



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

**DECISIONS FILED**

**APRIL 27, 2012**

**HON. HENRY J. SCUDDER, PRESIDING JUSTICE**

**HON. NANCY E. SMITH**

**HON. JOHN V. CENTRA**

**HON. EUGENE M. FAHEY**

**HON. ERIN M. PERADOTTO**

**HON. EDWARD D. CARNI**

**HON. STEPHEN K. LINDLEY**

**HON. ROSE H. SCONIERS**

**HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES**

**FRANCES E. CAFARELL, CLERK**

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

30

**KA 08-01991**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYLAND L. HICKS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered February 28, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, aggravated sexual abuse in the second degree and aggravated criminal contempt.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts one, two and four of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [2]), aggravated sexual abuse in the second degree (§ 130.67 [1] [a]), and aggravated criminal contempt (§ 215.52 [1]). Defendant's contention that a mistrial should have been granted when the victim's testimony was bolstered is unreserved for our review inasmuch as defendant did not ask for a further curative instruction after County Court sustained his objection to the admissibility of the testimony, nor did he renew his motion for a mistrial (see CPL 470.05 [2]; see also *People v Jones*, 219 AD2d 736, 736, *lv denied* 86 NY2d 873). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We reject defendant's contention that the court abused its discretion in denying his motion to file a late alibi notice with respect to a certain defense witness (see CPL 250.20 [1]; *People v Owens*, 26 AD3d 816, *lv denied* 7 NY3d 755, 760). We agree with defendant, however, that the court erred in precluding the testimony of that same defense witness concerning defendant's presence and activity at least one hour before the crimes occurred. The crimes occurred at 11:45 P.M. on September 4, 2007. The victim knew

defendant from a previous relationship, and they had a child together. According to defendant's trial testimony, the victim telephoned him earlier in the evening, demanding money for child support. Defendant testified that he drove to the victim's residence with the witness in question at approximately 10:30 P.M. to deliver some money to the victim and that, while in the residence, he observed another "dude" there. Defendant further testified that, after remaining at the residence for a few minutes, defendant then left.

According to the victim's trial testimony, however, she had not seen defendant since August 2007 until the night of the crimes and did not telephone him that night. The victim's testimony made no mention of any other person being present in her residence that evening, and she indicated that she was napping on the couch at the time of and prior to the crimes. Thus, the proposed testimony of defendant's witness would have directly contradicted the victim's version of events leading up to the crimes.

We agree with defendant that the proposed testimony of the defense witness in question did not constitute alibi testimony. Indeed, an alibi defense is defined in CPL 250.20 (1) as "a trial defense that *at the time of the commission of the crime[s]* charged [defendant] was at some place or places other than the scene of the crime" (emphasis added). Adhering to that statutory definition and the limited time frame encompassed by its express language, the proposed testimony of the defense witness "would not have accounted for the defendant's whereabouts during the crime[s] or placed him away from the crime scene shortly thereafter," and thus he was not in fact offering alibi testimony (*People v Bennett*, 128 AD2d 540, 540, lv denied 69 NY2d 1001; see *People v Evans*, 289 AD2d 417, lv denied 98 NY2d 637). We reject the People's contention that the proposed testimony would "implicate an alibi" and cause the jury to speculate that defendant had an alibi defense. "[T]he fact that such [testimony] may, in addition to its intended purpose, also be taken as circumstantial alibi evidence does not require that alibi notice be given" (*People v Green*, 70 AD3d 39, 44). Thus, we conclude that the court's preclusion of the testimony of the defense witness in question was an abuse of discretion that violated defendant's constitutional right to call witnesses - "a right 'recognized as essential to due process' " (*id.* at 45, quoting *Chambers v Mississippi*, 410 US 284, 294). It cannot be said in light of the less than overwhelming evidence of defendant's guilt that there is "no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237).

In view of our determination to grant a new trial, there is no need to consider defendant's remaining contentions.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

172

**KA 10-01480**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KADEEM R. HARRIS, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered May 17, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [2]). Contrary to defendant's contention, we conclude that he knowingly, intelligently and voluntarily waived his right to appeal as a condition of the plea (*see generally People v Lopez*, 6 NY3d 248, 256). "County Court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]), and the record establishes that he "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256). Contrary to the further contention of defendant, his "monosyllabic affirmative responses to questioning by [the c]ourt do not render his [waiver] unknowing and involuntary" (*People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *People v Gordon*, 89 AD3d 1466). Finally, to the extent that defendant's contention that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal (*see People v Jackson*, 85 AD3d 1697, 1699, *lv denied* 17 NY3d 817), we conclude that it lacks merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

225

**KA 09-00903**

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD E. AIKEY, JR., DEFENDANT-APPELLANT.

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JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

RICHARD E. AIKEY, JR., DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered October 22, 2008. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the second degree and endangering the welfare of a child (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]), defendant contends that the verdict is against the weight of the evidence based on inconsistencies in the testimony of one of the victims. Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we reject that contention (see generally *People v Bleakley*, 69 NY2d 490, 495). "Great deference is to be accorded to the fact [ ]finder's resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony" (*People v Curry*, 82 AD3d 1650, 1651, lv denied 17 NY3d 805 [internal quotation marks omitted]; see *People v Mateo*, 2 NY3d 383, 410, cert denied 542 US 946).

Contrary to defendant's further contention, County Court did not abuse its discretion in denying his request for an adjournment when his attorney became ill. "The court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Arroyo*, 161 AD2d 1127, 1127, lv denied 76 NY2d 852). Here, defense counsel continued to represent defendant at trial, and thus defendant failed to establish that he was

prejudiced by the court's denial of his request.

We reject defendant's contention that he was punished for exercising his right to a trial. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*People v Powell*, 81 AD3d 1307, 1308, *lv denied* 17 NY3d 799; *see generally People v Pena*, 50 NY2d 400, 411-412, *rearg denied* 51 NY2d 770, *cert denied* 449 US 1087). The record before us establishes that, although the court indicated it was willing to accept an *Alford* plea with a shorter sentence than the sentence that was eventually imposed, that offer was made to spare the child victims the trauma of testifying against defendant, their uncle (*see People v Austin*, 190 AD2d 508, 509, *lv denied* 81 NY2d 1011). "There is no 'evidence that defendant was given the lengthier sentence solely as a punishment for exercising his right to a trial' " (*People v Johnson*, 56 AD3d 1172, 1173, *lv denied* 11 NY3d 926; *see Pena*, 50 NY2d at 411-412). In addition, the sentence is not unduly harsh or severe.

Defendant's contention in his pro se supplemental brief that the court erred in allowing the People's expert to bolster the testimony of one of the victims is not preserved for our review (*see People v Smith*, 24 AD3d 1253, 1253, *lv denied* 6 NY3d 818). In any event, that contention is without merit (*see generally People v Carroll*, 95 NY2d 375, 387; *People v Wallace*, 60 AD3d 1268, 1270, *lv denied* 12 NY3d 922). Contrary to the further contention of defendant in his pro se supplemental brief, "[t]he failure of defense counsel to obtain the testimony of an expert does not constitute ineffective assistance of counsel because defendant has not shown that 'such testimony was available, that it would have assisted the jury in its determination or that [defendant] was prejudiced by its absence' " (*People v Brandi E.*, 38 AD3d 1218, 1219, *lv denied* 9 NY3d 863; *see People v Prince*, 5 AD3d 1098, 1098, *lv denied* 2 NY3d 804).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

250

**KA 10-01816**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

EMERSON C. VERNON, DEFENDANT-APPELLANT.

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MATTHEW D. NAFUS, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered August 24, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of assault in the second degree (Penal Law § 120.05 [7]) to assault in the third degree (§ 120.00 [1]) and vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on the conviction of assault in the third degree and for proceedings pursuant to CPL 460.50 (5) (see *People v Skinner*, \_\_\_ AD3d \_\_\_ [Apr. 27, 2012]).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

286

**CAF 11-01896**

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

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IN THE MATTER OF BARNEY M. MATHEWSON, JR.,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ELIZABETH SESSLER, RESPONDENT-APPELLANT.

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LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-APPELLANT.

TERRI BRIGHT, FABIVS, FOR PETITIONER-RESPONDENT.

DENNIS S. LERNER, ATTORNEY FOR THE CHILDREN, SYRACUSE, FOR MICHAEL  
B.M., KATHLEEN M.M., AND SAMUEL N.M.

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Appeal from an order of the Family Court, Onondaga County (Gina M. Glover, R.), entered April 25, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint legal custody of their children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and facts by denying the father's petition in part, vacating the 1st through 11th ordering paragraphs and inserting in place thereof the following:

ORDERED, that the father shall enjoy parenting time with the children on alternate weekends beginning May 1, 2012, from Friday at 6:30 P.M. until Sunday at 6:30 P.M.; and it is further

ORDERED, that the mother shall enjoy parenting time with the children each and every Thanksgiving weekend from Wednesday at 6:30 P.M. until Sunday at 6:30 P.M. and that such time shall take precedence over the father's regularly scheduled alternate weekend parenting time, without a right to the father for makeup time in the event there is a conflict; and it is further

ORDERED, that the father shall enjoy parenting time with the children each and every Easter weekend from Friday at 6:30 P.M. until Sunday at 6:30 P.M.; and it is further

ORDERED, that the father shall enjoy parenting time with the children on the father's birthday for a minimum of three hours and each of the children's birthdays for a

minimum of two hours; and it is further

ORDERED, that the mother shall enjoy parenting time with the children on the mother's birthday for a minimum of three hours and each of the children's birthdays for a minimum of two hours; and it is further

ORDERED, that the father shall enjoy parenting time with the children on Father's Day from 10:00 A.M. until 6:30 P.M., even in the event that Father's Day falls on an "off" weekend; and it is further

ORDERED, that the mother shall enjoy parenting time with the children on Mother's Day from 10:00 A.M. until 6:30 P.M. and that such time shall take precedence over the father's regularly scheduled alternate weekend parenting time, without a right to the father for makeup time in the event there is a conflict; and it is further

ORDERED, that during each summer, the father shall enjoy uninterrupted parenting time with the children during two consecutive weeks to run from Friday at 6:30 P.M. until the second Friday thereafter at 6:30 P.M. The father shall notify the mother by the first day of April which two consecutive weeks he will use for such parenting time; and it is further

ORDERED, that during each summer, the mother shall enjoy uninterrupted parenting time with the children during two consecutive weeks to run from Friday at 6:30 P.M. until the second Friday thereafter at 6:30 P.M., and that such time shall take precedence over the father's regularly scheduled alternate weekend parenting time, without a right to the father for makeup time in the event there is a conflict. The mother shall notify the father by the first day of June which two consecutive weeks she will use for such parenting time; and it is further

ORDERED, that the father shall have parenting time with the children on alternate holidays, commencing with Memorial Day 2012, as follows: New Year's Day, Martin Luther King, Jr. Day, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Christmas Eve and Christmas Day;

and as modified the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order that granted petitioner father's petition seeking to modify the prior order of custody and visitation by, inter alia, awarding him joint legal custody of the parties' three children. The parties previously entered into a stipulation whereby it was agreed that the mother would have "sole legal custody and placement of the children, subject to the [father's] rights of visitation." The father was to have visitation

every other Saturday from 3:00 P.M. to 7:00 P.M. That stipulation was incorporated into the judgment of divorce.

We note at the outset that, although Family Court failed "to set forth 'the facts it deems essential' and upon which its determination is based" (*Matter of Whitaker v Murray*, 50 AD3d 1185, 1186, quoting CPLR 4213 [b]; see generally Family Ct Act § 165 [a]), remittal of the matter is not required inasmuch as " 'the record is . . . sufficient to enable this Court to make the requisite findings of fact' " (*Matter of Bradbury v Monaghan*, 77 AD3d 1424, 1425).

We agree with the mother that the father failed to make a sufficient showing of a change in circumstances to warrant modification of the existing custody arrangement (see *Matter of Gridley v Syrko*, 50 AD3d 1560, 1561; cf. *Matter of Stacey L.B. v Kimberly R.L.*, 12 AD3d 1124, 1124-1125, lv denied 4 NY3d 704). "[A] long-term custodial arrangement established by agreement[, such as the arrangement herein,] should prevail 'unless it is demonstrated that the custodial parent is unfit or perhaps less fit' " (*Fox v Fox*, 177 AD2d 209, 211), and that is not the case here. Contrary to the father's contention, his new employment, which allowed him more free time to spend with the children, and his purchase of a home were insufficient to constitute the requisite change in circumstances. We therefore modify the order by denying that part of the father's petition seeking joint custody of the children and vacating the first and second ordering paragraphs.

We further agree with the mother that the court abused its discretion in setting the revised visitation schedule. Although we conclude that the father failed to meet his " 'burden of demonstrating a sufficient change in circumstances to warrant modification' " of the visitation schedule (*Matter of Darla N. v Christine N.* [appeal No. 2], 289 AD2d 1012, 1012), we note that the mother concedes that an increase in the father's visitation from the original visitation schedule is in the best interests of the children, and it is within this Court's authority to modify orders to increase or decrease visitation (see generally *Matter of Roody v Charles*, 283 AD2d 945, 946). We therefore further modify the order by vacating the 3rd through 11th ordering paragraphs and inserting in place thereof a visitation schedule that reflects a reasonable balance between the excessive visitation granted by the court and the limited prior visitation schedule.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

291

CA 11-02072

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

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IN THE MATTER OF ZEN CENTER OF SYRACUSE, INC.,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN C. GAMAGE, COMMISSIONER, DEPARTMENT OF  
ASSESSMENT OF CITY OF SYRACUSE, COUNTY OF  
ONONDAGA, STATE OF NEW YORK,  
RESPONDENT-APPELLANT.

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MARY ANNE DOHERTY, CORPORATION COUNSEL, SYRACUSE (SHANNON M. JONES OF  
COUNSEL), FOR RESPONDENT-APPELLANT.

CLIFFORD FORSTADT, DEWITT (ROBERT TEMPLE OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 1, 2011 in a proceeding pursuant to CPLR article 78. The judgment granted the amended petition.

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

Memorandum: Petitioner is a not-for-profit corporation "organized and operated for the furtherance of the Zen Buddhist religion and activities related thereto." Petitioner owns property in the City of Syracuse, which it uses as a residential and dining facility for students of Zen Buddhism and visiting clergy. Petitioner commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking a real property tax exemption pursuant to RPTL 420-a (1) (a). Respondent appeals from a judgment granting the amended petition and determining that petitioner is tax exempt for the 2010 tax year. We shall treat this as a proceeding solely pursuant to CPLR article 78 inasmuch as petitioner may thereby obtain the relief sought, without the necessity of a declaration. We affirm.

Contrary to respondent's contention, "there is no requirement that an application be filed to obtain an RPTL 420-a exemption" (*Matter of Eternal Flame of Hope Ministries, Inc. v King*, 76 AD3d 775, 777, *affd* 16 NY3d 778; see *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 201-204, *rearg denied* 78 NY2d 1008). Thus, Supreme Court properly granted petitioner the RPTL 420-a exemption, despite the fact that petitioner did not file an

application for an exemption with respondent (see *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel*, 78 NY2d at 201-204).

Respondent further contends that the court erred in granting petitioner the RPTL 420-a exemption because petitioner failed to commence a tax certiorari proceeding pursuant to RPTL article 7 (see generally RPTL 706). We reject that contention. RPTL 420-a (1) (a) provides a mandatory tax exemption for "[r]eal property owned by a corporation . . . organized or conducted exclusively for religious . . . purposes, and used exclusively for carrying out thereupon . . . such purposes . . . ." According to petitioner, respondent "wrongfully and illegally failed to classify [the property] as exempt religious property . . . ." A "proceeding commenced to challenge the denial of a mandatory exemption is, in essence, a challenge to the taxing authority's jurisdiction over the subject property" (*Eternal Flame of Hope Ministries, Inc.*, 76 AD3d at 777; see *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel*, 78 NY2d at 204-205; *Hewlett Assoc. v City of New York*, 57 NY2d 356, 363-364; see also *Xerox Corp. v Town of Webster*, 204 AD2d 990, 991). "It is well recognized that where a challenge is made to the taxing authority's jurisdiction over the subject property, the settled rule that review of a tax assessment may be obtained only by way of the statutory certiorari procedures is not applicable" (*Hewlett Assoc.*, 57 NY2d at 363; see *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel*, 78 NY2d at 205; *Xerox Corp.*, 204 AD2d at 991). Thus, inasmuch as petitioner contends that the property is wholly exempt from taxation pursuant to RPTL 420-a (1) (a), "review by way of collateral proceedings is appropriate" (*Hewlett Assoc.*, 57 NY2d at 363; see *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel*, 78 NY2d at 204-205; see also *Xerox Corp.*, 204 AD2d at 991).

Contrary to respondent's contention, petitioner met its burden of establishing that the subject property is used exclusively in furtherance of its religious purpose (see RPTL 420-a [1] [a]; see e.g. *Congregation Rabbinical Coll. of Tartikov, Inc. v Town of Ramapo*, 17 NY3d 763, 764; *Matter of Adult Home at Erie Sta., Inc. v Assessor & Bd. of Assessment Review of City of Middletown*, 10 NY3d 205, 215-216). Respondent's remaining contentions are not preserved for our review (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985; see generally *Matter of County of Niagara v Daines*, 79 AD3d 1702, 1704, lv denied 17 NY3d 703) and, in any event, they are without merit.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

319

**CA 11-01843**

PRESENT: SCUDDER, P.J., SMITH, CARNI, AND SCONIERS, JJ.

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IN THE MATTER OF THE ARBITRATION BETWEEN  
STARPOINT CENTRAL SCHOOL DISTRICT,  
PETITIONER-APPELLANT,

AND

ORDER

CSEA, INC., LOCAL 872, STARPOINT CENTRAL  
SCHOOL DISTRICT BUILDINGS AND GROUNDS  
UNIT #7698, RESPONDENT-RESPONDENT.

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SARGENT & COLLINS, LLP, WILLIAMSVILLE (RICHARD G. COLLINS OF COUNSEL),  
FOR PETITIONER-APPELLANT.

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

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Appeal from an order of the Supreme Court, Niagara County  
(Richard C. Kloch, Sr., A.J.), entered July 1, 2011 in a proceeding  
pursuant to CPLR article 75. The order, among other things, dismissed  
the petition.

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

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

323

CA 10-02489

PRESENT: SCUDDER, P.J., SMITH, CARNI, AND SCONIERS, JJ.

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IN THE MATTER OF THE STATE OF NEW YORK,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

RICHARD LESTER, A PATIENT IN THE CARE AND  
CUSTODY OF ST. LAWRENCE PSYCHIATRIC CENTER,  
RESPONDENT-RESPONDENT.

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ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF  
COUNSEL), FOR PETITIONER-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER  
(LISA PAINE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an amended order of the Supreme Court, Wayne County  
(Thomas M. Van Strydonck, J.), entered September 28, 2010 in a  
proceeding pursuant to Mental Hygiene Law article 10. The amended  
order directed the release of respondent from custody.

It is hereby ORDERED that the amended order so appealed from is  
unanimously reversed on the law without costs and a new trial is  
granted.

Memorandum: Petitioner appeals from an amended order pursuant to  
Mental Hygiene Law article 10 releasing respondent from custody upon a  
jury verdict in his favor on the issue of whether certain kidnappings  
he attempted to commit in 1984 (1984 attempted kidnappings) were  
"sexually motivated" (see Mental Hygiene Law § 10.03 [f], [g] [4]; [p]  
[4]). Petitioner contends that Supreme Court erred in refusing to  
instruct the jury that it could consider evidence of kidnappings  
committed by respondent in 1980 on the issue of respondent's motive  
and intent with respect to the 1984 attempted kidnappings. We agree.

Inasmuch as petitioner's burden in the proceeding was to  
establish by clear and convincing evidence that the 1984 attempted  
kidnappings were "sexually motivated" (see Mental Hygiene Law § 10.03  
[s]; § 10.07 [c], [d]), we conclude that the court should have  
instructed the jury that it could consider the evidence of the 1980  
kidnappings on the issue of respondent's intent in committing the 1984  
attempted kidnappings and whether those crimes were "sexually  
motivated" (see *Matter of State of New York v Shawn X.*, 69 AD3d 165,  
172, *lv denied* 14 NY3d 702). We therefore reverse the amended order

and grant a new trial.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

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CA 11-02055

PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND SCONIERS, JJ.

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RAMESH L. CHAINANI AND BONNIE R. CHAINANI,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

RONALD A. LUCCHINO AND BARBARA T. LUCCHINO,  
DEFENDANTS-RESPONDENTS.

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PHILLIPS LYTLE LLP, BUFFALO (MINRYU KIM OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 14, 2011. The order, insofar as appealed from, denied plaintiffs' motion for attorneys' fees.

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

Memorandum: In December 2000, defendants entered into an agreement with plaintiffs (2000 agreement), granting plaintiffs two easements. One of the easements was a nonexclusive "permanent right" to park vehicles on one section of defendants' parking lot (Permanent Lot). In the spring of 2008 defendants made modifications to the Permanent Lot, allegedly preventing plaintiffs from exercising their rights to use that lot. Plaintiffs commenced this action alleging that defendants had breached the 2000 agreement and seeking injunctive relief, damages and attorneys' fees.

The parties subsequently entered into a stipulation, granting plaintiffs "the relief sought by [them] . . . on their Second Cause of Action." Pursuant to the stipulated order, defendants were to make various modifications to the Permanent Lot. The stipulated order further provided that, having been granted the relief sought in the second cause of action, that cause of action was dismissed and severed from the remainder of the complaint, which would be subject to later adjudication. By a separate stipulation of discontinuance, the parties stipulated to dismiss plaintiffs' first cause of action, which sought injunctive relief prohibiting defendants from obstructing plaintiffs' parking rights. That dismissal was "without prejudice to [subsequent] application[s] . . . for reimbursement of . . . attorney[s'] fees, costs and disbursements."

Plaintiffs thereafter moved for an award of, inter alia, attorneys' fees and costs on the ground that they were the "prevailing party" within the meaning of the 2000 agreement. In relevant part, the 2000 agreement provided that, "[i]n the event that either [party] shall seek enforcement of the rights conferred pursuant to this [agreement], then the *prevailing party* shall be entitled to reimbursement and indemnification for all reasonable attorneys' fees, costs and disbursements expended as a result thereof (emphasis added)." The term "prevailing party" was not defined in the 2000 agreement. We conclude that Supreme Court properly denied the motion, determining that plaintiffs were not the "prevailing party" under the terms of the stipulated order.

In determining whether a party is a prevailing party, a fundamental consideration is whether that party has "prevailed with respect to the central relief sought" (*Nestor v McDowell*, 81 NY2d 410, 416, *rearg denied* 82 NY2d 750; *see Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279, 279). "[S]uch a determination requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" (*Excelsior 57th Corp. v Winters*, 227 AD2d 146, 147).

