppression of the pedigree information he provided to the police. This was the only statement by defendant that was admitted at trial.

The court properly exercised its discretion in denying defendant's application to have the victim testify at trial with

the aid of an interpreter (*cf. People v Morrison*, 244 AD2d 168 [1997], *lv denied* 91 NY2d 895 [1998]). The court had already heard the victim testify in English at the suppression hearing, and it properly concluded that no interpreter was required.

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7044 GPS Global Parking Solutions, LLC, Plaintiff-Respondent, Index 107944/10

-against-

151 West 17th Street Condominium, Defendant,

-against-

Board of Directors of 151 West 17th Street Condominium, et al., Defendants-Appellants.

White, Fleischner & Fino, LLP, New York (Evan A. Richman of counsel), for appellants.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 18, 2011, which denied the motion of defendant Board of Directors and its individual members to dismiss the complaint as against them, unanimously affirmed, without costs.

We accept the allegations of the complaint as true and construe the inferences that may be drawn therefrom in plaintiff's favor, as we must on a motion to dismiss pursuant to CPLR 3211 (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *DeMicco Brothers, Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99 [2004]). We find that the complaint sufficiently states a claim

against the Condominium Board and its individual members for trespass and misappropriation of property. In the complaint, plaintiff asserts that defendants directed employees of the condominium to continue to trespass on plaintiff's personal property and disrupt its business in bad faith and in furtherance of their personal "grudge" against plaintiff or its principal. This allegation of bad faith and a breach of fiduciary duty, not protected by the business judgment rule, is sufficient to withstand the motion to dismiss (*see Matter of Y & O Holdings (NY) v Board of Mgrs. of Exec. Plaza Condominium*, 278 AD2d 173 [2000]).

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7045 Kathryn Donnelly, Index 83/10
Plaintiff-Respondent,

-against-

Ronnen Gur-Arie,
Defendant-Appellant.

Hoffman & Behar, LLP, Mineola (Alexandra N. Cohen of counsel), for appellant.

Law Offices of Kenneth J. Weinstein, P.C., Garden City (Michael J. Langer of counsel), for respondent.

Order, Supreme Court, Queens County[1] (Pam Jackman Brown, J.), entered January 26, 2011, which, upon the parties' respective motions for pendente lite relief, inter alia, directed defendant to pay the mortgages on the marital residence in the amount of $2,892.63 per month, and on the Queens Village property in the amount of $2,800 per month, and to pay the following monthly bills in the amounts indicated: Con Edison ($599), water ($120), telephone ($100), disability insurance for plaintiff ($133.33), auto insurance ($262), the children's educational expenses ($3,000), cable ($92), and plaintiff's car lease payments ($387.73), and to deliver to plaintiff the monthly rental income of $900 from the tenant residing in the basement at

[1]This appeal was transferred to this Court from the Appellate Division, Second Department.

150-01 78th Avenue, Flushing, retroactive to August 1, 2010, unanimously affirmed, without costs.

We decline to disturb the pendente lite award that only required defendant to resume making payments that he had previously made. There was no showing of either exigent circumstances or a failure by the motion court to consider the factors set forth in Domestic Relations Law § 236(B)(6), such as the parties' respective incomes and their pre-separation standard of living (*see e.g. Strauss v Saadatmand*, 89 AD3d 415 [2011]).

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

ENTERED: MARCH 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7046N Frances Ashley Rubacha, Index 306003/10
Plaintiff-Appellant,

-against-

Paul Rubacha,
Defendant-Respondent.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Deborah E. Lans of counsel), for appellant.

Aronson Mayefsky & Sloan, LLP, New York (David Aronson of counsel), for respondent.

Order, Supreme Court, New York County (Saralee Evans, J.), entered July 27, 2011, which, to the extent appealed from as limited by the briefs, denied so much of plaintiff wife's motion as sought an order directing defendant husband to deposit a federal tax refund of $1,123,338 into the parties' joint account, and granted defendant's cross motion for an order directing plaintiff to authorize the transfer of $200,035, representing tax refunds from Michigan and Wisconsin, from the parties' joint account to Ashley Capital, and to sign an amended 2006 New York State tax return, with the projected tax refund, estimated to be $482,052, to be deposited with Ashley, unanimously affirmed, without costs.