Here, plaintiffs alleged in their complaint that defendants breached the 2000 agreement, and they sought injunctive relief, damages and attorneys' fees. Thus, the "true scope" of the dispute was whether defendants' breached the 2000 agreement (*id.*). Plaintiffs, however, did not obtain the full measure of injunctive relief they sought, did not receive an award of damages and, importantly, did not obtain a determination that defendants breached the 2000 agreement. The court, which was "significantly involved in the settlement discussions that led to the stipulated order," concluded that, although plaintiffs were " 'successful' in obtaining some of the relief requested," it would be "disingenuous for [plaintiffs] to declare that [they were] the prevailing party." We agree. "In view of the mixed results of this litigation, in which plaintiffs stipulated to resolve certain . . . claims, but also stipulated to discontinue [certain] claims, and abandoned [other] claims . . . , plaintiffs cannot be considered the prevailing party in this litigation" (*Berman v Dominion Mgt. Co.*, 50 AD3d 605, 605).

We note that plaintiffs' reliance on *McGrath v Toys "R" Us, Inc.* (3 NY3d 421) is misplaced. That action concerned attorneys' fees awarded in the context of a complex civil rights action, where only nominal damages were awarded. That case is thus distinguishable from the instant action (*see generally Texas State Teachers Assn. v Garland Ind. School Dist.*, 489 US 782, 789). Contrary to plaintiffs' contention, the public policy in favor of honoring private fee-shifting agreements does not compel a different result. Because the 2000 agreement did not define the term "prevailing party," there was no provision of that agreement expressly providing for the recovery by plaintiffs of attorneys' fees where, as here, plaintiffs obtained only a small measure of the overall relief they sought (*cf. Jay N Jen, Inc. v Polge Seafood Distrib., Inc.*, 70 AD3d 1447, 1449).

All concur except CARNI, J., who dissents and votes to reverse the order insofar as appealed from in accordance with the following Memorandum: I respectfully disagree with the conclusion of my colleagues that plaintiffs were not the "prevailing parties" within the meaning of the agreement granting plaintiffs two easements (2000 agreement), and I therefore dissent.

The 2000 agreement provides that, if either the grantee or the grantor "shall seek enforcement of the rights conferred pursuant to this [agreement], then the prevailing party shall be entitled to reimbursement and indemnification for all reasonable attorneys' fees, costs and disbursements expended as a result thereof." There is no dispute that the central focus of plaintiffs' action was to enforce their parking rights under the agreement. As a result of the litigation, defendants were required to (1) remove the designation of two parking spaces as "handicapped parking" and return them to their original unrestricted availability for use by plaintiffs' business patrons; (2) remove the markings of "No Parking" painted on the area designated in the 2000 agreement for plaintiffs' parking; and (3) permit plaintiffs to restripe the area previously designated "No Parking" to provide for parking consistent with plaintiffs' rights under the 2000 agreement.

Contrary to the majority's conclusion, it is not necessary that a party achieve the "full measure" of the relief sought to be entitled to the reimbursement and indemnification sought herein. In order to justify an award of contractual attorneys' fees, the court need not grant the relief sought in each claim raised in a lawsuit (*see Senfeld v I.S.T.A. Holding Co.*, 235 AD2d 345, *lv dismissed* 91 NY2d 956, *lv denied* 92 NY2d 818). The analysis in determining whether such an award is warranted does not involve a mere computation of the claims granted. Rather, the party seeking such reimbursement and indemnification must simply be the prevailing party on the *central claims* advanced, and must receive "substantial relief" to warrant the conclusion that the party had prevailed on those central claims (*501 E. 87th St. Realty Co. v Ole Pa Enters.*, 304 AD2d 310, 311). "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his [or her] attorney's fee reduced simply because the . . . court did not adopt each contention raised" (*Hensley v Eckerhart*, 461 US 424, 440; *see Senfeld*, 235 AD2d at 345; *Matter of Rahmey v Blum*, 95 AD2d 294, 304). In the instant case, the stipulated court order validated plaintiffs' theory of recovery in several categories, and granted plaintiffs the substantial relief that they requested (*see Board of Mgrs. of 55 Walker St. Condominium v Walker St., LLC*, 6 AD3d 279, 280). The fact that plaintiffs' success "was only partial does not negate the fact that [they] prevailed" in enforcing the 2000 agreement (*Duane Reade v 405 Lexington, L.L.C.*, 19 AD3d 179, 180; *see Board of Mgrs. of 55 Walker St. Condominium*, 6 AD3d 279).

I further note that the majority's reliance upon the fact that plaintiffs "did not obtain a determination that defendants breached the 2000 agreement" belies the nature of the litigation course pursued by the parties and places form over substance. Inasmuch as the

parties expressly agreed in the stipulation of discontinuance to reserve the parties' rights to seek attorneys' fees, costs and disbursements, they recognized and agreed that the absence of an express determination on the merits by the court was no barrier to the recovery of such sums under the 2000 agreement (see generally *Gaisi v Gaisi*, 48 AD3d 744, 745).

Therefore, I would reverse the order insofar as appealed from, thereby leaving intact the court's denial of the cross motion of defendants for attorneys' fees, grant that part of plaintiffs' motion for an award of attorneys' fees, costs and disbursements, and remit the matter to Supreme Court for a determination of the reasonable amount of attorneys' fees, costs and disbursements expended by plaintiffs as a result of this litigation, inclusive of this appeal.

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

333

**KA 11-00858**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARCHE JOHNSON, DEFENDANT-APPELLANT.

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ADAM H. VAN BUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a resentence of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered April 12, 2011. Defendant was resentenced upon his conviction of robbery in the second degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]), and he appeals from the resentence on that conviction. County Court (Corning, J.) originally sentenced defendant as a second violent felony offender to a determinate term of imprisonment of 10 years, but it failed to impose a period of postrelease supervision, as required by Penal Law § 70.45 (1). The court (Fandrich, A.J.) resentenced defendant to the same term of imprisonment to be followed by five years of postrelease supervision.

Defendant failed to preserve for our review his contention that the court should have assigned defendant substitute counsel, inasmuch as the record reflects that both defendant and the court understood that defendant sought an adjournment in order to retain counsel and did not request new assigned counsel (see CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We agree with defendant, however, that the court failed to conduct a searching inquiry to ensure that defendant's waiver of the right to counsel was unequivocal, voluntary and intelligent (see *People v Smith*, 92 NY2d 516, 520). Thus, "[t]he sentencing court erred by permitting defendant to represent himself at his ultimate sentencing proceeding" (*People v Adams*, 52 AD3d 243, 243, lv denied 11 NY3d 829). That error, however, does not warrant reversal of defendant's resentence because "the tainted proceeding had no adverse

impact . . . , and a remand for resentencing would serve no useful purpose" (*id.* at 244; see generally *People v Wardlaw*, 6 NY3d 556, 559). Indeed, defense counsel, speaking on behalf of defendant, admitted that defendant was advised during the plea proceedings that a period of postrelease supervision would be imposed, and thus there were no issues to be litigated with respect to defendant's sentence (see generally *People v Lingle*, 16 NY3d 621, 634-635; *cf.* *People v Verhow*, 83 AD3d 1528, 1528-1529).

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

All concur except FAHEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent. In my view, the record of the February 15, 2011 proceeding reflects that the People stipulated that the court may resentence defendant without imposing a period of postrelease supervision pursuant to Penal Law § 70.85 (see *People v Swanston*, 277 AD2d 600, 602, *lv denied* 96 NY2d 739; see also CPLR 2104; CPL 60.10). I would therefore reverse the resentence and remit the matter to County Court for further resentencing.

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

343

CA 11-02073

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

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BONNIE MORTILLARO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROCHESTER GENERAL HOSPITAL, DEFENDANT,  
ILYA ZHAVORONKOV AND DOMINIC CORTESE, DOING  
BUSINESS AS ANESTHESIOLOGIST ASSOCIATES OF  
ROCHESTER, DEFENDANTS-APPELLANTS.

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HIRSCH & TUBIOLO, P.C., ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL),  
FOR DEFENDANTS-APPELLANTS.

THE LADUCA LAW FIRM, ROCHESTER (DAVID C. PILATO OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 7, 2011 in a medical malpractice action. The order denied the motion of defendants Ilya Zhavoronkov and Dominic Cortese, doing business as Anesthesiologist Associates of Rochester, for summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants Ilya Zhavoronkov and Dominic Cortese, doing business as Anesthesiologist Associates of Rochester, in part and dismissing the amended complaint against them except insofar as it alleges that Dr. Zhavoronkov failed to conduct a postoperative interview to assess plaintiff's anesthesia experience and failed to document the findings of that interview, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries she allegedly sustained following a surgery during which she alleged to have experienced intraoperative awareness, i.e., waking up from anesthesia during surgery. Defendant Ilya Zhavoronkov administered the anesthesia for plaintiff's surgery. Defendant Dominic Cortese, chief of anesthesiology at defendant Rochester General Hospital, met with plaintiff approximately four months after her surgery to discuss her alleged intraoperative awareness, but he concluded that the memories plaintiff recounted at that time were consistent only with postoperative events. As a result of the stress and anxiety allegedly caused by her intraoperative memories, plaintiff admitted herself for inpatient psychiatric

treatment that included electroconvulsive therapy (ECT). According to plaintiff, Dr. Zhavoronkov was negligent in failing to administer anesthesia properly; failing to monitor her anesthesia during surgery and her recovery from the anesthesia after surgery; failing to conduct a postoperative interview to assess her anesthesia experience; and failing to document the findings of that interview. Also according to plaintiff, Dr. Cortese was negligent in failing to include Dr. Zhavoronkov in his postoperative meeting with plaintiff; failing to validate her claim of intraoperative awareness at that time; and failing to prevent her psychiatrist from subjecting her to ECT.

Dr. Zhavoronkov and Dr. Cortese, doing business as Anesthesiologist Associates of Rochester (hereafter, defendants), appeal from an order denying their motion for summary judgment dismissing the amended complaint against them. We conclude that Supreme Court erred in denying that part of the motion with respect to Dr. Cortese. We further conclude that the court erred in denying that part of the motion with respect to Dr. Zhavoronkov, except insofar as plaintiff alleges that he failed to conduct a postoperative interview to assess plaintiff's anesthesia experience and failed to document the findings of that interview. We therefore modify the order accordingly.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; see *Zuckerman v City of New York*, 49 NY2d 557, 562). "Once [that] showing has been made . . . , the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; see *Zuckerman*, 49 NY2d at 562). "In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he [or she] was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact" (*Alvarez*, 68 NY2d at 324).

With respect to Dr. Cortese, defendants met their initial burden on the motion inasmuch as they submitted the deposition testimony of Dr. Cortese in which he offered a reasonable explanation for not including Dr. Zhavoronkov in his postoperative meeting with plaintiff, i.e., that as an anesthesiologist, he was capable of assessing the validity of a claim of intraoperative awareness. We therefore conclude that Dr. Cortese's failure to include Dr. Zhavoronkov in that meeting does not constitute medical negligence. With respect to plaintiff's allegation that Dr. Cortese was negligent in failing to validate her claim of intraoperative awareness at their postoperative meeting, defendants' expert opined in his affidavit that Dr. Cortese had a valid basis for that determination, and plaintiff's expert failed to respond to that opinion. In addition, defendants submitted the affidavit of plaintiff's treating psychiatrist, who stated that

she would have treated plaintiff with ECT regardless of whether Dr. Cortese had concluded that plaintiff experienced intraoperative awareness. Thus, defendants established that Dr. Cortese could not be found liable for failing to prevent plaintiff from undergoing ECT, and plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562).

With respect to Dr. Zhavoronkov, we conclude that, through the affidavit of their expert, defendants met their initial burden of establishing that Dr. Zhavoronkov did not depart from the applicable standard of care in either his administration of anesthesia to plaintiff or his intraoperative and postoperative monitoring of plaintiff's reaction to anesthesia. Plaintiff failed to raise a triable issue of fact in opposition inasmuch as her expert failed to dispute those conclusions. Indeed, plaintiff's expert conceded that Dr. Zhavoronkov's administration of anesthesia and conduct during surgery satisfied the requisite standard of care.

Even assuming, *arguendo*, that defendants met their initial burden on that part of their motion concerning Dr. Zhavoronkov's performance of a postoperative interview of plaintiff to assess her anesthesia related experience and his documentation of such an interview, we conclude that plaintiff submitted sufficient evidence to raise a triable issue of fact with respect thereto (*see generally Zuckerman*, 49 NY2d at 562). Although Dr. Zhavoronkov testified at his deposition that he spoke to plaintiff after her surgery, that testimony was based on surgical records noting that such an interview took place inasmuch as he also testified that he had no specific recollection of plaintiff's surgery. We note that the portion of the surgical records relevant to a postoperative interview included in the record is illegible. In addition, plaintiff testified at her deposition that she never spoke to Dr. Zhavoronkov after her surgery.

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

358

**KA 08-00631**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HARRELL BONNER, ALSO KNOWN AS DAMIEN PROPHET,  
ALSO KNOWN AS PETE WALLER, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

HARRELL BONNER, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS TEXIDO OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered January 28, 2008. The judgment convicted defendant, upon a jury verdict, of promoting prostitution in the second degree and assault in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of promoting prostitution in the second degree (Penal Law § 230.30 [1]) and assault in the second degree (§ 120.05 [2]). In appeal No. 2, defendant appeals from a judgment convicting him, following the same jury trial, of three counts of murder in the second degree (§ 125.25 [1], [3]). We reject defendant's contention that County Court erred in denying his motion to sever the two murder counts relating to one victim from the remaining murder count relating to the second victim. Even assuming, arguendo, that those counts were not properly joinable pursuant to CPL 200.20 (2) (b), we nevertheless conclude that the offenses were properly joinable given that they "are defined by the same or similar statutory provisions and consequently are the same or similar in law" (CPL 200.20 [2] [c]; see *People v June*, 30 AD3d 1016, 1017, lv denied 7 NY3d 813, 868). We further conclude that the court did not abuse its discretion in denying defendant's motion for severance with respect to the murder counts "in the interest of justice and for good cause shown" (CPL 200.20 [3]; see *People v Mahboubian*, 74 NY2d 174, 183). There was not a "substantial difference in the quantum of proof presented with respect to the separate" murders (*People v McDougald*, 155 AD2d 867, lv denied 75 NY2d 870; see CPL 200.20 [3] [a]), and

defendant did not demonstrate that he had a "genuine need to refrain" from testifying with respect to one of the murders (CPL 200.20 [3] [b]). Although defendant contends that the court also erred in consolidating the two indictments for trial, that contention is unpreserved for our review (see CPL 470.05 [2]), and it lacks merit in any event.

We reject defendant's further contention that he was deprived of a fair trial by the court's *Molineux* ruling. The *Molineux* evidence admitted at trial was relevant to establish defendant's motive for beating and killing the victims, and to establish defendant's modus operandi and common scheme of using physical abuse to instill fear and obedience in the prostitutes who worked for him (see *People v Molineux*, 168 NY 264, 293-294). We further conclude that the court did not abuse its discretion in determining that the probative value of the evidence outweighed its potential for prejudice (see *People v Alvino*, 71 NY2d 233, 242). Defendant failed to preserve for our review his challenge to the court's *Sandoval* ruling (see *People v Caswell*, 49 AD3d 1257, 1258, *lv denied* 11 NY3d 735, 740; *People v Hawkes*, 39 AD3d 1209, 1211, *lv denied* 9 NY3d 844, 845) and, in any event, his challenge is without merit.

Defendant further contends that the court violated his right to confront witnesses against him by allowing the Deputy Chief Medical Examiner of Erie County to testify as to the cause of death of one of the victims even though she did not perform the autopsy on that victim. According to defendant, he should have been allowed to confront the individual who performed the autopsy. Defendant failed to preserve that contention for our review (see *People v Evans*, 59 AD3d 1127, 1127-1128, *lv denied* 12 NY3d 815). We note in any event that any error in the admission of the testimony is harmless (see generally *People v Crimmins*, 36 NY2d 230, 237), particularly in view of the absence of prejudice suffered by defendant as a result of the admission of that testimony (see generally *People v Bryant*, 27 AD3d 1124, 1125-1126, *lv denied* 7 NY3d 753). In light of the brutal and sadistic nature of defendant's crimes and his utter lack of remorse, we reject his challenges to the severity of the sentences imposed.

Finally, we have reviewed defendant's contentions raised in his pro se supplemental brief and conclude that they lack merit.

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

359

**KA 08-00632**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HARRELL BONNER, ALSO KNOWN AS DAMIEN PROPHET,  
ALSO KNOWN AS PETE WALLER, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

HARRELL BONNER, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS TEXIDO OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered January 28, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (three counts).

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

Same Memorandum as in *People v Bonner* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Apr. 27, 2012]).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

**394**

**CA 11-01319**

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

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JUSTIN A. JOHN,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

KLEWIN BUILDING COMPANY, INC.,  
DEFENDANT-APPELLANT-RESPONDENT.

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DAMON MOREY LLP, BUFFALO (THOMAS J. DRURY OF COUNSEL), FOR  
DEFENDANT-APPELLANT-RESPONDENT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 4, 2011 in a personal injury action. The order, among other things, denied defendant's cross motion for summary judgment dismissing the amended complaint and plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of defendant's cross motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims and dismissing those claims, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a roof at a construction project for the Seneca Niagara Casino. Defendant appeals from an order that, inter alia, denied its cross motion for summary judgment dismissing the amended complaint, and plaintiff cross appeals from the order insofar as it denied his motion for partial summary judgment on the Labor Law § 240 (1) claim.

We reject defendant's contention on appeal "that Labor Law vicarious liability provisions do not apply in this case because plaintiff sustained the injury on an Indian reservation, i.e., that of the Seneca Nation" (*Karcz v Klewin Bldg. Co., Inc.*, 85 AD3d 1649, 1650). We agree with defendant, however, that Supreme Court erred in denying those parts of its cross motion seeking summary judgment dismissing the Labor Law § 200 and common-law negligence claims, and we therefore modify the order accordingly. Defendant established as a matter of law that it did not have the authority to supervise or

control the methods and manner of plaintiff's work (see *Ortega v Puccia*, 57 AD3d 54, 61-63; *Wade v Atlantic Cooling Tower Servs., Inc.*, 56 AD3d 547, 549-550), and plaintiff failed to raise a triable issue of fact sufficient to defeat those parts of the cross motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to defendant's further contention on appeal, we conclude that the court properly denied that part of its cross motion seeking summary judgment dismissing the Labor Law § 241 (6) claim, which was based on alleged violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.24. Even assuming, arguendo, that defendant met its initial burden on that part of the cross motion, plaintiff raised triable issues of fact whether "work [was] to be performed" on the roof surface from which plaintiff fell (see 12 NYCRR 23-1.24 [a] [1] [i]), whether the roof surface had "a slope steeper than one in four inches" (*id.*), and whether the sloped roof surface was wet and thus failed "to provide safe footing" (12 NYCRR 23-1.7 [d]).

We reject defendant's contention on appeal that the court erred in denying that part of its cross motion seeking summary judgment dismissing the Labor Law § 240 (1) claim on the ground that plaintiff's conduct was the sole proximate cause of his injuries. We also reject plaintiff's contention on his cross appeal that the court erred in denying his motion seeking partial summary judgment on that claim. Triable issues of fact exist whether, before the accident and on the date thereof, plaintiff was specifically instructed to work only on the flat roof and not to work on the sloped roof surface from which he fell, and thus it cannot be determined as a matter of law whether plaintiff's decision to climb onto the sloped roof surface was the sole proximate cause of his injuries (*cf. Serrano v Popovic*, 91 AD3d 626, 627).

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

401

CA 11-02022

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

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DEBORAH A. THORNTON AND MARK L. THORNTON,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ERIC RICKNER, DEFENDANT-APPELLANT.

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BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT DEBORAH A. THORNTON.

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Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered April 6, 2011 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Deborah A. Thornton (plaintiff) on a ski trail when she was struck from behind by defendant, a snowboarder. We agree with defendant that Supreme Court erred in denying his motion for summary judgment dismissing the amended complaint on the ground that plaintiff assumed the risks associated with the sport of skiing. "[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484). "The risk of injury caused by another skier [or snowboarder] is an inherent risk of downhill skiing" (*Zielinski v Farace*, 291 AD2d 910, 911, *lv denied* 98 NY2d 612). Of course, however, a sporting participant "will not be deemed to have assumed the risks of reckless or intentional conduct" (*Morgan*, 90 NY2d at 485).

Defendant met his initial burden on the motion by establishing that "he did not engage in any risk-enhancing conduct that was not inherent in the activity of skiing [or snowboarding], which caused or contributed to the accident" (*DeMasi v Rogers*, 34 AD3d 720, 721; see *Clarke v Catamount Ski Area*, 87 AD3d 926, 927). Defendant submitted his deposition testimony in which he testified that he had snowboarded

on only one prior occasion, a week earlier, and that the trail where the accident occurred was a beginner's trail. Defendant further testified that icy conditions on the trail made it difficult for him to turn and stop. According to defendant, he was snowboarding between a low and medium speed when he saw plaintiff, attempted to stop, lost his balance, and ultimately collided with her. Defendant was heading in plaintiff's direction because he was trying to steer clear of a group of people on the trail. Defendant also submitted the deposition testimony of a member of the National Ski Patrol who witnessed the accident. He testified that the trail where the accident occurred is a "green" trail with easier terrain, that the trail is appropriate for beginners, and that ski schools often use that trail to teach beginners. He further testified that he believed the accident was caused by defendant's "[l]ack of ability," and he noted that, "just before impact, [defendant] was either falling down or trying to fall down, because it appeared that he wasn't able to turn." In opposition to the motion, plaintiffs failed to raise an issue of fact whether "defendant's conduct was intentional or reckless, outside of the risks skiers normally assume" (*DeMasi*, 34 AD3d at 721; see *Clarke*, 87 AD3d at 927).

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

409

**KA 11-00633**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALEXA R. KNOXSAH, DEFENDANT-APPELLANT.

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JAMES L. DOWSEY, III, ELLICOTTVILLE (KELIANN M. ELNISKI OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM  
OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered January 24, 2011. The judgment convicted defendant, upon her plea of guilty, of burglary in the third degree, criminal mischief in the third degree, overdriving, torturing or injuring an animal, petit larceny and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of, inter alia, burglary in the third degree (Penal Law § 140.20). We reject defendant's contention that her waiver of the right to appeal was invalid (*see generally People v Lopez*, 6 NY3d 248, 256). Although defendant's further contention that her plea was not knowingly, voluntarily and intelligently entered survives her valid waiver of the right to appeal, defendant failed to preserve that contention for our review (*see People v Davis*, 45 AD3d 1357, 1357-1358, *lv denied* 9 NY3d 1005). This case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666), "inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*People v Lewandowski*, 82 AD3d 1602, 1602). In any event, the record establishes that the plea was knowingly, voluntarily, and intelligently entered (*see generally People v Shubert*, 83 AD3d 1577, 1578).