In this action for divorce, plaintiff has failed to show that defendant is attempting or threatening to dispose of marital

assets in order to affect plaintiff's rights in equitable distribution (*see Guttman v Guttman*, 129 AD2d 537 [1987]). Rather, the record shows that defendant has transferred, or intends to transfer, the marital tax refunds to Ashley, a marital asset, to preserve the parties' collective net worth. Indeed, the record shows that Ashley, a real estate investment company that owns commercial real estate properties and acts as the landlord for industrial and manufacturing tenants originally paid the taxes that generated the refunds at issue. It is undisputed that Ashley is in need of operating capital to maintain assets at a level that it has guaranteed to its lenders and to continue as a viable ongoing concern (*see generally Morton v Morton*, 69 AD3d 693, 693 [2010]).

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

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

ENTERED: MARCH 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7139 In re Thomas Maldonado, M.D., etc., Petitioner-Respondent, Index 403230/11

-against-

R.J., etc., Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane Goldstein Temkin of counsel), for appellant.

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), entered December 22, 2011, which, in a special proceeding brought pursuant to Public Health Law § 2994-r(1), upon findings that respondent patient lacks the capacity to make a reasoned decision with respect to the medical treatment recommended by his physicians and that such treatment is in respondent's best interests, authorized petitioner doctor to arrange for major medical treatment under § 2994-g(4), including performing a right lower extremity amputation and all associated procedures upon respondent, unanimously affirmed, without costs.

Clear and convincing evidence — namely, respondent's testimony and the testimony of two attending physicians at the hospital, one of whom was a board-certified psychiatrist —

supports the court's determination that respondent lacks decision-making capacity (*see* Public Health Law § 2994-c[6]; *Addington v Texas*, 441 US 418, 431-433 [1979]; *Rivers v Katz*, 67 NY2d 485, 497 [1986]). Respondent's testimony was consistent with the psychiatrist's diagnosis of schizophrenia and showed that he lacked decision-making capacity because of his mental illness.

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

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

ENTERED: MARCH 8, 2012

CLERK

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5509 The People of the State of New York, Respondent, Ind. 2634/99

-against-

Nico LeGrand also known as Tony Jones, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 3, 2009, affirmed.

Opinion by Andrias, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
John W. Sweeny, Jr.
Dianne T. Renwick
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

5509
Ind. 2634/99

_____x

The People of the State of New York,
Respondent,

-against-

Nico LeGrand also known as Tony Jones,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 3, 2009, convicting him, after a jury trial, of murder in the second degree and imposing sentence.

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

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello and Patrick J. Hynes of counsel), for respondent.

ANDRIAS J.

The verdict convicting defendant of second-degree murder at his third trial was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The issue to be determined is whether the trial court committed reversible error when it precluded a defense expert from testifying about the effect of "weapon focus" on eyewitness identifications without conducting a *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]), or when it ruled that if the expert testified about "the effect of postevent information on accuracy of identification," the People could elicit evidence that the identifying witnesses cooperated with police to produce a composite sketch, which resembled defendant.

We hold that under the particular circumstances of this case, the proposed expert testimony as to weapon focus would have had little relevance and its exclusion did not prejudicially deprive defendant of a fair trial. Moreover, the testimony regarding the preparation of the composite sketch would have been admitted for the limited purpose of allowing the People to address a potentially misleading impression that would have been created by the defense identification expert's proposed postevent information testimony, and the conditional ruling was not unduly prejudicial to defendant, given the limiting instruction proposed

by the court. Therefore, we affirm the judgment.

On June 15, 1991, livery cab driver Joaquin Liriano was stabbed to death. A number of people witnessed the attack, and within days four of them collaborated on a composite sketch of the perpetrator. In 1993, defendant was deemed a suspect in the homicide after he was arrested for an unrelated burglary and an officer thought that he resembled the composite sketch. The police were unable to locate any of the witnesses and the homicide case remained dormant until April 1998 when defendant was arrested for another burglary and the police again concluded that he resembled the composite sketch.

The authorities then located the witnesses who contributed to the composite sketch and another who did not come forward until 1998. R.P., who saw the perpetrator from the street, positively identified defendant in a photo array and lineup as the perpetrator. T.F., who saw the perpetrator at a distance of 20 to 25 feet through a window in his apartment, viewed the photo array and noted that defendant's photograph was a "very close, if not exact match." J.G., who was with T.F. at the time of the attack, noted that defendant's photograph looked "similar" to the perpetrator. The fourth and fifth witnesses (L.G. and S.G.) were unable to identify defendant. No forensic or physical evidence tied defendant to the stabbing.

Defendant's first trial ended in a hung jury. He was found guilty at his second trial. This Court affirmed (28 AD3d 318 [2006]), but the conviction was reversed by the Court of Appeals (8 NY3d 449 [2007])(*LeGrand I*) and a new trial ordered on the ground that the trial court erred when it precluded the defense expert's proposed testimony regarding the lack of correlation between confidence and accuracy of identification, confidence malleability, and the effect of postevent information on identification accuracy, the underlying principles of which were generally accepted by the relevant scientific community.[1] The Court of Appeals found that testimony as to the psychological phenomenon of weapon focus was properly excluded because there was insufficient evidence to confirm that the principles underlying the proposed testimony were generally accepted in the relevant scientific community at that time.

In so ruling, the Court of Appeals established a two-stage

---

[1]"*Confidence-accuracy correlation* refers to the relation between the accuracy of an eyewitness's identification and the confidence that [the] eyewitness expresses in the identification." "*Postevent information* refers to the proposition that [e]yewitness testimony about an event often reflects not only what the eyewitness actually saw but information they obtained later on." "*Confidence malleability* refers to the proposition than an eyewitness's confidence can be influenced by factors that are unrelated to identification accuracy" *People v LeGrand*, 196 Misc 2d 179, 180-1 (internal quotation marks omitted).

inquiry for considering a motion to admit expert testimony. In the first stage, the court decides whether the case "turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime" (8 NY3d at 452). In the second stage, a court must consider whether the proposed "testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community [which may require a *Frye* hearing], (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror" (*id.*).

At the third trial, defense counsel informed the court that she would not be calling her identification expert to testify in light of the court's rulings that expert testimony as to the effect of weapon focus would not be allowed and that testimony on postevent information would open the door to testimony about the composite sketch. R.P. and J.G. identified defendant as the assailant; T.F. was too ill to attend and his testimony from the prior trials in which he identified defendant was read into the record.

Defendant argues that he established a sufficient basis for at least conducting a *Frye* hearing on the issue of the effect of weapon focus and that the court's ruling prejudicially deprived

him of the opportunity to elicit a form of valuable evidence. This conclusion is not supported by the record.

> "As a general rule, it is an abuse of discretion to deny a motion for expert testimony on eyewitness identifications in a case that depends solely on the accuracy of eyewitness testimony if there is no corroborating evidence connecting the defendant to the commission of the charged crime and the proposed testimony satisfies the general criteria for the admissibility of expert proof. [The Court of Appeals'] concern in recent years has arisen from psychological studies that have addressed the potential for misidentification when a person observes an assailant -- usually a stranger -- for the first time in a highly stressful environment" (*People v Muhammad*, 17 NY3d 532, 545-546 [2011] [internal citations omitted]).

However, even where expert testimony should be admitted, the court is still obliged to exercise its discretion with regard to the relevance and scope of the testimony and not all categories of such testimony are applicable or relevant in every case (*see People v Santiago*, 17 NY3d 661 [2011]).

"'Weapon focus' is the phenomenon which occurs when, during the course of a crime, a witness is exposed to a weapon, and the witness focuses his or her attention on the weapon and not on the perpetrator's face, which allegedly impairs the ability of the witness to make a subsequent identification of the perpetrator" (*People v Banks*, 16 Misc 3d 929, 931 n 4 [County Ct, Westchester County 2007]). While the testimony of R.P., T.F. and J.G. establishes that they did take notice of the knife when they saw

defendant stab the cab driver, none of them were close enough to defendant to be threatened by it, and thus were not within the zone of danger. T.F. and J.G. were inside their apartment and R.P. moved to a position of safety behind a vehicle, where he continued to watch the attack on the cab driver unfold.