Although defendant was not required to preserve for our review the contention that she was denied the right to counsel (*see People v Kinchen*, 60 NY2d 772, 773; *People v Harvey*, 70 AD3d 1454, 1455, *lv denied* 15 NY3d 750), we nevertheless conclude that it is without merit. The postplea return on warrant appearance was not a "critical stage of the proceeding" (*People v Chapman*, 69 NY2d 497, 500), and

thus the absence of defense counsel did not constitute a deprivation of defendant's rights (see generally *People v Garcia*, 247 AD2d 549, *affd* 92 NY2d 726, *cert denied* 528 US 845; *People v Bogan*, 78 AD3d 855, 855, *lv denied* 16 NY3d 742; *People v Blas*, 192 AD2d 540, 540, *lv denied* 82 NY2d 751).

Defendant further contends that County Court improperly issued a bench warrant based upon her failure to appear for a probation interview and improperly held her without bail pending sentencing upon her rearrest. Even assuming, arguendo, that defendant's contentions survive her valid waiver of the right to appeal, defendant failed to preserve those contentions for our review inasmuch as she did not raise them before County Court (see generally CPL 470.05 [2]), or by way of a motion to withdraw the plea or to vacate the judgment of conviction, and we decline to reach those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Defendant's contention that she was denied effective assistance of counsel does not survive her plea or her valid waiver of the right to appeal because defendant "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [her] attorney['s] allegedly poor performance' " (*People v Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912; see *People v Rizek* [appeal No. 1], 64 AD3d 1180, *lv denied* 13 NY3d 862). In any event, we nevertheless conclude that she received meaningful representation (see generally *People v Ford*, 86 NY2d 397, 404), inasmuch as "nothing in the record casts doubt upon the apparent effectiveness of counsel" (*People v Nieves*, 89 AD3d 1285, 1286 [internal quotation marks omitted]). Indeed, defense counsel successfully argued for the promised sentence despite defendant's rearrest in violation of the plea agreement.

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

410

**KA 10-01259**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBIE J. DRAKE, DEFENDANT-APPELLANT.

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DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBIE J. DRAKE, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Niagara County Court (Richard C. Kloch, Sr., A.J.), rendered May 27, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment, convicting him upon a jury verdict following a retrial, of two counts of murder in the second degree (Penal Law § 125.25 [1]). Defendant was convicted in 1982 of killing two victims who were teenagers, and the judgment was affirmed by this Court on appeal (*People v Drake*, 129 AD2d 963, *lv denied* 70 NY2d 799). The United States Court of Appeals conditionally granted defendant a writ of habeas corpus unless he was retried upon the indictment within 90 days of its judgment (*Drake v Portuondo*, 553 F3d 230, 247-248 [2nd Cir]). We now reverse the judgment and grant defendant a new trial.

As a preliminary matter, we conclude that defendant waived his present contention concerning the alleged lack of jurisdiction of the acting Supreme Court Justice who presided over the trial that was purportedly conducted in County Court, inasmuch as he failed to raise that objection in a timely manner (*see People v Ott*, 83 AD3d 1495, 1496, *lv denied* 17 NY3d 808; *see generally People v Wilson*, 14 NY3d 895, 897; *People v Daniels*, 86 AD3d 921, 922, *lv denied* 17 NY3d 715).

The underlying facts are undisputed, and the sole issue at trial was defendant's intent to kill the victims. On a December night in 1981, the then-17-year-old defendant left his home armed with two

rifles and proceeded to walk to a junk yard to shoot at abandoned cars. He observed a rusted vehicle, which was occupied by the victims, parked in a secluded area near the junk yard. He fired at the vehicle from a distance of no more than 15 feet, killing both occupants. Defendant told the police that he did not see anyone in the vehicle before he fired the rifle and that he thereafter attempted to conceal the killings by moving the vehicle to another location. Defendant was observed by police officers on routine patrol when he was attempting to place the body of the female victim in the trunk of the vehicle, where he had previously placed the body of the male victim.

We agree with defendant that the court committed reversible error in refusing to preclude evidence of an uncharged crime, i.e., defendant's alleged postmortem sexual assault on the female victim, in order to establish his intent to kill the victims (*see generally People v Ventimiglia*, 52 NY2d 350, 359). Because defendant presented expert testimony refuting the People's evidence that the female victim's body had been assaulted, there was a trial within a trial on the issue whether an uncharged crime had actually been committed (*see generally People v Robinson*, 68 NY2d 541, 549-550). That was error. The Second Circuit explicitly rejected the theory presented at the first trial that defendant's intent to kill the victims was the result of a psychological syndrome known as picquerism, which the Second Circuit referred to as a "fictive syndrome" (*Drake*, 553 F3d at 244). The court properly refused to permit any reference to that alleged syndrome at the second trial. We therefore conclude that the evidence of the alleged uncharged crime was not "directly relevant" to the purpose for which it was offered, i.e., defendant's intent to kill the victims, and thus should have been precluded (*People v Cass*, 18 NY3d 553, 560).

Even assuming, arguendo, that the court properly determined that the evidence was directly relevant to establish defendant's intent, we nevertheless conclude that the court abused its discretion in determining that the probative value of the evidence outweighed its prejudicial effect (*see People v Gillyard*, 13 NY3d 351, 355; *cf. People v Gamble*, 18 NY3d 386, 397-398). "Prejudice involves both the nature of the [uncharged] crime, for the more heinous the uncharged crime, the more likely that jurors will be swayed by it, and the difficulty faced by the defendant in seeking to rebut the inference from which the uncharged crime evidence brings into play" (*Robinson*, 68 NY2d at 549). Here, the uncharged crime is particularly heinous, and defendant sought to rebut not only the inference that he intended to kill the victims if he sexually abused the body of the female victim, but he also was required to defend against the equivocal evidence that the uncharged crime was actually committed. We thus conclude that the "distance of the particular [disputed] fact from the ultimate issue[] of the case" is too great to render the evidence of the alleged uncharged crime more probative than prejudicial with respect to the sole issue whether defendant intended to kill the victims (*People v Spotford*, 85 NY2d 593, 597 [internal quotation marks omitted]). We further conclude that the error is not harmless (*cf. Gillyard*, 13 NY3d at 356; *see generally People v Crimmins*, 36 NY2d

230, 241-242). We therefore reverse the judgment and grant a new trial. We reject defendant's remaining contentions with respect to additional alleged *Molineux* errors.

We also agree with defendant's contention, raised in his pro se supplemental brief, that the court committed a reversible mode of proceedings error in failing to advise counsel of that part of a jury note seeking guidance on how to proceed in the event that the jury was unable to reach a unanimous verdict on count one and, in addition, in failing to respond to that question (see *People v Tabb*, 13 NY3d 852, 853; see generally CPL 310.30; *People v O'Rama*, 78 NY2d 270, 276-277). We therefore reverse the judgment on that ground as well.

In light of our determination to grant a new trial, we have also addressed certain of defendant's remaining contentions in the interest of judicial economy. First, we reject defendant's contentions with respect to the alleged errors in charging the jury. We also reject defendant's contention that the court erred in determining that the physician who conducted the autopsies of the victims was not available to testify at the second trial by reason of illness or incapacity (see CPL 670.10 [1]), and thus properly allowed her testimony from the first trial to be read into the record. We reject defendant's further contention that the court abused its discretion in precluding his expert from giving certain opinion testimony and in refusing to admit in evidence a hand-drawn diagram prepared by that witness (see *People v Monk*, 57 AD3d 1497, 1498, lv denied 12 NY3d 785; see generally *People v Carroll*, 95 NY2d 375, 385). In light of our determination, we decline to address defendant's remaining contentions.

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

**414**

**CAF 11-02254**

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

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IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT  
OF SOCIAL SERVICES, ON BEHALF OF COLLEEN A.Y.,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

RITA M.S., RESPONDENT-APPELLANT.  
(PROCEEDING NO. 1.)

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IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT  
OF SOCIAL SERVICES, ON BEHALF OF COLLEEN A.Y.,  
PETITIONER-RESPONDENT,

V

KENNETH M.Y., RESPONDENT-APPELLANT.  
(PROCEEDING NO. 2.)

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LAW OFFICE OF ROBERT D. ARENSTEIN, NEW YORK CITY (ROBERT D. ARENSTEIN  
OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-RESPONDENT.

ANDREW T. RADACK, ATTORNEY FOR THE CHILDREN, SILVER CREEK, FOR COLLEEN  
Y. AND KELLY Y.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILDREN, FREDONIA, FOR MICHAELA  
Y. AND BRIDGET Y.

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Appeals from an order of the Family Court, Chautauqua County  
(Judith S. Claire, J.), entered February 4, 2011 in proceedings  
pursuant to Family Court Act article 4. The order dismissed the  
objections of respondents and affirmed the orders of the Support  
Magistrate.

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

Memorandum: Petitioner, Chautauqua County Department of Social  
Services, commenced these proceedings pursuant to Family Court Act  
article 4 seeking an order directing Rita M.S., the respondent in  
proceeding No. 1 (hereafter, stepmother), and Kenneth M.Y., the  
respondent in proceeding No. 2 (hereafter, father), both of whom are  
nonresidents of New York, to furnish support for the four children who

are the subjects of these proceedings (collectively, children). Petitioner sought child support retroactive to the time that the children entered the foster care system in New York. Upon respondents' default, the Support Magistrate, inter alia, directed the father to pay child support in the amount of \$775 per week effective the date on which the children were placed in foster care and directed the stepmother to notify the Support Collection Unit of any change in employment status and health insurance benefits. The support orders are dated July 6, 2010 (hereafter, July orders). Respondents did not file objections to the July orders.

In October 2010, respondents moved to vacate the support orders and to dismiss the support proceedings pursuant to CPLR 5015 (a) (4) based upon Family Court's alleged lack of personal jurisdiction. By orders dated November 9, 2010 (hereafter, November orders), the Support Magistrate "denied and dismissed" respondents' motions to vacate the support orders, determining that the court had jurisdiction over respondents pursuant to Family Court Act § 580-201 (5). Respondents filed objections to the November orders, and Family Court dismissed those objections and affirmed the November orders of the Support Magistrate.

On appeal, respondents contend that the court erred in failing to review their challenges to the July orders in the context of their objections to the November orders. We reject that contention. Although respondents are correct that the proper procedure to challenge an order entered upon a default is by way of a motion to vacate the default pursuant to CPLR 5015 (a) rather than by way of the filing of objections pursuant to Family Court Act § 439 (e) (see *Matter of Garland v Garland*, 28 AD3d 481, 481; *Matter of Wideman v Murley*, 155 AD2d 841, 842), here respondents moved to vacate the July orders and to dismiss the proceedings solely on the basis of alleged lack of personal jurisdiction pursuant to CPLR 5015 (a) (4), not on the basis of excusable default pursuant to CPLR 5015 (a) (1). Thus, respondents' motions brought up for review only the issue of jurisdiction, not the underlying merits of the July orders (see generally *Wells Fargo Bank, N.A. v Christie*, 83 AD3d 824, 825; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:9, at 220; cf. *Labozzetta v Fabbro*, 22 AD3d 644, 645-646; *Pilawa v Dalbey*, 275 AD2d 1035, 1036; *Palette Stone Corp. v Ebert*, 210 AD2d 807, 808).

Respondents further contend that the court's jurisdictional determination must be vacated because it was not based upon competent evidence. We reject that contention. Contrary to respondents' contention, the Support Magistrate was not required to hold a hearing on the issue of personal jurisdiction before issuing the July orders. The support petitions alleged that New York had long-arm jurisdiction over respondents pursuant to Family Court Act § 580-201 (5), and respondents failed to answer the petitions, failed to move to dismiss the petitions for lack of personal jurisdiction (see CPLR 3211 [a] [8]), and failed to appear in court in opposition to the petitions. We thus conclude that the Support Magistrate properly determined based upon the documentation provided by petitioner that it had long-arm

jurisdiction over respondents. When respondents moved to vacate the July orders on the ground that the court lacked personal jurisdiction, the Support Magistrate was faced with conflicting submissions on that issue from respondents and petitioner. Assuming, arguendo, that respondents' submissions disputed the underlying jurisdictional facts and not simply the legal conclusions to be drawn therefrom, respondents would have been entitled to a hearing on the issue of personal jurisdiction (see generally *Saxon Mtge. Servs., Inc. v Bell*, 63 AD3d 1029; *Penachio v Penachio*, 27 AD3d 540, 541; *Cliffstar Corp. v California Foods Corp.*, 254 AD2d 760, 760-761). Respondents, however, waived any right to a hearing on jurisdiction by submitting their motion on papers only (see generally *Matter of Pascarella v Pascarella*, 66 AD3d 909, 910). We further conclude that respondents failed to preserve for our review their contention that the Support Magistrate's jurisdictional findings were not based upon competent evidence inasmuch as they did not challenge the competence of the evidence submitted by petitioner in their motions to vacate the July orders (see generally *Mariano v New York City Tr. Auth.*, 38 AD3d 236, 236; *Matter of Schulman*, 161 AD2d 874, 875). Although respondents contended in their objections to the November orders denying their motions to vacate the July orders that those orders were not based upon competent proof, Family Court properly determined that such contention was unpreserved inasmuch as it was not raised before the Support Magistrate in the motions to vacate (see generally *Lopez v 724 Mgt., LLC*, 72 AD3d 453, 453; *Matter of Redmond v Easy*, 18 AD3d 283, 283-284).

Contrary to respondents' further contention, we conclude that the court properly determined that it had personal jurisdiction over them. Family Court Act § 580-201 provides that, "[i]n a proceeding to establish . . . a support order . . . , the tribunal of this state may exercise personal jurisdiction over a nonresident individual . . . if[, inter alia,] the child[ren] reside[] in this state as a result of the acts or directives of the individual" (§ 580-201 [5]). Here, the children clearly resided in New York as a result of respondents' acts and directives. After respondents were arrested and each charged with felony child abuse against the children, the Magistrate Court for Dona Ana County, Las Cruces, New Mexico ordered respondents to avoid all contact with the children. In light of the no-contact order, respondents requested that the children be placed in the care of the children's aunt in New York. In an August 2008 letter to the New Mexico Children, Youth and Families Department (CYFD), the father stated that "[t]he relative who will be available to take custody of any or all of the girls on our behalf is their aunt who would take them back to her dairy farm. We request they be released to her Monday 8/11/08 . . . [I]t is beyond all doubt in their best interest to be in such household rather than in foster care. She will be here as early tomorrow as you say they might be released." To that end, respondents executed a limited power of attorney authorizing the aunt to withdraw one of the children from school, and executed durable powers of attorney for health care designating the aunt as the children's agent for health care decisions. On August 11, 2008, CYFD and the aunt entered into a "safety contract" pursuant to which the aunt agreed to provide for the children's basic needs. In addition,

the safety contract stated that the aunt understood that respondents "have voluntarily placed the children in [her] care for an undetermined length of time," and that she was "to contact [respondents] if [she were] in need of any financial assistance for the [children], as the[ respondents] are still legally responsible for the[ children's] well-being." Thereafter, the aunt transported the children to her home in New York. Under those circumstances, we conclude that the children began residing in New York "as a result of the acts or directives" of respondents within the meaning of Family Court Act § 580-201 (5), and thus that the court properly exercised personal jurisdiction over respondents (see generally *Matter of Daknis v Burns*, 278 AD2d 641, 641-643).

Respondents further contend, however, that the assertion of jurisdiction in this case violates due process. We reject that contention. "As a general rule, in order for the courts of one State to exercise jurisdiction over an individual who is domiciled in another State, due process requires that there be sufficient minimum contacts between that individual and the forum State such that the forum State's assertion of jurisdiction will not offend 'traditional notions of fair play and substantial justice' " (*Matter of Shirley D. v Carl D.*, 224 AD2d 60, 63, quoting *International Shoe Co. v Washington*, 326 US 310, 316). In particular, the subject individual's "conduct and connection with the forum State [must be] such that he [or she] should reasonably anticipate being haled into court there" (*World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297).

Respondents rely on *Kulko v Superior Ct. of California* (436 US 84), in which the United States Supreme Court addressed the issue of personal jurisdiction in a child support action. There, the Supreme Court held that the father's mere "acquiescence" in his daughter's desire to live with the mother in California did not confer jurisdiction over the father in the California courts (*id.* at 94). Respondents contend that they merely acquiesced in the arrangement between CYFD and the aunt to place the children temporarily in New York with the aunt. We reject that contention. Unlike in *Kulko*, where the father assented to his daughter's desire to live with her mother in California, here respondents chose to send the children to New York after they were ordered to have no contact with the children. Respondents notified CYFD that they wished the children to reside with the children's aunt in New York rather than being placed in foster care in New Mexico, and they executed the necessary documents to facilitate the transfer of the children to the aunt. Respondents' voluntary decision to place the children with the aunt in New York and their formal acts in effectuating that decision constitute more than mere acquiescence (see *Daknis*, 278 AD2d at 643), and the fact that respondents did not make the children's travel arrangements is not dispositive (see *Kulko*, 436 US at 98).

Further, as distinguished from *Kulko*, here respondents " 'purposefully avail[ed themselves] of the privilege of conducting activities within th[is] State' " (*id.* at 94), by sending their children to New York to live with their aunt, a New York resident, without providing financial support for the children. Pursuant to the

safety contract, the aunt "agree[d] to provide for the [children's] basic needs, to include their medical, educational, and mental health needs." The aunt further agreed that she would "contact [respondents] if [she was] in need of any financial assistance for the [children], as they are still legally responsible for their well-being" (emphasis added). As the Support Magistrate aptly noted, "[i]t [was] foreseeable, certainly that someone, whether it be [petitioner] or the aunt herself, was, at some point, going to be asking for support of children that are not theirs." We thus conclude that respondents' conduct in relation to New York was such that they "should [have] reasonably anticipate[d] being haled into court [here]" (*World-Wide Volkswagen Corp.*, 444 US at 297) and, thus that the court properly exercised personal jurisdiction over respondents (see generally *Matter of Bowman v Bowman*, 82 AD3d 144, 152-153; *Daknis*, 278 AD2d at 643). Respondents' further contention that the court should have made separate jurisdictional determinations with respect to the father and the stepmother and each child is unpreserved for our review inasmuch as it was not raised in their motion to vacate the July orders but, rather, was raised for the first time in their objections to the order of the Support Magistrate denying their motion to vacate (see generally *Lopez*, 72 AD3d at 453; see also *Redmond*, 18 AD3d at 283-284). In any event, the court's assertion of personal jurisdiction was properly based upon evidence that each of the children resided in New York as a result of the acts and/or directives of both respondents.

Respondents' contention that Family Court Act § 580-201 (5) is unconstitutionally void because the phrase "acts or directives" is vague is not properly before us because there is no indication in the record that respondents notified the Attorney General of their constitutional challenge, as required by CPLR 1012 (b) (1) (see *Koziol v Koziol*, 60 AD3d 1433, 1434-1435, appeal dismissed 13 NY3d 763).

Finally, although we agree with respondents that the Support Magistrate abused his discretion in refusing to consider their reply papers on the motion to vacate, we conclude that such error is harmless inasmuch as the arguments raised in the reply papers are without merit for the reasons discussed above.

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

420

CA 11-02212

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

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SHAMEL SANDERS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SCOTT PATRICK, KURT ROESNER,  
DEFENDANTS-APPELLANTS,  
ET AL., DEFENDANTS.

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BURGIO, KITA & CURVIN, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

LIPSITZ & PONTERIO, LLC, BUFFALO (JOHN NED LIPSITZ OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 9, 2011 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendants Scott Patrick and Kurt Roesner for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, and the complaint against defendants Scott Patrick and Kurt Roesner is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to lead paint while residing in an apartment rented to his mother by Scott Patrick and Kurt Roesner (defendants). Supreme Court granted in part defendants' motion for summary judgment dismissing the complaint against them, and we agree with defendants that the court should have granted their motion in its entirety. Defendants met their initial burden with respect to the claim that they did not have actual or constructive notice of the lead-paint condition, and plaintiff failed to raise a triable issue of fact in opposition thereto (*see Joyner v Durant*, 277 AD2d 1014, 1014-1015). With respect to actual notice, even assuming, arguendo, that defendants were aware of chipping or peeling paint in the apartment, we conclude that such knowledge does not constitute actual notice of a dangerous lead paint condition (*see id.* at 1015; *Durand v Roth Bros. Partnership Co.*, 265 AD2d 448, 449; *Lanthier v Feroletto*, 237 AD2d 877, 877-878).

With respect to constructive notice, defendants established that they did not retain the requisite right of entry to the apartment to sustain a claim for constructive notice (*see Chapman v Silber*, 97 NY2d

9, 15; *cf. Charette v Santspre*, 68 AD3d 1583, 1584). Patrick testified at his deposition that defendants did not have a rental agreement or lease with plaintiff's mother, and plaintiff's mother likewise testified at her deposition that she signed only a one-page "landlord/tenant agreement" with the Department of Social Services. Defendants submitted affidavits in which they averred that, although they retained a key to the apartment, their arrangement with plaintiff's mother was such that they were unable to enter the apartment "unless [they] gave notice and received permission from" plaintiff's mother. Plaintiff's mother and her sister, who also occupied the apartment, both testified at their depositions that defendants could enter the apartment only with their permission. Further, in opposition to the motion, plaintiff's mother submitted an affidavit in which she averred that "[d]efendants maintained an extra key to [the] apartment and were allowed to enter with [her] permission." We thus conclude that defendants established as a matter of law that they did not retain a right of entry to the apartment, and plaintiff failed to raise a triable issue of fact in opposition (*see Netral v Lippold*, 304 AD2d 491, 491-492; *cf. Harden v Tynatishon*, 49 AD3d 604, 605; *Jackson v Brown*, 26 AD3d 804, 805).

We likewise agree with defendants that the court should have granted those parts of their motion insofar as plaintiff's claims are premised upon defendants' failure to inspect the apartment for lead paint. The Court of Appeals in *Chapman* (97 NY2d at 21) expressly "decline[d] to impose a new duty on landlords to test for the existence of lead in leased properties based solely upon the 'general knowledge' of the dangers of lead-based paints in older homes . . . ." Further, although landlords have a common-law duty "to inspect . . . the *common areas* of their premises [and to maintain them] in a reasonably safe condition" (*Wynn v T.R.I.P. Redevelopment Assoc.*, 296 AD2d 176, 178-179), windowsills and a balcony accessible only from an upstairs apartment are not common areas to which a landlord retains possession and unrestricted access. Rather, they are part of the leased premises, the possession of which is transferred to the tenants (*see id.* at 179).

Finally, we agree with defendants that the court should have granted those parts of their motion with respect to plaintiff's remaining claims, for warranty of habitability, inasmuch as "[p]laintiff may not rely upon any alleged breach of the warranty of habitability to recover damages for personal injuries" (*Joyner*, 277 AD2d at 1015; *see Doe v Westfall Health Care Ctr.*, 303 AD2d 102, 113).

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

435

**KA 10-01815**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN M. SKINNER, II, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered August 24, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of assault in the second degree (Penal Law § 120.05 [7]) to assault in the third degree (§ 120.00 [1]) and vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on the conviction of assault in the third degree and for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of assault in the second degree (Penal Law § 120.05 [7]) based on an incident in which he injured an employee of Industry Secure Facility (Industry), where defendant had been serving a sentence imposed upon him as a juvenile offender. A person violates section 120.05 (7) when, "[h]aving been charged with or convicted of a crime and *while confined in a correctional facility*, as defined in [Correction Law § 40 (3)], pursuant to such charge or conviction, with intent to cause physical injury to another person, he causes such injury to such person or to a third person" (emphasis added). Defendant contends that his conviction should be reduced to the lesser included offense of assault in the third degree (Penal Law § 120.00 [1]) because the evidence at trial is legally insufficient to establish that Industry is a correctional facility within the meaning of Correction Law § 40 (former [3]). Industry is operated by the Office of Children and Family Services, formerly known as the State Division for Youth. The People concede that the conviction should be reduced to assault in the third degree but on a different ground than that advanced by defendant. According to the People, the verdict is

against the weight of the evidence in light of the definition of a correctional facility given to the jury by Supreme Court in its final instructions, which did not include "a secure facility operated by the state division for youth" (§ 40 [former (3)]). Because we agree with defendant that the evidence is legally insufficient to support the conviction of felony assault, we need not address the People's alternative ground for modification.

Pursuant to Penal Law § 120.05 (7), conduct that would otherwise constitute a misdemeanor assault constitutes a class D felony assault when the conduct occurs within a correctional facility as defined in Correction Law § 40 (3). The version of Correction Law § 40 (3) in effect at the time of the incident in question defined a correctional facility as "any institution operated by the state department of correctional services, any local correctional facility, or any place used, pursuant to a contract with the state or a municipality, for the detention of persons charged with or convicted of a crime, or, *for the purpose of this article only*, a secure facility operated by the state division for youth" (emphasis added). A local correctional facility is defined as "any county jail, county penitentiary, county lockup, city jail, police station jail, town or village jail or lockup, court detention pen or hospital prison ward" (§ 40 [2]).

The indictment charged defendant with one count of assault in the second degree pursuant to Penal Law § 120.05 (7). Prior to trial, defendant moved to reduce the charge to assault in the third degree, contending that Industry was not a correctional facility within the meaning of Correction Law § 40 (former [3]). Defendant argued that, although the definition of correctional facility set forth in section 40 (former [3]) included "a secure facility operated by the state division for youth," the statute specifically stated that the definition in that regard was for the purpose of that "article only," i.e., article 3 of the Correction Law. Defendant therefore concluded that the definition of a correctional facility that includes secure facilities operated by the state division for youth did not apply to Penal Law § 120.05 (7). The court denied the motion and determined, inter alia, that the Legislature intended to include juvenile detention facilities such as Industry within the ambit of section 120.05 (7).

The case therefore proceeded to trial on the indictment. At the close of the People's proof, defendant moved for a trial order of dismissal on the ground that the evidence is legally insufficient to establish that Industry was a correctional facility. The court initially reserved decision on the motion but denied it after the jury rendered a guilty verdict. Defendant then moved to set aside the verdict prior to sentencing, again contending that the People failed to establish that Industry was a correctional facility within the meaning of Correction Law § 40 (former [3]). The court denied the motion and sentenced defendant to a term of imprisonment. This appeal ensued.

We agree with defendant that Industry does not constitute a correctional facility within the meaning of Correction Law § 40

(former [3]) and that the evidence therefore is legally insufficient to establish that he violated Penal Law § 120.05 (7). "It is a long-settled proposition that, in determining the Legislature's intent in enacting a statute, a court should interpret the statute in a manner that is most consistent with the plain language of the statute" (*People v Hill*, 82 AD3d 77, 79; see generally *People v Kisina*, 14 NY3d 153, 158). Here, the plain language of Correction Law § 40 (former [3]) supports defendant's interpretation that the reference to "a secure facility operated by the state division for youth" in the statute's definition of a correctional facility applies only to article 3 of the Correction Law and not to Penal Law § 120.05 (7). Because " 'the clearest indicator of legislative intent is the statutory text' " (*Hill*, 82 AD3d at 79, quoting *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583), and the text of Correction Law § 40 (former [3]) is clear and unambiguous with respect to the matter in question, we need not explore the legislative history behind that statute or Penal Law § 120.05 (7) in an attempt to discern a contrary intent.

In any event, we do not agree with the court's determination that the Legislature intended for Penal Law § 120.05 (7) to apply to assaults committed in juvenile facilities. It is true, as the court pointed out, that the legislation enacting section 120.05 (7) was entitled, "An Act to amend the penal law, in relation to mandatory consecutive terms of imprisonment for persons convicted of assault upon a guard, employee, or inmate of a correction institution or *juvenile detention facility*" (L 1981, ch 372 [emphasis added]). Indeed, the original version of the proposed statute applied not just to correctional institutions and juvenile detention facilities, but also to facilities within the "reformatory system" (1981 NY Assembly Bill A6725). During the legislative process, however, amendments were made and the references to juvenile detention facilities were omitted from the substantive provisions of the bill (see 1981 NY Assembly Journal, 1155, 1259, 1442; 1981 NY Senate Journal, 553-554, 578). Thus, the bill that ultimately passed the Legislature applied only to correctional facilities as defined in Correction Law § 40 (former [3]). Inasmuch as the Legislature considered the option of applying Penal Law § 120.05 (7) to assaults committed in juvenile facilities but ultimately passed an amended version of the bill not containing such language, we conclude that the Legislature expressed its intent that section 120.05 (7) would not apply to juvenile facilities.

Defendant's interpretation of Penal Law § 120.05 (7) is also supported by a comparison to article 205 of the Penal Law, which defines the various crimes of escape and other crimes relating to custody. A person is guilty of escape in the second degree when he or she, inter alia, "escapes from a detention facility" (§ 205.10 [1]) or, "[h]aving been arrested for, charged with or convicted of a class C, class D or class E felony, he [or she] escapes from custody" (§ 205.10 [2]). If a person has been charged with or convicted of a felony and escapes from a detention facility, or if he or she has been arrested for, charged with or convicted of a class A or class B felony and escapes from custody, that person is guilty of escape in the first degree (§ 205.15 [1], [2]). Notably, a "[d]etention [f]acility" is

defined in article 205 as "any place used for the confinement, pursuant to an order of a court, of a person (a) charged with or convicted of an offense, or (b) charged with being or adjudicated a youthful offender, person in need of supervision or juvenile delinquent, or (c) held for extradition or as a material witness, or (d) otherwise confined pursuant to an order of a court" (§ 205.00 [1]).

It is therefore evident that the definition of a "detention facility" for purposes of escape is far broader than that of a "correctional facility" in Correction Law § 40 (3), and that definition of a detention facility would clearly include Industry within its ambit. It stands to reason that, if the Legislature, in enacting Penal Law § 120.05 (7), had intended to make it a felony to commit misdemeanor assault in a youth facility such as Industry, it could easily have done so by using language similar to that contained in article 205 with respect to escape crimes. We thus conclude that, for the purpose of Penal Law § 120.05 (7), Industry is not a correctional facility within the meaning of Correction Law § 40 (3), and that the evidence at trial therefore is legally insufficient to establish a necessary element of the crime charged. We need not address defendant's remaining contentions because, even in the event that they were meritorious, they would not result in dismissal of the indictment. We therefore modify the judgment by reducing the conviction of assault in the second degree to assault in the third degree and vacating the sentence, and we remit the matter to Supreme Court for sentencing on the conviction of assault in the third degree.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

439

**KA 10-01481**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DUANE COBLE, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered July 7, 2010. The judgment convicted defendant, upon a nonjury verdict, of burglary in the second degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of burglary in the second degree (Penal Law § 140.25 [1] [d]) and robbery in the second degree (§ 160.10 [2] [b]). At the conclusion of the trial, County Court found two codefendants guilty of burglary in the second degree as a lesser included offense of burglary in the first degree (§ 140.30 [1]) as charged in the second count of the indictment. In rendering its verdict, however, the court failed to dispose of that count of the indictment with respect to defendant. Notwithstanding that failure, the court sentenced defendant on, inter alia, a conviction of burglary in the second degree. As the People correctly concede, the court's failure to dispose of the second count "constitute[d] a verdict of not guilty with respect to [that] count" (CPL 350.10 [5]). We therefore agree with defendant that he was acquitted of burglary in the first degree and all lesser included offenses thereof, and we modify the judgment accordingly.

Defendant's further contention that the testimony of one of the complainants should have been precluded because she violated the order excluding certain witnesses from observing the trial and that the court's failure to preclude that testimony deprived him of a fair

trial is not preserved for our review (see CPL 470.05 [2]). In any event, that contention is without merit. "It was in the trial court's discretion to grant an order excluding witnesses from observing the trial, and the fact that a witness might have disobeyed such order does not disqualify the witness from testifying" (*People v Rivera*, 182 AD2d 1092, 1092-1093, lv denied 80 NY2d 896; see also *People v Palmer*, 272 AD2d 891, 891). "[W]here a witness violates an order of exclusion, he or she is subject to court-imposed sanctions[,] the severity of which are committed to the sound discretion of the trial court. And while the sanction may include precluding the witness from testifying, such sanction clearly is the most drastic available and would be appropriate only in the most egregious circumstances" (*People v Brown*, 274 AD2d 609, 610). We conclude that the court did not abuse its discretion in permitting the complainant in question to testify, especially when she was cross-examined concerning her alleged violation of the order of exclusion and the court was permitted to consider that violation in assessing her credibility (see generally *Palmer*, 272 AD2d at 891).

Defendant contends that the evidence is legally insufficient to support the conviction of robbery in the second degree because he was charged as a principal rather than as an accessory and the evidence failed to establish that he acted as a principal. We reject that contention. "It is well established that liability as a principal or an accomplice is not an element of the crime charged and that the People may charge defendant as a principal but establish his guilt as an accomplice" (*People v Jackson*, 286 AD2d 946, 946, lv denied 97 NY2d 683; see *People v Rivera*, 84 NY2d 766, 769-770; *People v Duncan*, 46 NY2d 74, 79-80, rearg denied 46 NY2d 940, cert denied 442 US 910, rearg dismissed 56 NY2d 646). In any event, the evidence is legally sufficient to establish that defendant committed robbery in the second degree as a principal (see generally *People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495).

Viewing the evidence in light of the elements of the crime of robbery in the second degree in this nonjury trial (see *Danielson*, 9 NY3d at 349), we reject defendant's further contention that the verdict with respect to that crime is against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). " 'Issues of credibility . . . , including the weight to be given the backgrounds of the People's witnesses and inconsistencies in their testimony, were properly considered by the [court as the trier of fact] and there is no basis for disturbing its determinations' " (*People v Rogers*, 70 AD3d 1340, 1340, lv denied 14 NY3d 892, cert denied 131 S Ct 475; see generally *Bleakley*, 69 NY2d at 495). Further, the inconsistencies in the witnesses' testimony raised by defendant on appeal do not render their testimony incredible as a matter of law (see *People v Nilsen*, 79 AD3d 1759, 1760, lv denied 16 NY3d 862; cf. *People v Wallace*, 306 AD2d 802, 802-803).

Defendant's contention that the court erred in considering robbery in the second degree as a lesser included offense of robbery in the first degree (Penal Law § 160.15 [2]) and in convicting him of

the lesser included offense is waived inasmuch as defendant failed to make a timely objection with respect thereto (see *People v Ford*, 62 NY2d 275, 282-283; *People v Smith*, 13 AD3d 1121, 1122-1123, lv denied 4 NY3d 803).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

440

**KA 10-02004**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LITTLE GOLDIE G. DIGGS, DEFENDANT-APPELLANT.

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JASON J. BOWMAN, ONTARIO, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered August 24, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of assault in the second degree (Penal Law § 120.05 [7]) to assault in the third degree (§ 120.00 [1]) and vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on the conviction of assault in the third degree (*see People v Skinner*, \_\_\_ AD3d \_\_\_ [Apr. 27, 2012]).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

447

CA 11-02180

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

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IN THE MATTER OF DONALD G. MCGRATH AND  
ROSLYN F. MCGRATH, PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN OF AMHERST ZONING BOARD OF APPEALS,  
RESPONDENT-APPELLANT.

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E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (PHILIP B. ABRAMOWITZ OF  
COUNSEL), FOR RESPONDENT-APPELLANT.

HOPKINS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR  
PETITIONERS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court,  
Erie County (Timothy J. Drury, J.), entered December 23, 2010 in a  
proceeding pursuant to CPLR article 78. The judgment invalidated a  
determination of respondent and directed that petitioners no longer be  
denied a building permit.

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

Memorandum: Petitioners commenced this CPLR article 78  
proceeding seeking to annul the determination of respondent, Town of  
Amherst Zoning Board of Appeals (ZBA), denying their request for a  
building permit for a single family home. The ZBA denied that request  
on the ground that petitioners' lot did not meet the minimum width  
requirement imposed by the zoning ordinance of the Town of Amherst  
(Town). Contrary to the ZBA's contention, we conclude that Supreme  
Court properly granted the petition and ordered the ZBA to grant  
petitioners the requested building permit.

Although an "interpretation by a zoning board of its governing  
code is generally entitled to great deference by the courts . . . ,  
'[w]here . . . the question is one of pure legal interpretation of  
[the code's] terms,' deference to the zoning board is not required"  
(*Matter of Emmerling v Town of Richmond Zoning Bd. of Appeals*, 67 AD3d  
1467, 1467-1468). In such cases, the determination of a zoning board  
can be overturned where the zoning board's interpretation "is contrary  
to the clear wording" of the applicable zoning ordinance (*id.* at 1468  
[internal quotation marks omitted]).

Here, the ZBA's determination that petitioners were not entitled

to build a single family home on their lot in the absence of a width variance "is contrary to the clear wording" of the Town's zoning ordinance (*id.* [internal quotation marks omitted]), set forth in chapter 203 of the Code of the Town of Amherst (Code). Although the lot does not satisfy the width requirement contained in chapter 203, section 3-6-2 (B) of the Code, the record establishes that the lot complied with the width requirement that was in effect when the lot was filed as part of a subdivision plat in 1979, and thus that it constituted a "lot of record" at the time the current zoning ordinance took effect (ch 203, § 2-4). Inasmuch as petitioners' lot was lawful prior to the enactment of the current zoning ordinance and became unlawful only when that zoning ordinance took effect, the lot qualifies as a "nonconforming . . . lot of record" (*id.*). The Code provides that, in the district in which petitioners' lot is located, "a single-family detached dwelling and customary accessory structures may be erected on any single nonconforming lot of record . . . , notwithstanding limitations imposed by other provisions of [the zoning ordinance, where such lot is] in separate ownership and not of continuous frontage with other lots in the same ownership" (ch 203, § 9-5-1 [A]). That provision applies "even though the nonconforming lot of record fails to meet the requirement[] for . . . width" (ch 203, § 9-5-1 [B]). The ZBA's failure to apply chapter 203, section 9-5-1 of the Code to petitioners' circumstances and to permit the construction of petitioners' proposed single family home is, in our view, "contrary to the clear wording" of the zoning ordinance (*Emmerling*, 67 AD3d at 1468 [internal quotation marks omitted]). Supreme Court therefore properly granted the petition.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

448

CA 11-01853

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

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SHARLENE MCKENZIE, AS EXECUTRIX OF THE ESTATE  
OF OSCAR MCKENZIE, JR., DECEASED,  
PLAINTIFF-APPELLANT,

V

ORDER

ONONDAGA COUNTY AND ONONDAGA COUNTY BAR  
ASSOCIATION ASSIGNED COUNSEL PROGRAM, INC.,  
DEFENDANTS-RESPONDENTS.

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JEFFREY R. PARRY, SYRACUSE, FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF  
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered July 5, 2011. The order, among other things, granted the motion of defendants to dismiss the second through seventh causes of action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Roulan v County of Onondaga*, 90 AD3d 1617; *Cagnina v Onondaga County*, 90 AD3d 1626; *Matter of Parry v County of Onondaga*, 51 AD3d 1385).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

451

CA 11-01681

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

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ROBERT M. WARNER, II, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

APRIL L. WARNER, DEFENDANT-APPELLANT.

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LEGAL AID SOCIETY OF MID-NEW YORK, INC., OSWEGO (SUSAN M. FAUST OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN W. SPRING, JR., ATTORNEY FOR THE CHILDREN, PHOENIX, FOR ASHLEIGH W., THOMAS W., COURTNEY W., BRITNEY W., AND MONICA W.

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Appeal from a judgment of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered February 25, 2011. The judgment, insofar as appealed from, referred to Family Court all future issues relative to income tax deductions and exemptions concerning the children.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs and that part referring to Family Court all future issues relative to income tax deductions and exemptions concerning the parties' children is vacated.

Memorandum: Defendant appeals from that part of the judgment of divorce providing that all future "issues relative to income tax deductions and exemptions [concerning] the children" shall be referred to Family Court. We note at the outset that, although the judgment was entered upon consent, the provision at issue was added by Supreme Court sua sponte, and defendant's attorney objected to that provision. Thus, defendant's contention is properly before us (*cf. Hatsis v Hatsis*, 122 AD2d 111, 111). We agree with defendant that the court erred in adding the provision with respect to the tax deductions and exemptions inasmuch as the jurisdiction of Family Court is generally limited "to matters pertaining to child support and custody" (*Matter of Paratore v Paratore*, 90 AD2d 975; see *Matter of Howard v Janowski*, 226 AD2d 1087, 1087), and tax deductions or exemptions are not an element of support (see *Matter of John M.S. v Bonni L.R.*, 49 AD3d 1235, 1235; see generally *Paratore*, 90 AD2d at 975). Although Family Court Act § 115 (b) provides that Family Court has jurisdiction "over applications for support, maintenance, a distribution of marital property and custody in matrimonial actions when referred to the family court by the supreme court" (emphasis added), marital property is defined as that property which is acquired during the marriage (see Domestic Relations Law § 236 [B] [1] [c]), and the parties'

entitlement to tax deductions and exemptions concerning the children will affect only property acquired after the marriage.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

452

CA 11-01968

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

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JOHN GISEL, PLAINTIFF-APPELLANT,  
ET AL., PLAINTIFF,

V

MEMORANDUM AND ORDER

CLEAR CHANNEL COMMUNICATIONS, INC. AND ROBERT  
LONSBERRY, DEFENDANTS-RESPONDENTS.

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MICHAEL A. ROSENHOUSE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

GREENBERG TRAURIG, LLP, ALBANY (MICHAEL J. GRYGIEL OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered December 7, 2010. The order granted the motion of defendants for summary judgment, dismissed the complaint and denied the cross motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this defamation action seeking, inter alia, damages based on statements made by defendant Robert Lonsberry, the host of a radio talk show that aired on a station owned by defendant Clear Channel Communications, Inc. The statements at issue were made during an on-air discussion that Lonsberry had with former plaintiff Jacqueline Inzinga the day after her brother, John Gisel (plaintiff), was acquitted of criminally negligent homicide for fatally shooting a man in a hunting accident. According to plaintiffs, Lonsberry asked Inzinga "how it felt to have a brother who was 'a cold-blooded murderer' " and whether plaintiff " 'put a notch in the stock of his gun as he kills people?,' " and Lonsberry told Inzinga "that the hunting incident could not have been an accident . . . ." In support of their motion for summary judgment dismissing the complaint, defendants alleged that those comments were made in the midst of a debate amongst Lonsberry and his callers regarding whether plaintiff should have been held criminally liable for the death of the other hunter, that the issue of plaintiff's culpability for the shooting had been discussed on Lonsberry's show on several occasions prior to the date on which he made the statements in question and that plaintiff's accident, prosecution and acquittal were widely covered by media outlets in Western New York. We conclude that Supreme Court properly granted the motion.

We agree with the court that defendants met their burden of establishing that each of Lonsberry's statements at issue constituted a nonactionable expression of pure opinion (see generally *Gross v New York Times Co.*, 82 NY2d 146, 151; *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139, *rearg denied* 81 NY2d 759, *cert denied* 508 US 910; *Steinhilber v Alphonse*, 68 NY2d 283, 286). Applying the four-part test set forth in *Steinhilber* (68 NY2d at 292) and considering "the over-all context in which the [statements] were made," we conclude that defendants established that a " 'reasonable [listener] would [not] have believed that the challenged statements were conveying facts about the . . . plaintiff,' " rather than opinions (*Brian v Richardson*, 87 NY2d 46, 51, quoting *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254, *cert denied* 500 US 954). Because Lonsberry's statements were based on facts that were widely reported by Western New York media outlets and were known to his listeners, it cannot be said that his statements were based on undisclosed facts (see *Gross*, 82 NY2d at 153-154; *Lukashok v Concerned Residents of N. Salem*, 160 AD2d 685, 686). Moreover, none of the statements were "capable of being objectively characterized as true or false" (*Steinhilber*, 68 NY2d at 292). Further, the context in which the statements were made supports the conclusion that a reasonable listener would not have thought that Lonsberry was stating facts. Lonsberry's show used a call-in format and generally provided a forum for public debate on newsworthy topics, and his statements were made during an on-air debate with his listeners regarding plaintiff's culpability and whether the jury had properly acquitted plaintiff. Lonsberry had engaged his listeners in similar debates regarding plaintiff's culpability on several previous occasions. In addition, some of Lonsberry's callers used "harsh and intemperate language," and the tone of Lonsberry's statements was obviously intended to be caustic and confrontational, rather than factual. We therefore conclude that defendants established their entitlement to judgment as a matter of law that the statements in question were "expression[s] of [pure] opinion [that were] not actionable" (*Wanamaker v VHA, Inc.*, 19 AD3d 1011, 1012-1013), and plaintiff failed to raise a triable issue of fact in opposition to the motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Inasmuch as Lonsberry's statements were nonactionable expressions of pure opinion, we need not address plaintiff's remaining contentions.

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

457

**KA 11-00432**

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES T. WILLIAMS, ALSO KNOWN AS CHARLES  
GUS THIGPEN WILLIAMS, DEFENDANT-APPELLANT.