Significantly, the identifying witnesses' observations of defendant were not limited to the point in time when the cab driver was stabbed. R.P. testified that after the stabbing, defendant walked away and then returned to retrieve a "multi-color African" type bag from inside the cab. At that time, R.P. had an unobstructed view of defendant and got a good look at him. R.P. saw defendant's face and watched him calmly walk towards Morningside Park. When the cab driver was on the ground, J.G. saw defendant walk around to the other side of the cab, pick up the multi-colored bag and walk away "like nothing happened." As she watched this going on, she was able to see defendant's face. T.F. also observed defendant grab a multi-colored bag from the cab and casually walk away. S.G. did not identify defendant, but her 911 call was offered to show that the incident lasted about two minutes.

Further, unlike *People v Abney* (13 NY3d 251 [2009]), where the victim did not describe the assailant as possessing any unusual or distinctive features or physical characteristics, R.P.

testified that defendant's face had cheekbones like Mike Tyson, and a moustache and sideburns "like Elvis." T.F. and J.G. were struck by the fact that defendant did not appear angry and had a blank expression on his face. J.G. also explained at trial that she wrote “similar” on the photo array because “it looks exactly the same as what I saw outside the window.” T.F. felt that the photo in the array was a “strong match,” but it was a “black and white photo, photocop[ied] with wavy lines in it so it’s not a crystal clear sharp black and white photograph.” T.F. explained that there was a “profound difference” between seeing a “degraded photocopy of a person” and seeing that person at the time of the incident and in the courtroom.

In light of this testimony, which establishes that the identifying witnesses got a clear look at defendant as he retrieved the bag and casually left the scene, at which time the knife was no longer a point of focus, the proposed expert testimony as to the weapon focus effect had little relevance and its exclusion was at most harmless error which did not prejudicially deprive defendant of the opportunity to elicit a form of valuable evidence. In this regard, we note that defendant was still free to produce expert testimony regarding the lack of correlation between confidence and accuracy of identification, confidence malleability, and the effect of

postevent information on identification accuracy.

Defendant also argues that the trial court effectively precluded his identification expert from testifying when it ruled that his proposed testimony on postevent information, authorized by the Court of Appeals in *LeGrand I*, would open the door to testimony about the composite sketch. Defendant maintains that the trial court's holding that evidence relating to the preparation of the sketch was admissible to show "unintentional falseness" is contrary to the holding in *People v Maldonado* (97 NY2d 522 [2002]) that such evidence may not be admitted to counteract evidence that a witness's identification was the result of mistake or confusion. While the trial court would not permit the actual sketch to come into evidence and proposed a limiting instruction, defendant argues that under *Maldonado*, the mere mention of the sketch would have been impermissibly prejudicial.

In *Maldonado*, the victim identified the defendant as one of the assailants in an attempted murder/robbery. However, on cross-examination, the victim was shown a photograph of the defendant's brother and identified him as that assailant. The defense also elicited testimony from a detective that fingerprints at the scene did not match the defendant's and that the detective never showed the victim a photograph of a third

assailant. The prosecution then sought to introduce the composite sketch prepared by the victim and a police artist, on the ground that the defense had opened the door by creating the impression that the victim's identification was incorrect. The trial court, over defense objection, admitted the sketch and gave no limiting instruction as to its use or purpose. In summation, the prosecutor emphasized the importance of the sketch.