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BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 2, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). As defendant correctly concedes, he failed to preserve for our review his contention that a conflict of interest between the probation officer who prepared the presentence report and a police officer at the scene of the arrest required the preparation of a new presentence report and resentencing (see CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). The sentence is not unduly harsh or severe.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

458

**KA 08-02646**

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAMALL KNIGHT, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 12, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in denying his motion to suppress evidence obtained by the police following his arrest, including the loaded firearm he was charged with possessing. We reject that contention. Defendant was arrested based on information provided to the police by a confidential informant. The informant telephoned a detective with whom he had a relationship and stated that a black male wearing a brown hooded sweatshirt, jeans and brown boots was in possession of a .380 caliber handgun in the area of Lafayette Avenue and South Salina Street in Syracuse. The informant also stated that the man with the gun was riding a "female type bicycle." The detective relayed that information to police headquarters, and the information was then transmitted over the police radio. Within minutes, two uniformed officers arrived at the specified location and observed defendant, who matched the description provided by the informant. Defendant was standing in front of a house on South Salina Street, and there was a bicycle on the ground next to him. Defendant ran inside the house when the marked police vehicle stopped in front of it, and the officers gave chase. Defendant was tackled inside the house by one of the officers, whereupon a handgun fell onto the floor from defendant's clothing.

Contrary to defendant's contention, the court did not err in

restricting defense counsel's cross-examination of the detective with respect to his understanding of the informant's basis of knowledge. The court properly determined that "the full factual predicate for the warrantless search at issue could not be disclosed without jeopardizing the confidential informant's safety" (*People v Merejildo*, 305 AD2d 143, 143, *lv denied* 1 NY3d 540; *see generally People v Morales*, 292 AD2d 253, 254-255). Stated otherwise, if the court had required the detective to respond to defense counsel's proposed line of questioning, the identity of the informant would no longer have been confidential.

We further conclude that the informant's basis of knowledge was sufficiently established at the in camera *Darden* hearing (*see People v Darden*, 34 NY2d 177). "Without disclosing the exact substance of the *Darden* hearing testimony," we conclude that the information from the informant, in its totality, "provided ample basis to conclude that the informant had a basis for his or her knowledge that defendant was in possession of" a weapon (*People v Lowe*, 50 AD3d 516, 516, *affd* 12 NY3d 768). Defendant does not challenge the reliability of the informant, who had provided accurate information to the police on many occasions in the past, and we thus conclude that the People satisfied both prongs of the *Aguilar/Spinelli* test (*see People v Henry*, 74 AD3d 1860, *lv denied* 15 NY3d 852).

We reject defendant's further contention that the information provided by the confidential informant was not sufficient to support the officers' pursuit of defendant into the house, where he admittedly did not reside. We conclude that, at a minimum, the officers had "reasonable suspicion to stop and detain defendant based on the totality of the circumstances, including a radio transmission providing a general description of the perpetrator[ ] of [the] crime . . . [,] the . . . proximity of the defendant to the site of the crime, the brief period of time between the crime and the discovery of the defendant near the location of the crime, and the [officers'] observation of the defendant, who matched the radio-transmitted description" (*People v Moss*, 89 AD3d 1526, 1527, *lv denied* 18 NY3d 855 [internal quotation marks omitted]). Defendant's flight upon seeing the officers exit their marked patrol vehicle further established the informant's reliability (*see People v Norman*, 66 AD3d 1473, 1474, *lv denied* 13 NY3d 940; *see generally People v Lee*, 258 AD2d 352, *lv denied* 93 NY2d 900), and increased the degree of suspicion (*see People v Pines*, 99 NY2d 525, 526). Thus, the pursuit and forcible detention of defendant by the officers thereafter was justified (*see id.* at 526-527; *People v Wilson*, 49 AD3d 1224, 1224-1225, *lv denied* 10 NY3d 966).

We have reviewed defendant's remaining contentions and conclude that they lack merit.

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

463

**KA 08-01990**

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES D. JOHNSON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 1, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). The conviction was based on defendant's possession of cocaine that was found by a parole officer in the center console of a motor vehicle driven by defendant shortly before the vehicle was searched. Defendant moved to suppress the cocaine, contending that the warrantless search was not supported by probable cause. In denying the motion, Supreme Court determined as a preliminary matter that, because defendant did not own the vehicle, he failed to establish that he had standing to contest the search of the vehicle. The court in any event concluded that the search was lawful because it was rationally and reasonably related to the performance of the duties of defendant's parole officer, and that defendant's status as a parolee was not exploited as a pretext for what would otherwise be an unlawful police-initiated search. Defendant thereafter entered a guilty plea, and on appeal he contends that the court erred in denying his suppression motion. We affirm.

On the evening in question, defendant's parole officer was working with a joint task force involving the Division of Parole, the Onondaga County Department of Probation, the Onondaga County Sheriff's Department, the Syracuse Police Department and the New York State Police. The joint task force, consisting of between 12 and 14 law enforcement officials, had a list of at least 15 parolees and

probationers to be searched, and defendant's name was on that list. As a condition of his parole, defendant had consented to searches of his residence, property and person. Defendant's parole officer testified at the suppression hearing that he included defendant on the list of parolees to be searched because, among other reasons, defendant had recently moved into a new apartment that had not yet been inspected by the parole officer.

Defendant's parole officer and a fellow parole officer arrived at defendant's apartment shortly before his 9:00 P.M. curfew, but defendant was not there. Defendant arrived minutes later in a motor vehicle he was operating, with no passengers. Upon parking in the lot next to his apartment, defendant exited the vehicle and locked the doors. He was then approached by the parole officers, who explained that they were there to inspect his residence. Defendant's parole officer notified the other members of the joint task force, who were waiting nearby and arrived momentarily. Upon entering his apartment with the officers, defendant placed the keys to the vehicle on a table before he was handcuffed for safety reasons. The officers proceeded to search the apartment, finding therein a digital scale and \$839 but no contraband. While the apartment was being searched, one of the parole officers took the keys to the vehicle from the table and used them to open the vehicle, which he then searched. The parole officer found cocaine weighing more than one half of an ounce in the false bottom of a beverage container located in the center console, along with marijuana and \$572 in cash.

We agree with defendant that the court erred in determining that he lacked standing to contest the legality of the search of the vehicle. Although "a defendant seeking to suppress evidence, on the basis that it was obtained by means of an illegal search, must allege standing to challenge the search and, *if the allegation is disputed*, must establish standing" (*People v Carter*, 86 NY2d 721, 722-723, *rearg denied* 86 NY2d 839 [emphasis added]), here at no time did the People contend that defendant lacked standing to challenge the search (see *People v Hunter*, 17 NY3d 725, 726). "Since the issue of defendant's standing was not raised, the court had no occasion to rule on that issue" (*id.* at 727). In any event, the evidence adduced at the hearing by the People established that defendant was the sole occupant of the vehicle, which he parked directly outside of his apartment in a private parking lot and then locked before he was approached by his parole officer. We conclude, based on that evidence, that defendant had "a possessory interest in, dominion and control over and the right to exclude others from the vehicle" sufficient to convey standing (*People v Banks*, 85 NY2d 558, 561, *cert denied* 516 US 868). Although there was no evidence that defendant owned the vehicle in question, it is well settled that a person may have a legitimate expectation of privacy in a vehicle that he or she does not own (see generally *id.* at 561-562).

We nevertheless agree with the court's further determination that the search of the vehicle was lawful. A parolee's "right to be free from unreasonable searches and seizures, guaranteed by [the] State Constitution[] . . . , remains inviolate" (*People ex rel. Piccarillo v*

*New York State Bd. of Parole*, 48 NY2d 76, 82). Nonetheless, "in any evaluation of the reasonableness of a particular search or seizure the fact of defendant's status as a parolee is always relevant and may be critical; what may be unreasonable with respect to an individual who is not on parole may be reasonable with respect to one who is" (*People v Huntley*, 43 NY2d 175, 181). Here, we conclude that the record supports the court's determination that the search was "rationally and reasonably related to the performance of the parole officer's duty" and was therefore lawful (*id.*). The fact that officers from other law enforcement agencies assisted in the search does not demonstrate that the parole officers in this case were used as "a 'conduit' for doing what the police could not do otherwise" (*People v Mackie*, 77 AD2d 778, 779). As noted, defendant's parole officer testified that he alone made the decision to include defendant on the list of parolees to be searched, and that he was motivated to do so by legitimate reasons related to defendant's status as a parolee. We note that we afford deference to the court's determination that the parole officer's testimony was credible (*see generally People v Prochilo*, 41 NY2d 759, 761), and that defendant was not singled out by law enforcement officials to be searched; instead, he was one of at least 15 parolees and probationers to be searched by the joint task force.

Although defendant's parole officer was aware that Syracuse police officers had received an anonymous tip that defendant was in possession of a handgun, that tip was received approximately two months before the search was conducted, and the court specifically determined that the tip "played no role" in the parole officer's decision to search the residence of defendant. Affording deference to the court as the factfinder, we cannot conclude that the court's determination in that regard was erroneous (*see generally id.*). We thus agree with the court that this was not a police search conducted in the guise of a parole search.

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

468

CA 10-02290

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

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BRENDA L. D'AMBRA, PLAINTIFF-APPELLANT,

V

ORDER

RICHARD T. D'AMBRA, DEFENDANT-RESPONDENT.

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DEAN J. FERRO, ATTORNEY FOR THE CHILDREN,  
RESPONDENT.  
(APPEAL NO. 1.)

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DAVIDSON FINK, LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

SAMUEL A. DISPENZA, JR., EAST ROCHESTER (TERRENCE G. BARKER OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

DEAN J. FERRO, ATTORNEY FOR THE CHILDREN, ROCHESTER, RESPONDENT PRO SE.

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Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered September 29, 2010 in a divorce action. The order, among other things, determined the equitable distribution of the marital assets.

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

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

469

CA 11-00085

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

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BRENDA L. D'AMBRA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RICHARD T. D'AMBRA, DEFENDANT-RESPONDENT.

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DEAN J. FERRO, ATTORNEY FOR THE CHILDREN,  
APPELLANT.  
(APPEAL NO. 2.)

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DAVIDSON FINK, LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

DEAN J. FERRO, ATTORNEY FOR THE CHILDREN, ROCHESTER, APPELLANT PRO SE.

SAMUEL A. DISPENZA, JR., EAST ROCHESTER (TERRENCE G. BARKER OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeals from a judgment of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered December 27, 2010 in a divorce action. The judgment, among other things, dissolved the marriage between the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part equitably distributing plaintiff's M&T savings account as well as those parts precluding plaintiff from sharing in defendant's early retirement benefits or enhanced pension payments, if any, and as modified the judgment is affirmed without costs.

Memorandum: In this matrimonial action, plaintiff wife and the Attorney for the Children (AFC) appeal from a judgment of divorce that "incorporated and merged" an amended decision and order issued by Supreme Court following a trial on issues relating to custody of the parties' two children and equitable distribution. With respect to custody, the court awarded the parties joint custody with primary physical residence to the wife and visitation to defendant husband on alternate weekends until Monday morning, every Wednesday from 4:00 P.M. to 7:30 P.M., and Sunday afternoons from 3:00 P.M. to 7:00 P.M. on the weekends during which the husband does not otherwise have visitation. The court further determined that, if the husband obtained a "suitable residence," i.e., an appropriately sized and equipped apartment within five miles of the wife's residence, within six months of its amended decision and order, the residency schedule

would be adjusted to afford the parties equal time with the children. Finally, with respect to custody, the court ordered that the parent whose residency period is beginning shall be responsible for picking up the children from the other parent's residence.

The wife challenges the court's residency schedule on several grounds. She initially contends that the court erred in determining that the husband shall automatically be entitled to equal time with the children if he obtained a "suitable residence" within six months of the amended decision and order. That contention is moot, however, inasmuch as the husband did not obtain a "suitable residence" within the requisite six months, and indeed still has not done so. The wife further contends, and the AFC agrees, that the court erred in awarding the father visitation on Sunday afternoons with the children on the weekends that he does not have residency. According to the wife, the schedule deprives her of quality time with the children because she never has the children for an entire weekend. We reject that contention. Because the wife is permanently disabled and does not work, the court's residency schedule affords her ample quality time with the children (*see generally Chamberlain v Chamberlain*, 24 AD3d 589, 592-593). She has the children every day after school and most week nights, as well as on alternate weekends until Sunday afternoon. "It is well settled that visitation issues are determined based on the best interests of the children . . . and that trial courts have 'broad discretion in fashioning a visitation schedule' " (*Veronica S. v Philip R.S.*, 70 AD3d 1459, 1459). Affording deference to the court's determination and its "first-hand assessment" of the parties (*Matter of Thayer v Thayer*, 67 AD3d 1358, 1359), we cannot conclude that the court erred in awarding visitation to the husband on alternate Sunday afternoons.

The wife further challenges the custody provisions of the amended decision and order insofar as it requires her to transport the children from the husband's residence to school on alternate Monday mornings. It appears from the wife's brief on appeal, however, that her challenge may be moot. According to the wife's brief, the court clarified its amended decision and order after it was rendered to make clear that the transportation provision did not apply to Monday mornings, and the husband has agreed to provide such transportation. In any event, we conclude that, because the record demonstrates that the wife is capable of operating a motor vehicle without difficulty despite her disability, the court did not err in requiring her to share equally in the transportation burden associated with the residency schedule on alternate Monday mornings. In addition, we reject the AFC's contention that the court should have required the husband to provide *all* of the transportation for visitation and residency. We also reject the AFC's contentions that the court erred in awarding residency of the children to the husband on alternate school breaks and holidays, and in failing to direct the parties to attend the Assisting Children through Transition program (*see generally Veronica S.*, 70 AD3d at 1459).

With respect to equitable distribution, there is no merit to the wife's contention that the court erred in granting one dependency

exemption to each party while allowing the husband to purchase in any given year the wife's exemption for the amount of tax savings the wife would have realized were she to claim the child on her tax return. We note at the outset that the wife does not appear to be aggrieved thereby. According to the uncontradicted testimony of the husband's tax expert, the wife will derive no benefit from the dependency exemption due to her limited income, which consists solely of disability benefits. In any event, "[n]othing in the language of the federal tax law limits the discretion of a state court to allocate the dependency exemption" (*Agnello v Payne*, 26 AD3d 837, lv denied 7 NY3d 707), and the court therefore could have awarded both exemptions to the husband.

We agree with the wife, however, that the court erred in awarding the husband one half of the funds in the wife's M&T savings account as of the date of commencement of the action, and we therefore modify the judgment accordingly. That account was in the wife's name only, and she established at trial that the funds therein came exclusively from her disability payments. Domestic Relations Law § 236 (B) (1) (d) (2) provides that "compensation for personal injuries" is separate property not subject to equitable distribution, and disability payments constitute compensation for personal injuries (see *Miceli v Miceli*, 78 AD3d 1023, 1025; *Masella v Masella*, 67 AD3d 749, 750; *Solomon v Solomon*, 206 AD2d 971).

We conclude that the court erred in determining that the wife shall not share in any early retirement benefits or enhanced pension payments, if any, that the husband may receive in the future. We thus further modify the judgment accordingly. "Vested rights in a noncontributory pension plan are marital property to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action, even though the rights are unmaturing at the time the action is begun" (*Majauskas v Majauskas*, 61 NY2d 481, 485-486). Although Social Security bridge payments and severance payments generally are not subject to distribution under *Majauskas*, early retirement or pension benefits of the type at issue in this case have been treated differently (see *Olivo v Olivo*, 82 NY2d 202, 207-209).

We reject the wife's contention that the court erred in awarding her only a 15% share of the husband's business, given that the wife made only indirect contributions to that business (see e.g. *Peritore v Peritore*, 66 AD3d 750, 753; *Hiatt v Tremper-Hiatt*, 6 AD3d 1014, 1016). Finally, we conclude that the " 'equities of the case and the financial circumstances of the parties' " support the court's refusal to award attorney's fees to plaintiff (*Matter of William T.M. v Lisa A.P.*, 39 AD3d 1172, 1173).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

470

CA 11-02023

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

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ADAM R. STEARNS AND KATHLEEN STEARNS,  
PLAINTIFFS-APPELLANTS,

V

ORDER

IRENE O'BRIEN, DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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CHARLES A. HALL, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL),  
FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered January 21, 2011 in a personal injury action. The order denied the motion of plaintiffs to set aside the verdict.

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

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

471

CA 11-02024

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

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ADAM R. STEARNS AND KATHLEEN STEARNS,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

IRENE O'BRIEN, DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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CHARLES A. HALL, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL),  
FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered January 21, 2011 in a personal injury action. The judgment dismissed the complaint upon a verdict of no cause of action.

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

Memorandum: Plaintiffs contend on appeal that Supreme Court erred in denying their motion to set aside the verdict of no cause of action, finding that Adam R. Stearns (plaintiff) did not sustain a serious injury. Previously, we affirmed an order that denied those parts of defendant's motion for summary judgment dismissing the complaint with respect to the permanent consequential limitation and significant limitation of use categories of serious injury as defined by Insurance Law § 5102 (d) (*Stearns v O'Brien*, 77 AD3d 1383). We note that plaintiffs met their burden at trial by submitting the requisite objective proof that plaintiff was injured as a result of the accident. Nevertheless, we agree with defendant that the jury was entitled to conclude that the injury was nothing more than "a mild, minor, or slight limitation of use" (*King v Johnston*, 211 AD3d 907, 907; see *Gaddy v Eyler*, 79 NY2d 955, 957).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

476

CA 11-00335

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

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IN THE MATTER OF THE STATE OF NEW YORK,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM JOHNSON, RESPONDENT-APPELLANT.

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO  
(AILEEN M. MCNAMARA OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 28, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, respondent appeals from an order revoking his prior regimen of strict and intensive supervision and treatment (SIST) and committing him to a secure treatment facility (see § 10.11 [d] [1], [4]). We reject respondent's contention that he was denied due process when Supreme Court denied his request for an independent psychiatric evaluation. An indigent respondent in a civil commitment proceeding does not have an absolute right to an independent psychiatric evaluation (see *Goetz v Crosson*, 967 F2d 29, 36-37). Instead, a right to present the testimony of an independent psychiatrist arises only where "such testimony is necessary to a reliable assessment" of an indigent respondent's mental condition (*id.*). Here, the court did not abuse its discretion in denying respondent's request for an independent psychiatric evaluation, which was made during the trial after petitioner had rested and respondent had called two witnesses. We also note that this was a SIST revocation hearing, not an initial proceeding under Mental Hygiene Law article 10, and that respondent stipulated that he had a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i). We further conclude that petitioner established at the hearing by the requisite clear and convincing evidence that respondent is a dangerous

sex offender requiring confinement (see § 10.03 [e]; § 10.07 [f]).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

477

CA 11-01704

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

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IN THE MATTER OF NORTH TONAWANDA FIRST, BY  
KATHY KERN, PRESIDENT, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF NORTH TONAWANDA, CITY OF NORTH  
TONAWANDA PLANNING COMMISSION, CITY OF NORTH  
TONAWANDA COMMON COUNCIL, WAL-MART STORES, INC.,  
WAL-MART REAL ESTATE BUSINESS TRUST,  
RESPONDENTS-RESPONDENTS,  
ET AL., RESPONDENTS.

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DAVID J. SEEGER, APPELLANT.

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DAVID J. SEEGER, BUFFALO, APPELLANT PRO SE.

THE HOUSH LAW OFFICES, BUFFALO (FRANK HOUSH OF COUNSEL), FOR  
PETITIONER-APPELLANT.

SHAWN P. NICKERSON, CITY ATTORNEY, NORTH TONAWANDA, FOR  
RESPONDENTS-RESPONDENTS CITY OF NORTH TONAWANDA, CITY OF NORTH  
TONAWANDA PLANNING COMMISSION, AND CITY OF NORTH TONAWANDA COMMON  
COUNCIL.

MANATT, PHELPS & PHILLIPS, LLP, NEW YORK CITY (KENNETH D. FRIEDMAN OF  
COUNSEL), FOR RESPONDENTS-RESPONDENTS WAL-MART STORES, INC. AND WAL-  
MART REAL ESTATE BUSINESS TRUST.

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Appeals from an order of the Supreme Court, Niagara County (Ralph  
A. Boniello, III, J.), entered March 7, 2011. The order adjudicated  
Catherine A. Kern and her attorney, David J. Seeger, to be in civil  
contempt.

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

Memorandum: Petitioner, Catherine A. Kern (incorrectly  
referenced in the caption as Kathy Kern), and her attorney, David J.  
Seeger, appeal separately from an order of Supreme Court holding them  
in contempt for failing to comply with court-ordered discovery in aid  
of determining sanctions (see Judiciary Law § 753 [A] [3]). The  
contempt order arises out of litigation involving the development of a  
Wal-Mart store in the City of North Tonawanda. Several lawsuits were  
filed by a citizens group, of which Kern was the president,

challenging the development. Respondents moved to dismiss the latest CPLR article 78 petition, and they moved for sanctions against Kern and Seeger for civil contempt pursuant to 22 NYCRR 130-1.1 (a), alleging that the proceeding was frivolous. Supreme Court reserved on the motion to dismiss and on the motion for sanctions, but permitted respondents to serve written discovery requests regarding the funding of the litigation. The court eventually dismissed the petition and proceeded with the motion seeking sanctions, permitting limited discovery in connection therewith. The court stated in its decision permitting discovery that a failure by Kern "to expeditiously comply with such discovery requests may result in a finding of contempt." Kern took an appeal from the order that, inter alia, permitted discovery, but the appeal was dismissed on March 14, 2011 for failure to perfect it.

Subsequently, Seeger sent a letter to the court indicating that petitioner would seek a protective order because the material sought was protected by the First Amendment. When that motion was finally made, respondents cross-moved for an order to compel discovery. The court denied the motion for a protective order and granted the cross motion to compel, directing petitioner to comply with the discovery order by December 1, 2010. Petitioner submitted a response to the discovery order, but the court concluded that the responses of petitioner and Seeger were either insufficient or the answers were "incomplete/vague." The court then granted respondents' subsequent motion and cross motion seeking to hold Kern and Seeger in contempt, and permitting them to purge the contempt by producing detailed responses to the discovery requests by a specified date. Kern and Seeger did not purge the contempt, and they now appeal.

Preliminarily, we note that the validity of the underlying discovery order is not at issue here because, as noted, the appeal taken by Kern from that order was dismissed for failure to perfect it. It is well settled that an appeal from a contempt order that is jurisdictionally valid does not bring up for review the prior order (see *Bergin v Peplowski*, 173 AD2d 1012, 1014). We conclude that the contempt order was jurisdictionally valid and that it was an "unequivocal mandate" to comply with limited discovery in connection with the request for sanctions (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583, *not to amend granted* 60 NY2d 652). We have considered the remaining contentions of Kern and Seeger and conclude that they are without merit.

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

481

**KA 11-00934**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER MOUSTAKOS, DEFENDANT-APPELLANT.

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CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 31, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]), defendant contends that he was denied due process and his right to a speedy trial based on a delay of just over seven months between the date of the incident and the date the indictment was issued. Applying the factors set forth in *People v Taranovich* (37 NY2d 442, 445), we reject that contention (see *People v Vernace*, 96 NY2d 886, 887-888). "There is no specific temporal period by which a delay may be evaluated or considered 'presumptively prejudicial' " (*People v Romeo*, 12 NY3d 51, 56, cert denied \_\_\_ US \_\_\_, 130 S Ct 63, quoting *Doggett v United States*, 505 US 647, 652), but a delay of just over seven months alone is insufficient to require dismissal of the indictment (see *People v Doyle*, 50 AD3d 1546; *People v Walker*, 2 AD3d 1454, lv denied 2 NY3d 808; *People v Beyah*, 302 AD2d 981, lv denied 99 NY2d 626). The delay was caused in part by an investigative delay inherent in the process by which crimes that occur in prison are referred to the District Attorney's Office, and defendant does not contend that the delay was caused by bad faith (see *Romeo*, 12 NY3d at 56-57). "The charge against defendant was serious, 'involv[ing] the safety and security of a correctional facility' . . . Moreover, because defendant was already incarcerated on a prior felony conviction, 'the delay caused no further curtailment of his freedom' . . . Finally, we are unable to conclude on the record before us that the defense has been impaired by reason of the delay" (*People v Jenkins*, 2 AD3d 1390, 1391; see *People*

*v Coggins*, 308 AD2d 635, 636; *People v Richardson*, 298 AD2d 711, 712).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

485

**KA 10-02438**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BENJAMIN A. ADDISON, II, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered May 27, 2010. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the third degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal mischief in the third degree (Penal Law § 145.05 [2]) and resisting arrest (§ 205.30). The evidence at trial established that defendant shoveled substantial amounts of snow and large chunks of ice onto a neighbor's vehicle, causing a crack in the windshield that cost more than \$250 to repair. Although defendant does not dispute on appeal that he engaged in such conduct, he contends that the evidence is legally insufficient to establish that he intended to cause damage to the vehicle, which is a necessary element of criminal mischief in the third degree. We reject that contention. "A defendant may be presumed to intend the natural and probable consequences of his actions" (*People v Mahoney*, 6 AD3d 1104, 1104, *lv denied* 3 NY3d 660). Here, we conclude that a damaged windshield is a natural and probable consequence of heaving large chunks of ice onto a motor vehicle. Viewing the evidence in light of the elements of the crime of criminal mischief in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial based on improper comments made by the prosecutor during voir dire that allegedly trivialized the case and

blamed defendant for exercising his right to a jury trial (see generally *People v Williams*, 8 NY3d 854, 855). In any event, County Court dismissed the prospective jurors in the initial jury panel who had not already been sworn, thereby alleviating any prejudice to defendant based on the comments made to those prospective jurors. Contrary to defendant's further contention, the court did not err in failing to discharge sua sponte the three sworn jurors who had been selected from that initial panel of allegedly tainted prospective jurors. "[Q]uestions concerning prospective jurors' knowledge or attitudes relating to a particular law are irrelevant to their functions as triers of factual issues and, therefore, have no bearing on their qualifications as jurors . . . [and where, as here, t]he prospective jurors were asked by the court whether, given the nature of the case, they could render a fair and impartial verdict" those who responded that they were able to do so could properly serve (*People v Corbett*, 68 AD2d 772, 778-779, *affd* 52 NY2d 714).

Finally, we reject defendant's contention that the failure of defense counsel to request that the three sworn jurors in question be disqualified constituted ineffective assistance of counsel requiring reversal. Defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; see *People v Dickeson*, 84 AD3d 1743).

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

489

CAF 11-02152

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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IN THE MATTER OF SHAWN D.R.-S.,  
RESPONDENT-APPELLANT.

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

MEMORANDUM AND ORDER

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ROBERT A. DINIERI, ATTORNEY FOR THE CHILD, CLYDE, FOR  
RESPONDENT-APPELLANT.

DANIEL M. WYNER, COUNTY ATTORNEY, LYONS (KATHLEEN H. POHL OF COUNSEL),  
FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered September 13, 2011 in a proceeding pursuant to Family Court Act article 3. The order, among other things, adjudicated respondent to be a juvenile delinquent and placed him in the custody of the New York State Office of Children and Family Services.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision adjudicating respondent a juvenile delinquent based upon the finding that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree and substituting therefore a provision adjudicating respondent a juvenile delinquent based upon a finding that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and as modified the order is affirmed without costs.

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree (Penal Law § 120.00 [1]). Respondent waived a dispositional hearing and consented to placement in the custody of the New York State Office of Children and Family Services for a period of one year. We agree with respondent that the evidence is legally insufficient to establish that the victim sustained physical injury, i.e., "impairment of physical condition or substantial pain" (§ 10.00 [9]; § 120.00 [1]; see *Matter of Philip A.*, 49 NY2d 198, 200). Viewed in the light most favorable to the presentment agency, the evidence establishes that respondent and another individual hit the victim several times in the face and back of the head, causing him to suffer three minor cuts on his face, swelling on his nose and behind his ear

and a red bruise on his neck (see *Philip A.*, 49 NY2d at 200; *People v Patterson*, 192 AD2d 1083). The victim testified at the fact-finding hearing that the injuries did not hurt and, although he sought medical attention approximately three hours after the incident, there is no evidence that he needed stitches, that he was prescribed pain medication or that he received any further treatment (see *Matter of Jonathan S.*, 55 AD3d 1324, 1325; *People v Richmond*, 36 AD3d 721, 722; *People v Green*, 145 AD2d 929, 931). In addition, neither the victim nor his mother testified that the victim had any lingering pain or scarring in the days following the incident (cf. *Matter of Nico S.C.*, 70 AD3d 1474, 1475; *People v Smith*, 45 AD3d 1483, 1483, lv denied 10 NY3d 771; *People v Wooden*, 275 AD2d 935, 936, lv denied 96 NY2d 740).

We agree with the presentment agency, however, that the acts proved would, if committed by an adult, constitute the lesser included offense of attempted assault in the third degree (Penal Law §§ 110.00, 120.00 [1]; see *Matter of Kristie II.*, 252 AD2d 807, 807-808; see generally *Matter of Dwight M.*, 80 NY2d 792, 793-794). "The absence of proof of an actual physical injury does not preclude a finding that respondent attempted to inflict such injury" (*Kristie II.*, 252 AD2d at 808; see also *People v Lewis*, 294 AD2d 847, 847) and, here, respondent's intent to cause physical injury can be inferred from his act of repeatedly punching the victim in the head with a closed fist (see *Matter of Dwayne H.*, 278 AD2d 706, 707; *Kristie II.*, 252 AD2d at 808). We therefore modify the order by vacating the provision adjudicating respondent a juvenile delinquent based upon the finding that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree and substituting therefore a provision adjudicating respondent a juvenile delinquent based upon a finding that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree (see generally *Matter of Shourik D.*, 65 AD3d 1042, 1043-1044; *Matter of William A.*, 4 AD3d 647, 649-650; *Matter of Phoenix G.*, 265 AD2d 554, 554-555). In light of our determination, we do not address respondent's remaining contentions.

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

490

CAF 11-02154

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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IN THE MATTER OF AMANDA J. MCDERMOTT,  
PETITIONER-RESPONDENT-RESPONDENT,

V

MEMORANDUM AND ORDER

ANDREW JOHN BALE,  
RESPONDENT-PETITIONER-RESPONDENT.

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SANFORD A. CHURCH, ESQ., ATTORNEY FOR THE  
CHILDREN, APPELLANT.

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SANFORD A. CHURCH, ATTORNEY FOR THE CHILDREN, ALBION, APPELLANT PRO  
SE.

MUSCATO, DIMILLO & VONA, L.L.P., LOCKPORT (P. ANDREW VONA OF COUNSEL),  
FOR PETITIONER-RESPONDENT-RESPONDENT.

JAMES D. BELL, BROCKPORT, FOR RESPONDENT-PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Orleans County (James P. Punch, J.), entered January 21, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parents joint custody of their children, with petitioner-respondent having primary physical residence.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, the Attorney for the Children (AFC) appeals from an order granting the parties joint custody of their two children, with primary physical residence to petitioner-respondent mother and liberal visitation to respondent-petitioner father. The order incorporated the terms of a written stipulation executed by the parties on the eve of trial. The AFC refused to join in the stipulation, but Family Court approved the stipulation over the AFC's objection. We reject the AFC's contention that the court erred in approving the stipulation. Although we agree with the AFC that he " 'must be afforded the same opportunity as any other party to fully participate in [the] proceeding' " (*Matter of White v White*, 267 AD2d 888, 890), and that the court may not "relegate the [AFC] to a meaningless role" (*Matter of Figueroa v Lopez*, 48 AD3d 906, 907), the children represented by the AFC are not permitted to "veto" a proposed settlement reached by their parents and thereby force a trial. The

record reflects that, unlike in *Matter of Figueroa*, upon which the AFC relies, the court here gave the AFC a full and fair opportunity to be heard, and the AFC stated in detail all of the reasons that he opposed the stipulation. Indeed, the court gave credence to many of the comments made by the AFC, as did the attorneys for the parents, both of whom agreed to modify the stipulation to address several of the AFC's concerns.

We cannot agree with the AFC that children in custody cases should be given full-party status such that their consent is necessary to effectuate a settlement. The purpose of an attorney for the children is "to help protect their interests and to help them express their wishes to the court" (Family Ct Act § 241). There is a significant difference between allowing children to express their wishes to the court and allowing their wishes to scuttle a proposed settlement. We note that the court is not required to appoint an attorney for the children in contested custody proceedings, although that is no doubt the preferred practice (see *Matter of Amato v Amato*, 51 AD3d 1123, 1124; *Davis v Davis*, 269 AD2d 82, 85). Thus, there is no support for the AFC's contention that children in a custody proceeding have the same legal status as their parents, inasmuch as it is well settled that parents have the right to the assistance of counsel in such proceedings (see § 262 [a] [v]; *Matter of Kristin R.H. v Robert E.H.*, 48 AD3d 1278, 1279).

In sum, we conclude that, where the court in a custody case appoints an attorney for the children, he or she has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests. Parents who wish to settle their disputes should not be required to engage in costly and often times embittered litigation merely because their children or the attorney for the children would prefer a different custodial arrangement.

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

494

CAF 11-02198

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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IN THE MATTER OF SHAWN D.R.-S.,  
RESPONDENT-APPELLANT.

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

MEMORANDUM AND ORDER

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ROBERT A. DINIERI, ATTORNEY FOR THE CHILD, CLYDE, FOR  
RESPONDENT-APPELLANT.

DANIEL M. WYNER, COUNTY ATTORNEY, LYONS (KATHLEEN H. POHL OF COUNSEL),  
FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered September 19, 2011 in a proceeding pursuant to Family Court Act article 3. The order, among other things, placed respondent with the New York State Office of Children and Family Services upon an adjudication of juvenile delinquency.

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

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, would constitute the crime of criminal trespass in the second degree (Penal Law § 140.15 [1]). Contrary to respondent's contention, the evidence presented at the hearing, when viewed in the light most favorable to the presentment agency, is legally sufficient to establish that respondent was not licensed or privileged to be in or upon the premises (see § 140.00 [5]; *People v Daniels*, 8 AD3d 1022, 1023, lv denied 3 NY3d 705; see generally *Matter of David H.*, 69 NY2d 792, 793). The testimony of the three residents of the home in question established that respondent entered the home through the locked back door, that respondent was located on the second floor of the home and that none of the residents gave respondent permission to enter or remain inside the home (see generally *Daniels*, 8 AD3d at 1023; *People v Matuszek*, 300 AD2d 1131, 1131-1132, lv denied 99 NY2d 630; cf. *Matter of Quanel M.*, 8 AD3d 386, 386-387; *Matter of Daniel B.*, 2 AD3d 440, 441). We reject the further contention of respondent that Family Court's findings are against the weight of the evidence (see *Matter of Travis D.*, 1 AD3d 968, 969).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

**495**

**CA 11-01286**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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IN THE MATTER OF THE APPLICATION OF  
PETITIONER/CONDEMNOR NEW YORK STATE URBAN  
DEVELOPMENT CORPORATION, DOING BUSINESS AS  
EMPIRE STATE DEVELOPMENT CORPORATION,  
PETITIONER-RESPONDENT, TO ACQUIRE  
IN FEE SIMPLE CERTAIN REAL PROPERTY  
CURRENTLY OWNED BY FALLSITE, LLC, AND  
KNOWN AS:

232 SIXTH STREET, CITY OF NIAGARA FALLS  
700 RAINBOW BLVD., CITY OF NIAGARA FALLS  
231 SIXTH STREET, CITY OF NIAGARA FALLS  
626 RAINBOW BLVD., CITY OF NIAGARA FALLS  
701 FALLS STREET, CITY OF NIAGARA FALLS

MEMORANDUM AND ORDER

SITUATED IN THE COUNTY OF NIAGARA, STATE OF  
NEW YORK AND HAVING, RESPECTIVELY; THE FOLLOWING  
TAX SECTIONS, BLOCKS, AND LOTS:

159.09-2-25.122  
159.09-2-25.112  
159.09-2-25.121  
159.09-2-25.111  
159.09-2-25.211

TOGETHER WITH ALL COMPENSABLE INTERESTS THEREIN  
CURRENTLY OWNED BY FALLSITE, LLC, FALLSVILLE  
SPLASH, LLC AND ANY OTHER CONDEMNNEES WHO ARE  
CURRENTLY UNKNOWN.

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FALLSITE, LLC AND FALLSVILLE SPLASH, LLC,  
RESPONDENTS-APPELLANTS.

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JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS, D.J. & J.A. CIRANDO,  
ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR  
RESPONDENTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County  
(Richard C. Kloch, Sr., A.J.), entered January 24, 2011. The order,  
inter alia, denied respondents' cross motion for a mistrial and  
recusal.

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

Memorandum: In this condemnation proceeding, respondents appeal from an order that, inter alia, denied their cross motion for a mistrial and recusal based upon Supreme Court's alleged relationship with a partner at the law firm representing petitioner and comments made by the court in other proceedings concerning the viability of development in the Niagara Falls area. We affirm. Neither of the grounds raised in support of recusal invoke the court's mandatory duty to recuse itself (see Judiciary Law § 14). Thus, recusal was a matter for the court's discretion, and we perceive no abuse of that discretion (see *Caplash v Rochester Oral & Maxillofacial Surgery Assoc., LLC*, 63 AD3d 1683, 1686; *Matter of Gutzmer v Santini*, 60 AD3d 1295, lv dismissed 12 NY3d 889).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

499

CA 11-01518

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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MICHAEL SINGH SANDU, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

KULWINDER SINGH SANDU, DEFENDANT-APPELLANT.

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JASON L. SCHMIDT, FREDONIA, FOR DEFENDANT-APPELLANT.

BORINS, HALPERN & PASKOWITZ, BUFFALO (MICHAEL PASKOWITZ OF COUNSEL),  
FOR PLAINTIFF-RESPONDENT.

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Appeal from an amended order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered October 14, 2010. The amended order and judgment granted the motion of plaintiff for summary judgment in lieu of complaint and granted plaintiff judgment in the sum of \$37,500, plus interest, costs and disbursements.

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

Memorandum: Defendant appeals from an amended order and judgment that granted plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213 and awarded him damages in the amount of the balance due on a promissory note executed by NANAK Hospitality, LLC (NANAK) and personally guaranteed by defendant, a partner of NANAK. We affirm.

Plaintiff met his initial burden on the motion by submitting the promissory note, which contained defendant's personal guarantee, and evidence of NANAK's default (*see LaMar v Vasile* [appeal No. 4], 49 AD3d 1218, 1219; *Di Marco v Bombard Car Co., Inc.*, 11 AD3d 960, 960-961). In opposition thereto, defendant failed to "come forward with evidentiary proof showing the existence of a triable issue of fact with respect to a bona fide defense of the note" (*Judar1 v Cycletech, Inc.*, 246 AD2d 736, 737; *see Ring v Jones*, 13 AD3d 1078, 1078). Defendant's bare assertion that he does not recall signing the promissory note is insufficient to raise a triable issue of fact whether he personally guaranteed the note (*see generally John Deere Ins. Co. v GBE/Alasia Corp.*, 57 AD3d 620, 621; *Bank of Am. v Tatham*, 305 AD2d 183, 183). We reject defendant's contention that the personal guarantee was not supported by consideration inasmuch as defendant concedes that the promissory note was executed in exchange for plaintiff's release of his entire interest in NANAK, and defendant

benefitted from that release as a remaining partner of the company. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

500

**CA 11-02213**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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BETHANNE M. HAHN AND DOUGLAS HAHN,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOPS MARKETS, LLC, ET AL., DEFENDANTS,  
CONCEPT CONSTRUCTION CORPORATION AND  
INDUSTRIAL POWER AND LIGHTING CORP.,  
DEFENDANTS-APPELLANTS.

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TOPS MARKETS, LLC, THIRD-PARTY  
PLAINTIFF-RESPONDENT,

V

CONCEPT CONSTRUCTION CORPORATION,  
THIRD-PARTY DEFENDANT-APPELLANT.

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RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MELISSA  
VINCTION OF COUNSEL), FOR DEFENDANT-APPELLANT CONCEPT CONSTRUCTION  
CORPORATION AND THIRD-PARTY DEFENDANT-APPELLANT.

CAPEHART & SCATCHARD, P.A., ELMIRA (MATTHEW R. LITT OF COUNSEL), FOR  
DEFENDANT-APPELLANT INDUSTRIAL POWER AND LIGHTING CORP.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR  
THIRD-PARTY PLAINTIFF-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL),  
FOR PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered July 13, 2011 in a personal injury action. The order, insofar as appealed from, denied the motions of Concept Construction Corporation and Industrial Power and Lighting Corp. for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Bethanne M. Hahn (plaintiff) while shopping at a supermarket owned by defendant-third-party plaintiff Tops Markets, LLC (Tops). Plaintiff was injured when she was pushing a shopping cart

down an aisle and a front wheel on the cart became stuck in a small hole in the floor. The hole in the floor was an uncovered electrical box that plaintiff did not see before the accident. When the wheel got caught in the hole, the cart abruptly stopped and began to tip over. Plaintiff allegedly injured her shoulder and back when she grabbed the cart to prevent its contents from spilling onto the floor. Although the store was undergoing significant renovations during the time period surrounding the accident, no work was being performed at the time the accident occurred, i.e., on the weekend. Defendant-third-party defendant Concept Construction Corporation (Concept) was the general contractor hired by Tops for the renovation project, defendant Industrial Power and Lighting Corp. (Industrial) was a subcontractor hired by Concept to perform electrical work and defendant Antonicelli Const., Inc. (Antonicelli) was a contractor hired directly by Tops to remove and replace aisle shelving. Tops commenced a third-party action against Concept seeking indemnification.

Following discovery, Concept moved for summary judgment dismissing the amended complaint and all cross claims against it and the third-party complaint, contending that it owed no duty of care to plaintiff and that its conduct was not the proximate cause of her injuries. Industrial also moved for summary judgment dismissing the amended complaint and all cross claims against it on the ground that its conduct was not the proximate cause of plaintiff's injuries. According to both Concept and Industrial, Antonicelli was solely responsible for the uncovered electrical box. In support of its motion, Concept argued that, because Tops hired Antonicelli and Concept did not supervise or control Antonicelli's work, Concept could not be held liable for injuries caused by the negligence of Antonicelli. Concept and Industrial appeal from an order insofar as it denied their motions. We affirm.

Even assuming, arguendo, that Industrial established its entitlement to judgment as a matter of law, we conclude that plaintiff submitted sufficient evidence in opposition to Industrial's motion to raise an issue of fact whether Industrial, rather than Antonicelli, was responsible for leaving the electrical box uncovered (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). The evidence submitted by plaintiff also raised issues of fact regarding which party was responsible for ensuring that the electrical box was covered and which party was responsible for ensuring that the area in question was free from dangerous conditions. We reject Industrial's contention that Supreme Court erred in denying its motion on the ground that its conduct was not the proximate cause of the accident. We note that, " '[a]s a general rule, issues of proximate cause[, including superceding cause,] are for the trier of fact' " (*Bucklaew v Walters*, 75 AD3d 1140, 1142; see *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312, rearg denied 52 NY2d 784, 829), and this case does not present an exception to the general rule. Although "[t]here are certain instances . . . where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law" (*Derdiarian*, 51 NY2d at 315), here, we conclude that more than one conclusion may be drawn from the

established facts.

We reject Concept's contention that the court erred in denying those parts of its motion for summary judgment dismissing the amended complaint and all cross claims against it on the ground that it owed no duty to plaintiff. We conclude that, although Concept met its initial burden on those parts of the motion, plaintiff raised an issue of fact whether Concept, in failing to ensure that the hole was covered or that the dangerous condition was cured, thereby " 'launche[d] a force or instrument of harm' " (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140), "or otherwise made the construction area 'less safe than before the construction project began,' " and thus owed a duty to plaintiff (*Golisano v Keeler Constr. Co., Inc.*, 74 AD3d 1915, 1916). Finally, we conclude that the court properly denied Concept's motion insofar as it sought summary judgment dismissing the third-party complaint.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

505

**KA 10-01774**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

PARIS SMITH, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ROBERT R. REITTINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered March 17, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree (two counts) and criminal possession of a weapon in the second degree.

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

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

506

**KA 11-02148**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

PARIS SMITH, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ROBERT R. REITTINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered March 17, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

508

**KA 10-01052**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN CIPOLLINA, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered April 14, 2010. The judgment convicted defendant, upon a jury verdict, of reckless endangerment in the second degree, assault in the second degree, unlawful fleeing a police officer in a motor vehicle in the third degree, reckless driving, speeding, failure to obey red light, failure to obey no passing zone and driving without a safety belt.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, reckless endangerment in the second degree (Penal Law § 120.20), assault in the second degree (§ 120.05 [3]), and unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25). We reject the initial contention of defendant that Supreme Court erred in failing sua sponte to order a competency hearing (see *People v Tortorici*, 92 NY2d 757, 765-766, cert denied 528 US 834; *People v Morgan*, 87 NY2d 878, 879-880; see also CPL 730.30 [2]). Shortly after defendant's arrest, the court ordered that defendant undergo a competency examination pursuant to CPL 730.30. Two psychiatrists then independently examined defendant, and each determined that he was not an incapacitated person. Due to concerns raised by defense counsel, the court ordered that defendant undergo another set of competency examinations shortly before trial. The same two psychiatrists again independently determined that defendant was not an incapacitated person. "[I]t is perfectly well settled that a trial court is entitled to give weight to the findings of competency derived from the ordered examinations" (*People v Ferrer*, 16 AD3d 913, 914, lv denied 5 NY3d 788, citing *Morgan*, 87 NY2d at 880; see CPL 730.30 [1]). " Moreover, [we] note[ ] that defense counsel did not request a hearing and, as it has

been observed, [defense] counsel was in the best position to assess defendant's capacity' " (*People v Chicherchia*, 86 AD3d 953, 954, *lv denied* 17 NY3d 952, quoting *Ferrer*, 16 AD3d at 914; see *People v Taylor*, 13 AD3d 1168, 1170, *lv denied* 4 NY3d 836). The court also " 'had the opportunity to interact with and observe defendant . . . , [and thus] the court had adequate opportunity to properly assess defendant's competency' " (*Chicherchia*, 86 AD3d at 954).