The Court of Appeals reversed, holding that a composite sketch may not be admitted to counteract evidence which casts doubt on the reliability of a witness's identification, because it impermissibly bolsters the witness's testimony (97 NY2d at 529). The Court explained that, especially where the identity of an assailant is in dispute and the proof rests entirely on identification, "[m]ere mention at trial that an identifying witness cooperated with a police artist to produce a composite sketch is, *under most circumstances*, impermissibly prejudicial" (*id.* at 528 [emphasis added]). The Court did carve out a limited exception to the hearsay rule barring the admission of a sketch, holding that it "may be admissible as a prior consistent statement where the testimony of an identifying witness is assailed as a recent fabrication" (*id.* at 529) to confirm the identification with "proof of declarations of the same tenor before the motive to falsify existed" (*id.*). The Court found

that the exception did not apply in *Maldonado* because the defense suggested that the identification was a mistake, rather than a recent fabrication. Nor did the cross-examination of the detective open the door since the inquiry "merely completed the account brought out by the prosecutor and did not carry an implication of fraud or bad faith" (*id.* at 530).

As the trial court noted, the situation here differs from *Maldonado*. The court did not rule that the sketch itself would be admitted. Nor did the court in any way preclude the proposed expert testimony as to lack of correlation between confidence and accuracy of identification or confidence malleability. Rather, the court ruled that if the defense intended to have its expert testify that the witnesses' identification was tainted by postevent information (in the form of the photo array), evidence as to the preparation of the sketch would be allowed so the jury would have a true picture of what transpired, i.e. that shortly after the event the witnesses could recall and relate their observations of defendant. Unlike *Maldonado*, there were no conflicting identifications that had to be explained away and the court made clear that it would give a limiting instruction as to the use of the testimony, which was not being introduced to prove defendant's guilt.

A party may open the door to otherwise inadmissible evidence

by creating a misleading impression before the jury (*see People v Massie*, 2 NY3d 179, 180 [2004]; *People v Lindsay*, 42 NY2d 9, 12 [1977]; *People v Heckstall*, 45 AD3d 907, 909 [2007], *lv denied* 10 NY3d 766 [2008]). In these and similar cases, the witness had multiple opportunities to identify the accused, and the defense was unfairly selective in an effort to suggest that the witness was unable to make an identification. Here too, had the defense expert been permitted to testify about postevent information in order to discredit the eyewitness's in-court identification of defendant, without the People being able to introduce evidence relating to the preparation of the sketch, it would have created the misleading impression that the eyewitnesses were unable to identify the assailant without seeing the photos (*see People v Lopez*, 9 AD3d 692, 694 [2004]).

Accordingly, the trial court did not err when it ruled that in order to avoid giving the jury an incomplete recitation of the events leading to defendant's identification at the photo array, and to the extent that the defense intended to argue that the array caused the witnesses to identify defendant, testimony could be elicited that the witnesses met with an artist shortly after the crime, gave a description of the perpetrator, from which a composite sketch was created, and then years later the witnesses viewed the photo array. As the trial court stated, this would

balance things "by giving the jury an understanding of what each of the witnesses' bases for the identification was as to whether they fabricated, either subliminally or induced to do it by the picture of him, or whether this goes back." The sketch itself would not have been admitted into evidence and a limiting instruction would have been given that the testimony as to the sketch could be used only to evaluate the expert's opinion that the eyewitnesses' in-court identifications were caused by having viewed defendant in the photo array years after the crime occurred.

We note further that in *Santiago*, when the Court of Appeals ruled that "Supreme Court should also have given more adequate consideration to whether the proposed testimony concerning exposure time, lineup fairness, the forgetting curve, and simultaneous versus sequential lineups was relevant ... and beyond the ken of the average juror, and if necessary held a *Frye* hearing," it stated in footnote 4: "We note that the fact that the victim assisted in the creation of an artist's sketch of her attacker does not render the expert testimony irrelevant" (*Santiago*, 17 NY3d at 672). While the eyewitnesses' assistance in the creation of a sketch does not render the expert testimony irrelevant, we believe that its existence may be disclosed where it has a direct impact on the value of the expert's testimony on

a particular point. Here, with the appropriate limiting instruction, it would not be unduly prejudicial to question the defense expert as to whether his opinion on the effect of postevent information would change based on evidence that the eyewitnesses had contributed to the preparation of a composite sketch of the perpetrator within days of the crime and before they saw the photo array.

Accordingly, the judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 3, 2009, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, should be affirmed.

All concur.

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

ENTERED: MARCH 8, 2012

CLERK