Defendant contends that, with respect to his conviction of assault in the second degree (Penal Law § 120.05 [3]), the evidence is legally insufficient to establish that he caused the injuries to the police officer who was struck by another patrol car arriving on the scene after defendant abandoned his vehicle following a high-speed chase and the police officer had pursued defendant on foot. We reject that contention (see *People v Carncross*, 14 NY3d 319, 325-326; see generally *People v Bleakley*, 69 NY2d 490, 495). It is well settled that, "[w]here a defendant's flight naturally induces a police officer to engage in pursuit, and the officer is killed [or injured] in the course of that pursuit, the causation element of the crime will be satisfied" (*Carncross*, 14 NY3d at 325). "Liability will attach even if the defendant's conduct is not the sole cause of [the injuries] . . . if the actions were a sufficiently direct cause of the ensuing [injuries] . . . [A]n act qualifies as a sufficiently direct cause when the ultimate harm should have been reasonably foreseen" (*People v DaCosta*, 6 NY3d 181, 184 [internal quotation marks omitted]). Contrary to defendant's further contention, we conclude that, viewed in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), the evidence at trial is legally sufficient to support the conviction of reckless endangerment in the second degree (see § 120.20; see generally *Bleakley*, 69 NY2d at 495). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

Defendant consented to the annotations on the verdict sheet and thus waived his present contention that the verdict sheet was improperly annotated (see CPL 310.20 [2]; *People v Brown*, 90 NY2d 872, 874; *People v Hicks*, 12 AD3d 1044, 1045, *lv denied* 4 NY3d 799). Additionally, defendant failed to preserve for our review his contention that the count of the indictment charging him with unlawful fleeing a police officer in a motor vehicle was duplicitous (see *People v Sponburgh*, 61 AD3d 1415, 1416, *lv denied* 12 NY3d 929), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We reject the further contention of defendant that he was denied effective assistance of counsel (see generally *People v Caban*, 5 NY3d 143, 152; *People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

509

**KA 09-02301**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSHUA M. PERRIN, DEFENDANT-APPELLANT.

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JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered October 28, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of marihuana in the first degree, criminal possession of marihuana in the second degree and criminal possession of marihuana in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count two of the indictment and imposing a sentence of a determinate term of 2½ years on that count, to run concurrently with the sentences imposed on counts one and three, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of marihuana in the first degree (Penal Law § 221.55), criminal possession of marihuana in the second degree (§ 221.25) and criminal possession of marihuana in the first degree (§ 221.30). Contrary to defendant's contention, the three-year determinate term of imprisonment with two years of postrelease supervision imposed on counts one and three is not unduly harsh or severe. Although defendant does not challenge the legality of the sentence imposed on count two, i.e., a three-year determinate term of imprisonment, we cannot allow that illegal sentence to stand (see *People v VanValkinburgh*, 90 AD3d 1553, 1554). In the interest of judicial economy, we exercise our inherent authority to correct the illegal sentence (see generally *People v Savery*, 90 AD3d 1505, 1505). We therefore modify the judgment by vacating the sentence imposed on count two and imposing a sentence of a determinate term of imprisonment of 2½ years on that count, to run concurrently with the sentences imposed on counts one and three. Because defendant has served the maximum term of 2½ years of imprisonment and has been released from custody, a period of postrelease supervision may not now be imposed on that count (see *People v Williams*, 14 NY3d 198, 217,

*cert denied* \_\_\_ US \_\_\_, 131 S Ct 125).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

512

**KA 10-00326**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES ARMSTRONG, DEFENDANT-APPELLANT.

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CHRISTOPHER J. PELLI, UTICA, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered December 1, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of marihuana in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of marihuana in the third degree (Penal Law § 221.20). We reject defendant's contention that he was improperly permitted to proceed pro se. The record establishes that defendant made a "knowing, voluntary and intelligent waiver of the right to counsel" (*People v Arroyo*, 98 NY2d 101, 103). The record further establishes that defendant adhered to that waiver throughout the proceedings, despite the "'searching inquir[ies]' " by County Court "to make him 'aware of the dangers and disadvantages of self-representation' " and the fact that the court impressed upon him the value of trained trial counsel knowledgeable about criminal law and procedure (*People v Providence*, 2 NY3d 579, 582; see *People v Crampe*, 17 NY3d 469, 481-482). The court properly refused to permit standby counsel, while defendant was proceeding pro se, to conduct jury selection on defendant's behalf (see *People v Brown*, 6 AD3d 1125, 1126, lv denied 3 NY3d 657). "A criminal defendant has no Federal or State constitutional right to hybrid representation . . . While the Sixth Amendment and the State Constitution afford a defendant the right to counsel or to self-representation, they do not guarantee a right to both . . . [, and] a defendant who elects to exercise the right to self-representation is not guaranteed the assistance of standby counsel during trial" (*People v Rodriguez*, 95 NY2d 497, 501).

By failing to move to dismiss the indictment within the five-day statutory period on the ground that he was denied his right to testify

before the grand jury (see CPL 190.50 [5] [c]; *People v Ray*, 27 AD3d 1056, 1057, *lv denied* 7 NY3d 761), defendant thus waived his right to testify before the grand jury and his contention that the indictment should have been dismissed based on the denial of his right to testify before the grand jury lacks merit (see *Ray*, 27 AD3d at 1057). Finally, the conclusory allegations made by defendant in support of his suppression motion were not sufficient to warrant a hearing, and the court properly summarily decided the motion (see CPL 710.60 [3] [b]; *People v Haskins*, 86 AD3d 794, 795-796, *lv denied* 17 NY3d 903; see also *People v Jeffreys*, 284 AD2d 550, *lv denied* 99 NY2d 536; *People v Gadsden*, 273 AD2d 701, 701-702, *lv denied* 95 NY2d 934).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

513

**KA 10-01978**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY BAKER, DEFENDANT-APPELLANT.

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NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (MARSHALL A. KELLY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered January 19, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed shall all run concurrently and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of three counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that County Court erred in directing that the sentences imposed on counts two and three shall run concurrently with each other but consecutively to the sentence imposed on count one. We agree. Defendant was convicted of possessing three weapons, i.e., a rifle (count one) and two knives (counts two and three), on a specified date in Village Park in Warsaw with the intent to use those weapons unlawfully against two of his siblings. Because "defendant possessed [the weapons] at the same place and time, with the intent to use them unlawfully against the same victim[s], . . . the offenses arose from the same act, [and thus] concurrent sentences should have been imposed" (*People v Cleveland*, 236 AD2d 802, lv denied 89 NY2d 1033; see *People v Williams*, 144 AD2d 1012, 1012, lv denied 73 NY2d 984; see also *People v Taylor*, 197 AD2d 858, 859). We therefore modify the judgment accordingly.

We reject defendant's contention that the court erred in failing to address the constitutionality of his 1997 conviction of driving while intoxicated, which conviction elevated the crimes with which he was charged from criminal possession of a weapon in the fourth degree

to criminal possession of a weapon in the third degree. It is well settled that, where there are procedural vehicles for challenging the constitutionality of prior guilty pleas in the courts in which those guilty pleas were entered, a defendant's right to due process is not violated in a subsequent case by the lack of a procedural vehicle for challenging a prior conviction resulting from a guilty plea that serves as the basis for an enhanced charge or sentence (see *People v Knack*, 72 NY2d 825, 826-827). Finally, we reject defendant's contention that the conviction is not supported by legally sufficient evidence (see generally *People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

531

**KA 10-01482**

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER RIPLEY, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 2, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We reject defendant's contention that he did not knowingly, voluntarily and intelligently waive his right to appeal. Contrary to defendant's contention, Supreme Court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Wright*, 66 AD3d 1334, lv denied 13 NY3d 912 [internal quotation marks omitted]). Further, the record as a whole establishes "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; see *People v Korber*, 89 AD3d 1543, 1543). Contrary to defendant's further contention, a "waiver of the right to appeal [is] not rendered invalid based on the court's failure to require [the] defendant to articulate the waiver in his [or her] own words" (*People v Dozier*, 59 AD3d 987, 987, lv denied 12 NY3d 815; see *People v Thompson*, 70 AD3d 1319, 1319-1320, lv denied 14 NY3d 845, 15 NY3d 810; *People v Ludlow*, 42 AD3d 941, 942). In addition, defendant's waiver of the right to appeal is not invalid on the ground that the court did not specifically advise defendant that his general waiver of the right to appeal encompassed any challenge to the severity of the sentence (see *People v Hidalgo*, 91 NY2d 733, 736-737; see generally *People v Eron*, 79 AD3d 1774, 1775; *People v Tanta*, 41 AD3d 1274, 1275, lv denied 9 NY3d 882).

Defendant's contention that the court abused its discretion in denying his request for youthful offender status is encompassed by his valid waiver of the right to appeal (see *People v Farewell*, 90 AD3d 1502, 1502; *People v Harris*, 77 AD3d 1326, lv denied 16 NY3d 743).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

533

**KA 10-02445**

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHEN O. WILLIAMS, JR., DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 4, 2010. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree and sexual abuse in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [2]) and sexual abuse in the third degree (§ 130.55). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19), and he failed to renew that motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury reasonably could have found that defendant engaged in " '[s]exual contact' " when he touched the victim's buttocks (§ 130.00 [3]; *see Matter of Kenny O.*, 276 AD2d 271, 272, *lv denied* 96 NY2d 701; *People v Felton*, 145 AD2d 969, 971, *lv denied* 73 NY2d 1014), and that such touching was "for the purpose of gratifying [defendant's] sexual desire" (§ 130.00 [3]; *see People v Stewart*, 57 AD3d 1312, 1315, *lv denied* 12 NY3d 788, *cert denied* \_\_\_ US \_\_\_, 130 S Ct 1047). With respect to the count charging defendant with sexual abuse in the first degree, the testimony of the victim that she was asleep when defendant began touching her was legally sufficient to establish the element of physical helplessness (*see People v Smith*, 16 AD3d 1033, 1034, *affd* 6 NY3d 827, *cert denied* 548 US 905; *see generally* § 130.00 [7]), even in the absence of evidence that sleep was induced by drug or alcohol use (*see People v Irving*, 151 AD2d 605, 605-606; *see generally People v Manning*, 81 AD3d 1181, 1181-1182). With respect to the count charging defendant with sexual

abuse in the third degree, the People presented legally sufficient evidence that the victim was 16 years old at the time of the incident and thus incapable of consenting (see § 130.05 [2] [b]; [3] [a]).

We reject defendant's further contention that County Court erred in failing to give the jury a missing witness charge with respect to the victim's mother (see generally *People v Kitching*, 78 NY2d 532, 536-537; *People v Gonzalez*, 68 NY2d 424, 427-428). Defendant's request for that charge was untimely because it was not made until both parties had rested, rather than at the close of the People's proof, when defendant became "aware that the witness would not testify" (*People v Hayes*, 261 AD2d 872, 873, lv denied 93 NY2d 1019, 1021). In any event, we conclude that the People demonstrated that the victim's mother was unavailable (see generally *Kitching*, 78 NY2d at 536-537), inasmuch as her "whereabouts [were] unknown and that diligent efforts to locate [her had] been unsuccessful" (*Gonzalez*, 68 NY2d at 428).

Contrary to defendant's contention, he was not deprived of his constitutional right to present a defense when the court barred one of his potential witnesses from testifying concerning certain statements made by the victim's mother. In those statements, the victim's mother allegedly threatened to accuse defendant of the crimes at issue as part of an extortion scheme. The "right to present a defense does not give criminal defendants carte blanche to circumvent the rules of evidence" (*People v Hayes*, 17 NY3d 46, 53, cert denied 132 S Ct 844 [internal quotation marks omitted]). The courts therefore have the discretion to exclude evidence sought to be introduced by a defendant where such evidence is irrelevant or constitutes hearsay, and its probative value is "outweighed by the dangers of speculation, confusion, and prejudice" (*id.* at 54; see *People v Procanick*, 68 AD3d 1756, 1756, lv denied 14 NY3d 844), or where such evidence is "too slight, remote or conjectural to have any legitimate influence in determining the fact in issue" (*People v Martinez*, 177 AD2d 600, 601, lv denied 79 NY2d 829). Finally, the sentence is not unduly harsh or severe.

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

536

CAF 11-01394

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

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IN THE MATTER OF SCOTT HOLTZ,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KATHRYN WEAVER, RESPONDENT-APPELLANT.

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IN THE MATTER OF KATHRYN WEAVER,  
PETITIONER-APPELLANT,

V

SCOTT HOLTZ, RESPONDENT-RESPONDENT.

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WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR  
RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR PETITIONER-RESPONDENT AND RESPONDENT-  
RESPONDENT.

BERT R. DOHL, ATTORNEY FOR THE CHILD, SALAMANCA, FOR HAYLEY H.

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Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered June 13, 2011 in proceedings pursuant to Family Court Act article 6. The order, inter alia, denied the cross petition of Kathryn Weaver for relocation to Florida.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, denied her cross petition seeking to modify the custody and visitation provisions of the judgment of divorce by granting permission for the parties' child to relocate with her to Florida. We affirm. "A parent seeking permission for a child to relocate with him or her has the burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests" (*Matter of Murphy v Peace*, 72 AD3d 1626, 1626; see *Matter of Tropea v Tropea*, 87 NY2d 727, 741). In assessing a parent's request to relocate, the relevant factors include "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced

economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*Tropea*, 87 NY2d at 740-741).

Here, we conclude that the Referee properly considered the factors set forth in *Tropea* and determined that the mother did not meet her burden of establishing that the proposed relocation is in the child's best interests (see *Matter of Webb v Aaron*, 79 AD3d 1761, 1761; *Murphy*, 72 AD3d at 1626-1627; *Matter of Seyler v Hasfurter*, 61 AD3d 1437). Although the mother's reason for moving, i.e., to assist in caring for the ill maternal grandfather, is valid, our "primary focus must be on the best interests of the child[]" (*Matter of Confort v Nicolai*, 309 AD2d 861, 861; see *Tropea*, 87 NY2d at 738-739). The Referee determined that the mother failed to establish that the lives of the mother and the child would be "enhanced economically[ or] educationally by the move" (*Tropea*, 87 NY2d at 741), and that determination has a sound and substantial basis in the record (see *Webb*, 79 AD3d at 1761; *Murphy*, 72 AD3d at 1626-1627).

The Referee also properly determined that the child's relationship with petitioner-respondent father would be adversely affected by the proposed relocation (see *Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347; *Webb*, 79 AD3d at 1761-1762; *Seyler*, 61 AD3d 1437). "While the relocation of a child outside of the geographic area where the noncustodial parent resides is not presumptively against the child's best interests, 'the impact of the move on the relationship between the child and the noncustodial parent will remain a central concern' " (*Matter of Dukes v McPherson*, 50 AD3d 1529, 1530, quoting *Tropea*, 87 NY2d at 739). Here, the Referee found that the child and the father have a strong relationship and that the father is very active in the child's life, and the Referee expressed "grave doubts about the parties' ability to sustain the quality of the father-daughter relationship if [the child] relocates to Florida." Although the Attorney for the Child indicated to the Referee that the child wished to move to Florida, the Referee properly concluded that the child's wishes are not determinative (see *Matter of Marino v Marino*, 90 AD3d 1694, 1695-1696; *Matter of Thomas v Thomas*, 79 AD3d 1829, 1830), particularly in light of her young age (see *Matter of Seymour v Seymour*, 267 AD2d 1053, lv denied 95 NY2d 761; *Matter of Graci v Graci*, 187 AD2d 970, 973; *Fox v Fox*, 177 AD2d 209, 211).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

544

CA 10-02493

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

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IN THE MATTER OF THE STATE OF NEW YORK,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DERRICK HARLAND, RESPONDENT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 29, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. Contrary to respondent's contention, we conclude that petitioner established by clear and convincing evidence at the dispositional hearing that he is a dangerous sex offender requiring confinement (see § 10.03 [e]; § 10.07 [f]). Supreme Court "was 'in the best position to evaluate the weight and credibility of the conflicting psychiatric testimony presented' " (*Matter of State of New York v Blair*, 87 AD3d 1327, 1327; see *Matter of State of New York v Richard W.*, 74 AD3d 1402, 1404; *Matter of State of New York v Timothy J.*, 70 AD3d 1138, 1144-1145). We see no basis upon which to disturb the court's determination to credit the testimony of petitioner's expert over that of the expert who testified on behalf of respondent (see *Matter of State of New York v Boutelle*, 85 AD3d 1607, 1607; see also *Matter of State of New York v Flagg* [appeal No. 2], 71 AD3d 1528, 1530).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

553

**KA 11-00095**

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY C. JACKSON, JR., DEFENDANT-APPELLANT.

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PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered December 14, 2010. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the second degree, criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of one count each of criminal sale of a controlled substance in the second degree (Penal Law § 220.41 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]), and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). The conviction arises out of defendant's sale of cocaine to a police informant on two separate occasions on a single day. Defendant rejected a plea offer that would have subjected him to a local sentence of one year in jail, and the matter proceeded to a trial that resulted in a hung jury. Defendant thereafter was convicted of the above crimes following a retrial.

We reject defendant's contention that County Court's pretrial *Molineux* ruling constitutes an abuse of discretion (see *People v Molineux*, 168 NY 264). The court thereby denied the People's request to admit evidence of a prior uncharged drug sale by defendant to the informant, but ruled that such evidence could be admitted if defendant opened the door to it at trial. Although evidence of the prior uncharged drug sale was not admitted at trial, defendant asserts that he would have testified if not for the court's improper conditional ruling. We conclude that the court's ruling was proper (see *People v Rojas*, 97 NY2d 32, 36-38; *People v Cimino*, 49 AD3d 1155, 1156, lv denied 10 NY3d 861; *People v Ortiz*, 259 AD2d 979, 980, lv denied 93

NY2d 1024). We further conclude that the court properly allowed the People to introduce evidence at trial that defendant had offered to pay the informant \$5,000 if the informant did not testify at the retrial. It is well settled that "[e]vidence that a defendant attempted to procure false testimony or to corrupt a witness is generally admissible as evidence of consciousness of guilt" (*People v Violante*, 144 AD2d 995, 996, *lv denied* 73 NY2d 897, citing *People v Davis*, 43 NY2d 17, 26, *cert denied* 435 US 998, *rearg dismissed* 61 NY2d 670; see *People v Hendricks* [appeal No. 1], 4 AD3d 798, 799, *lv denied* 2 NY3d 800).

Defendant further contends that the court should have precluded three police officers from offering identification testimony at trial based on the People's failure to comply with the notice requirements of CPL 710.30. That contention is unpreserved for our review (see CPL 470.05 [2]; *People v Pagan*, 248 AD2d 325, *affd* 93 NY2d 891), and in any event lacks merit. CPL 710.30 applies to " 'in-court identifications predicated on earlier police-arranged confrontations between a defendant and an eyewitness, typically involving the use of lineups, showups or photographs, for the purpose of establishing the identity of the criminal actor' " (*People v Gee*, 286 AD2d 62, 72, *affd* 99 NY2d 158, *rearg denied* 99 NY2d 652, quoting *People v Gissendanner*, 48 NY2d 543, 552; see generally *People v Peterson*, 194 AD2d 124, 128, *lv denied* 83 NY2d 856). Where, as here, "there has been no pretrial identification procedure and the defendant is identified in court for the first time, the defendant is not [thereby] deprived of a fair trial because [defendant] is able to explore weaknesses and suggestiveness of the identification in front of the jury" (*People v Madison*, 8 AD3d 956, 957, *lv denied* 3 NY3d 709 [internal quotation marks omitted]).

Defendant failed to preserve for our review his contention that the People improperly attempted to elicit identification testimony from a person present when the drug sales took place (see CPL 470.05 [2]). We note in any event that the witness in question did not in fact make an in-court identification of defendant. Defendant also failed to preserve for our review his contention that the court punished him for exercising his constitutional right to a trial by sentencing him to five years in prison rather than to the one year in jail offered during pretrial plea negotiations (see *People v Brink*, 78 AD3d 1483, 1485, *lv denied* 16 NY3d 742, 828; *People v Dorn*, 71 AD3d 1523, 1523-1524). In any event, as the Court of Appeals has noted, "a State may encourage a guilty plea by offering substantial benefits, notwithstanding the fact that every such instance is bound to have the concomitant effect of discouraging a defendant's assertion of his trial rights" (*People v Pena*, 50 NY2d 400, 411-412, *rearg denied* 51 NY2d 770, *cert denied* 449 US 1087). Here, our "review of the record shows no retaliation or vindictiveness against the defendant for electing to proceed to trial" (*People v Shaw*, 124 AD2d 686, 686, *lv denied* 69 NY2d 750). Nor is the sentence unduly harsh or severe. Although the court could have imposed consecutive sentences totaling 19 years of imprisonment on the two counts of criminal sale of a controlled substance, the court instead imposed concurrent sentences

with a maximum of 5 years of imprisonment. We also note that defendant refused to accept responsibility for his crimes and that, while these charges were pending, he was convicted of other criminal charges in Bronx County.

We further conclude that the court did not err in allowing the People to introduce audio recordings of the controlled buys. Although portions of the recordings are less than clear, they are not "so inaudible and indistinct that the jury would have to speculate concerning [their] contents" and would not learn anything relevant from them (*People v Cleveland*, 273 AD2d 787, 788, lv denied 95 NY2d 864; see *People v Rivera*, 257 AD2d 172, 176, affd 94 NY2d 908). Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

554

**KA 09-00167**

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT J. LAW, DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (DAVID M. PARKS OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Ontario County Court (Craig J. Doran, J.), entered December 15, 2008. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act following a redetermination hearing.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he should not have been assessed 10 points under risk factor 1, for the use of forcible compulsion (*see generally People v Smith*, 17 AD3d 1045, *lv denied* 5 NY3d 705). In any event, that contention lacks merit inasmuch as defendant pleaded guilty to sexual abuse in the first degree under Penal Law § 130.65 (1), a necessary element of which is that he acted with forcible compulsion. Because “[f]acts previously . . . elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated” for purposes of a SORA determination (Correction Law § 168-n [3]), County Court properly assessed points for the use of forcible compulsion.

Defendant further contends that the court erred in assessing 25 points under risk factor 2 on the ground that he engaged the victim in sexual contact consisting of “sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual abuse.” We reject that contention. The court’s finding under that risk factor was based on the victim’s statement to the police, in which she indicated that one of the instances of abuse by defendant involved an act of sexual intercourse. The court was required to review the victim’s statement (*see* Correction Law § 168-n [3]), and thus the court received the

requisite clear and convincing evidence to support the assessment of 25 points under risk factor 2 (see generally *id.*). To the extent that defendant contends that the absence of any indicted charges alleging acts of intercourse constituted "strong evidence that [such] offense [conduct] did not occur" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 5 [2006]), we note that defendant could not have been charged for such conduct in New York because it allegedly occurred in Texas (see CPL 20.20).

Because defendant's evidentiary objection to a letter written by the victim was made on a different ground than the "unreliable hearsay" ground he raises on appeal, his contention that the court erred in admitting that letter in evidence is not preserved for our review. In any event, defendant's present contention lacks merit. The court was required to consider the letter because it constituted a "victim's statement" within the meaning of Correction Law § 168-n (3). Moreover, the letter constituted "reliable hearsay" (*id.*) because, although it was unsworn, it was not "equivocal, inconsistent with other evidence, or . . . dubious in light of other information in the record" (*People v Mingo*, 12 NY3d 563, 577). Indeed, inasmuch as the letter was a "victim's statement" and "reliable hearsay," the court was not "free to disregard it" (*id.*; see § 168-n [3]).

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

559

**KA 09-00322**

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY JOHNSON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered December 3, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Defendant contends that, because the jury acquitted him of attempted robbery in the first degree (§§ 110.00, 160.15 [3]), the verdict with respect to the weapons offense necessarily is repugnant and thus is against the weight of the evidence. We reject that contention. The crime occurred shortly before midnight outside a nightclub in Syracuse. The victim, a Chief Warrant Officer in the United States Army, testified at trial that defendant approached him in the parking lot and, after flashing what appeared to be a knife or gun in his jacket, said, "Give me money or I will kill you." The victim refused to comply with defendant's demand and in turn threatened to shoot defendant, who thereupon walked away. When defendant was stopped by the police shortly after being contacted by the victim, he was found to have a large knife in the pocket of his jacket. We conclude with respect to the weapons offense that, based on the victim's testimony, the jury could have found that defendant used the knife "unlawfully against another" (§ 265.01 [2]), i.e., to intimidate the victim, regardless of whether defendant ultimately intended to stab the victim (see *People v Durand*, 188 AD2d 747, 747-748, lv denied 81 NY2d 884). At the same time, the jury could have reasonably found with respect to the attempted robbery charge of which defendant was acquitted that, given the reaction of the victim, defendant's attempt to steal money from

him did not come " 'dangerously close' " to fruition (*People v Lamagna*, 30 AD3d 1052, 1053, *lv denied* 7 NY3d 814).

Defendant's further challenge to the weight of the evidence is based largely upon a challenge to the credibility of the victim, who did not know defendant and had no apparent motive for falsely accusing him of a crime. Although defendant testified at trial that he never approached or spoke to the victim, the jury chose to credit the testimony of the victim over that of defendant, and there is no basis in the record for us to disturb the jury's credibility determinations (see *People v Morgan*, 77 AD3d 1419, 1420, *lv denied* 15 NY3d 922). Viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (see *People v Kalen*, 68 AD3d 1666, 1666-1667, *lv denied* 14 NY3d 842; see generally *Bleakley*, 69 NY2d at 495).

We also reject defendant's remaining contention that he was deprived of effective assistance of counsel. Because, as noted, the verdict is not repugnant, defense counsel cannot be faulted for failing to object to the verdict on that ground before the jury was discharged (see generally *People v Satloff*, 56 NY2d 745, 746, *rearg denied* 57 NY2d 674). It is well settled that an attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152). Although defense counsel erred in attempting to serve the People by fax with defendant's notice of intent to testify before the grand jury (see CPL 190.50 [5] [a]), that error alone does not render his representation ineffective. The "failure of defense counsel to facilitate defendant's testimony before the grand jury does not, per se, amount to the denial of effective assistance of counsel" (*People v Simmons*, 10 NY3d 946, 949). Here, as in *Simmons*, "defendant failed to establish that he was prejudiced by the failure of his attorney to effectuate his appearance before the grand jury" (*id.*).

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

565

CA 11-02418

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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GAIL E. PATTERSON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CENTRAL NEW YORK REGIONAL TRANSPORTATION  
AUTHORITY (CNYRTA) AND CENTRO, INC.,  
DEFENDANTS-APPELLANTS.

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MACKENZIE HUGHES LLP, SYRACUSE (MICHAEL J. LIVOLSI OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

ALEXANDER & CATALANO, LLC, SYRACUSE (PETER J. ADDONIZIO OF COUNSEL),  
FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County  
(Donald A. Greenwood, J.), entered February 9, 2011 in a personal  
injury action. The order, insofar as appealed from, denied the motion  
of defendants for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is  
unanimously reversed on the law without costs, defendants' motion is  
granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for  
injuries she allegedly sustained while riding on a public bus owned  
and operated by defendants. According to plaintiff, she was standing  
in the aisle of the bus when the driver suddenly applied the brakes,  
causing her to lurch forward. Although plaintiff did not fall to the  
ground, she testified at her deposition that she heard something "pop"  
in her right knee when she leaned forward. Plaintiff alleged in her  
bill of particulars that she sustained a fracture of the "proximal  
tibia, laterally, involving the tibial plateau," and underwent  
surgery. The bus driver testified at her deposition that the incident  
occurred when she stopped the bus as it was pulling away from the curb  
after picking up several passengers. The driver applied the brakes in  
order to avoid hitting a boy on a skateboard who "came out of nowhere"  
and rode in front of the bus. According to plaintiff, the bus driver  
operated the bus in a negligent manner, and defendants were  
vicariously liable for her negligence. Following discovery,  
defendants moved for summary judgment dismissing the complaint and for  
dismissal of the complaint for failure to state a cause of action. In  
support of their request for summary judgment, defendants contended  
that the emergency doctrine applied and that the bus driver's actions  
were reasonable under the circumstances. We agree with defendants

that Supreme Court erred in denying the motion insofar as defendants sought summary judgment dismissing the complaint.

Under the emergency doctrine, " 'when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the [driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context' " (*Caristo v Sanzone*, 96 NY2d 172, 174, quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg denied* 77 NY2d 990).

Here, defendants met their initial burden by establishing as a matter of law that the emergency doctrine applied, inasmuch as the boy on the skateboard rode unexpectedly in front of the bus as it was pulling away from the curb and the driver was therefore compelled to apply the brakes suddenly in order to avoid hitting him. In response, plaintiff failed to raise an issue of fact with respect to the applicability of the emergency doctrine or the reasonableness of the driver's actions. Although "it generally remains a question for the trier of fact to determine whether an emergency existed and, if so, whether the [driver's] response thereto was reasonable" (*Schlanger v Doe*, 53 AD3d 827, 828), summary judgment is appropriate where, as here, " 'the driver presents sufficient evidence to establish the reasonableness of his or her actions [in an emergency situation] and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact' " (*McGraw v Glowacki*, 303 AD2d 968, 969; see *Ward v Cox*, 38 AD3d 313, 314). Plaintiff's contentions that the driver could or should have seen the skateboarder earlier or applied the brake less forcefully are based entirely on speculation and thus are insufficient to raise an issue of fact to defeat the motion (see generally *Bellassai v Roberts Wesleyan Coll.*, 59 AD3d 1125, 1126).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

570

**CA 11-00923**

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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IN THE MATTER OF JEFFREY TAMSEN,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

OLIVIA A. LICATA, DIRECTOR, CITY OF BUFFALO  
DEPARTMENT OF HUMAN RESOURCES, CIVIL SERVICE  
DIVISION, AND CITY OF BUFFALO,  
RESPONDENTS-APPELLANTS.

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DAVID RODRIGUEZ, ACTING CORPORATION COUNSEL, BUFFALO (CINDY T. COOPER  
OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Gerald J. Whalen, J.), dated April 14, 2011 in a proceeding pursuant to CPLR article 78. The judgment, among other things, denied the motion of respondents to dismiss the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the determination that found him to be ineligible for appointment as a firefighter in respondent City of Buffalo (City) based on his failure to satisfy the residency requirements set forth in Rule 10 of the City's Classified Civil Service Rules (hereafter, Rule 10). The relevant underlying facts are not in dispute. Petitioner owned and resided in a two-family residence located in the City for approximately seven years prior to applying for a position as a City firefighter in March 2008. Petitioner thereafter passed a civil service test administered by the City and was placed on the eligibility list to become a firefighter. In May 2009, while still on the eligibility list but before his appointment as a firefighter, petitioner and his wife purchased a residence in the Town of Amherst. On September 4, 2009, petitioner was appointed to the position of firefighter and began training at the Firefighter Academy (Academy). While at the Academy, however, petitioner sustained an injury that prevented him from completing the necessary training. In April 2010, the City informed petitioner that he was being reinstated to the eligibility list, that he would be appointed as a firefighter, and

that he would begin training again at the next Academy class, scheduled to commence on April 18, 2011. On March 21, 2011, however, the City notified petitioner that it was "disqualifying" him from eligibility for appointment as a firefighter based upon his failure to meet the residency requirements of Rule 10. After his administrative appeal was denied, petitioner commenced this proceeding seeking a judgment directing respondent Olivia A. Licata, Director, City of Buffalo Department of Human Resources, Civil Service Division, and the City (collectively, City) to restore him to the eligibility list and to enroll him in the training Academy scheduled for April 18, 2011.

The City filed a pre-answer motion to dismiss, contending that the petition failed to state a cause of action and that the City's determination to disqualify petitioner was not arbitrary or capricious. The City offered various items of evidence in support of the motion, and petitioner in turn offered evidence in opposition thereto. Following oral argument, the court denied the motion and directed the City to restore petitioner to the eligibility list and enroll him in the Academy class scheduled for April 18, 2011. The court ruled that the City's determination that petitioner failed to comply with Rule 10 was arbitrary and capricious. We affirm.

We note at the outset that the City relied exclusively on Rule 10 of its Classified Civil Service Rules to disqualify petitioner. Although counsel for the City referred during oral argument in Supreme Court to the more onerous residency requirement set forth in the examination announcement, the written notice of disqualification sent to petitioner cited only Rule 10, and the court's decision was based solely on the applicability of Rule 10. In fact, in its brief on appeal the City refers to Rule 10 and not the residency requirements of the examination announcement. Thus, as the court determined, the issue presented is whether the City's determination that petitioner failed to comply with Rule 10 was arbitrary and capricious.

Rule 10 provides that "[a]n applicant for any open competitive position must reside and be domiciled within the corporate limits of the City of Buffalo on the date of his or her application for examination or appointment, as the case may be, except as may be otherwise provided by law." The rule further provides that, "[i]n the absence of clear and convincing evidence to the contrary, an applicant shall be deemed a non-resident if he or she cannot show ninety (90) days of continuous and uninterrupted residence within the corporate limits of the City . . . immediately preceding the date of his or her application for examination or appointment as the case may be."

Here, there is no dispute that petitioner was a City resident when he applied for the firefighter position in March 2008, and that he had been a City resident for at least 90 days without interruption prior to the date of his application. This case, however, turns on whether petitioner was a City resident for 90 days immediately preceding the date of his "appointment." The court used April 18, 2011 as the date of petitioner's appointment, inasmuch as that is the date on which he was scheduled to begin training at the Academy. Notably, the City does not contend on appeal that the court erred in

selecting April 18, 2011 as the date of appointment for purposes of applying Rule 10. It thus follows that petitioner, to comply with Rule 10, must have been a City resident from January 18, 2011 through April 18, 2011, without interruption. As the court determined, the City produced no evidence indicating that petitioner lived outside the City during that relevant time period. Instead, the City's evidence tended to show that petitioner may have lived in the Town of Amherst at some time between the date of his application in March 2008 and January 18, 2011.

In support of its motion to dismiss, the City's attorney argued that petitioner was properly disqualified because he failed to maintain a continuous residence from the date of his application in March 2008 until the date of his appointment in April 2011. Rule 10, however, does not require petitioner to maintain continuous residence within the City from the date of application to the date of appointment; it requires petitioner to maintain residence for 90 days prior to the date of application or the date of appointment, as the case may be. He satisfied that requirement on both counts. First, with respect to the 90-day application requirement, it is undisputed that petitioner resided in the City before his application in March 2008, inasmuch as he did not purchase the residence in Amherst until May 2009. Second, with respect to the 90-day appointment requirement, as the court properly determined, the City presented no evidence that petitioner did not reside in the City from January 18, 2011 to April 18, 2011. Although the examination announcement stated that applicants must maintain continuous residence within the City from the date of application to the date of appointment, as noted the City did not rely on the notice set forth in the examination announcement to disqualify petitioner. We therefore agree with the court that the City's determination to disqualify petitioner based on his purported failure to comply with Rule 10 was arbitrary and capricious. Even assuming, arguendo, that petitioner maintained dual residences during the 90 days immediately prior to his appointment, we conclude that the evidence nevertheless established that he was domiciled in the City and that the evidence did not establish that petitioner evinced "a present, definite and honest purpose to give up the old and take up the new place as [his] domicile" (*Matter of Newcomb*, 192 NY 238, 251).

We reject the City's contention that the court erred in refusing to allow it to file an answer after denying its motion to dismiss. Where, as here, "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer," a court may grant the relief requested in the petition without permitting an answer to be filed (*Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 102). Finally, we reject the contention of the City that the court lacked the authority to order petitioner's reinstatement as a firefighter. By ordering petitioner to be reinstated, the court was merely restoring petitioner to the same position before the City made its arbitrary and capricious administrative determination.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

578

**KA 10-02115**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRIAN K. BELL, JR., DEFENDANT-APPELLANT.

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WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 16, 2008. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [3]). As the People correctly concede, defendant's waiver of the right to appeal is invalid because County Court did not ensure "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256). Although defendant's contention that the court abused its discretion in failing to adjudicate him a youthful offender is not encompassed by the invalid waiver of the right to appeal, we nevertheless reject that contention. " 'The determination . . . whether to grant . . . youthful offender status rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Dawson*, 71 AD3d 1490, 1490, lv denied 15 NY3d 749). Here, the record reflects that the court considered the relevant facts and circumstances in denying defendant's request for youthful offender status, including the mitigating factors cited by defense counsel at sentencing. Although a contrary ruling would not have been unreasonable, we cannot conclude that the court abused its discretion in denying defendant's request.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

580

**KA 10-01437**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICKY BENNETT, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 8, 2010. The judgment convicted defendant, upon a jury verdict, of arson in the third degree and attempted arson in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of arson in the third degree (Penal Law § 150.10 [1]) and attempted arson in the third degree (§§ 110.00, 150.10 [1]). We reject defendant's contention that Supreme Court erred in admitting in evidence a tape-recorded conversation between defendant and his former fiancée. Contrary to defendant's contention, the People laid a proper foundation for the admission in evidence of that recording (see *People v Hurlbert*, 81 AD3d 1430, 1431, *lv denied* 16 NY3d 896; see generally *People v Ely*, 68 NY2d 520, 527), and the court did not abuse its discretion in concluding that the recording was sufficiently audible to warrant its admission in evidence (see *People v Cleveland*, 273 AD2d 787, 788, *lv denied* 95 NY2d 864). Defendant's further contention that the court erred in admitting in evidence the recording of a jailhouse telephone call between defendant and his girlfriend is not preserved for our review (see generally *People v Jacquin*, 71 NY2d 825, 826-827), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We reject the contention of defendant "that the court failed to make an appropriate inquiry into his complaints concerning defense counsel and in response to his request for substitution of counsel. Defendant 'did not establish a serious complaint concerning defense counsel's representation and thus did not suggest a serious

possibility of good cause for substitution [of counsel]' " (*People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857; *see generally People v Moore*, 41 AD3d 1149, 1150-1151, *lv denied* 9 NY3d 879, 992). In any event, inasmuch as defendant did not subsequently express dissatisfaction with defense counsel or renew his request for new counsel, we conclude under the circumstances of this case that his request for substitution of counsel was abandoned (*see People v Ocasio*, 81 AD3d 1469, 1470, *lv denied* 16 NY3d 898, *cert denied* \_\_\_ US \_\_\_, 132 S Ct 318).

We also reject the contention of defendant that the court erred in denying that part of his second omnibus motion seeking to sever the counts of the indictment. We conclude that the counts were properly joined inasmuch as "they are 'defined by the same or similar statutory provisions and consequently are the same or similar in law' " (*People v Davis*, 19 AD3d 1007, 1007, *lv denied* 21 AD3d 1442; *see* CPL 200.20 [2] [c]). Defendant " 'failed to meet his burden of submitting sufficient evidence of prejudice from the joinder to establish good cause to sever' " (*People v Ogborn*, 57 AD3d 1430, 1430, *lv denied* 12 NY3d 786; *see* CPL 200.20 [3]), and the court therefore did not abuse its discretion in denying that part of the second omnibus motion (*see People v Owens*, 51 AD3d 1369, 1370-1371, *lv denied* 11 NY3d 740; *People v Dozier*, 32 AD3d 1346, 1346-1347, *lv dismissed* 8 NY3d 880). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, the sentence is not unduly harsh or severe.

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

583

**KA 10-01433**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN NATER-VAZQUEZ, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered June 9, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 et seq.). Defendant contends that County Court erred in agreeing with the recommendation of the Board of Examiners of Sex Offenders that an upward departure from the presumptive risk level was warranted inasmuch as the court relied upon factors already taken into account by the risk assessment instrument. That contention is raised for the first time on appeal and thus is not preserved for our review (see *People v Staples*, 37 AD3d 1099, lv denied 8 NY3d 813). In any event, defendant's contention lacks merit.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

**584**

**CAF 10-01947**

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

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IN THE MATTER OF DIANE K. MASON-CRIMI,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL J. CRIMI, SR., RESPONDENT-RESPONDENT.  
(APPEAL NO. 1.)

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TIMOTHY R. LOVALLO, BUFFALO, FOR PETITIONER-APPELLANT.

RANDY S. MARGULIS, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

RONALD M. CINELLI, ATTORNEY FOR THE CHILD, BUFFALO, FOR MICHAEL J.C.,  
JR.

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Appeal from an order of the Family Court, Erie County (Debra L. Givens, A.J.), entered September 14, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition to modify a prior order of custody and visitation.

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

Memorandum: Petitioner mother commenced the first of these consolidated proceedings seeking to modify a prior order of custody and visitation by awarding her sole custody of the parties' child. According to the mother, respondent father violated the prior order, pursuant to which he had sole custody of the child, by interfering with her visitation rights and restricting her telephone access to the child. The mother further alleged that the child wished to live with her. The mother commenced the second proceeding alleging that the father wilfully violated the visitation and access provisions of the prior order. Following an evidentiary hearing, Family Court slightly modified the mother's visitation schedule but denied her request for sole custody of the child. With respect to the violation petition, the court stated in its decision that the father "failed to provide counseling for the child," as required by the prior order, but that such violation "is not a basis for a change in custody in this case, rather it is the basis for a finding that [the father] did indeed violat[e] that provision of the [prior order]." The court added that the father's continued violation of the prior order in that regard "would mitigate against his continued appropriateness as a custodial parent."

As limited by her brief in appeal No. 1, the mother appeals from the order in the first proceeding insofar as it denied her request for sole custody of the child. In appeal No. 2, the mother appeals from the order in the second proceeding that did not indicate whether the petition was granted but, rather, merely stated that the court's decision was incorporated therein.

We reject the mother's contention in appeal No. 1 that the court's determination to maintain custody with the father is against the weight of the evidence. "It is well established that alteration of an established custody arrangement will be ordered only upon a showing of a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Carey v Windover*, 85 AD3d 1574, 1574, *lv denied* 17 NY3d 710 [internal quotation marks omitted]). Here, the evidence amply supports the court's determination that the mother failed to establish a change of circumstances sufficient to warrant a modification of custody. There is no merit to the mother's contention in each appeal that the court erred in failing to sanction the father for violating the counseling provisions of the prior order. We note that neither petition filed by the mother alleged that the father violated the prior order by failing to arrange for counseling for the child. Instead, the petitions alleged that the father violated the visitation and access provisions of the prior order, and the court properly determined that the mother failed to prove such violations. In addition, it is not clear from the order in appeal No. 2 whether the court held the father in contempt of court. Even assuming, *arguendo*, that the court determined that the father had violated the order in a manner not alleged by the mother, we conclude that the court did not improvidently exercise its discretion in declining to sanction the father by fine or imprisonment (*see Kulhan v Courniotes*, 209 AD2d 383, 384). "The court's admonition to [the father] was sufficient in this instance" (*Matter of Palacz v Palacz*, 249 AD2d 930, 931, *lv dismissed* 92 NY2d 920).

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

585

**CAF 10-01948**

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

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IN THE MATTER OF DIANE K. MASON-CRIMI,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL J. CRIMI, SR., RESPONDENT-RESPONDENT.  
(APPEAL NO. 2.)

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TIMOTHY R. LOVALLO, BUFFALO, FOR PETITIONER-APPELLANT.

RANDY S. MARGULIS, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

RONALD M. CINELLI, ATTORNEY FOR THE CHILD, BUFFALO, FOR MICHAEL J.C.,  
JR.

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Appeal from an order of the Family Court, Erie County (Debra L. Givens, A.J.), entered September 14, 2010 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, did not sanction respondent for an alleged violation of a prior order.

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

Same Memorandum as in *Matter of Mason-Crimi v Crimi* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Apr. 27, 2012]).

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

586

CA 11-02241

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

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TIMOTHY VOIGT, DOING BUSINESS AS V-CON COMPANY,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SAVARINO CONSTRUCTION CORPORATION,  
DEFENDANT-RESPONDENT.

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LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK J. MACKEY OF  
COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered May 18, 2011 in a breach of contract action. The order denied without prejudice the motion of plaintiff for summary judgment and granted the motion of defendant for leave to amend its response to plaintiff's notice to admit.

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

Memorandum: Plaintiff appeals from an order that denied his motion for, inter alia, summary judgment on the amended complaint and granted the motion of defendant for leave to amend its response to plaintiff's notice to admit. Contrary to plaintiff's contention, Supreme Court did not abuse its discretion in granting defendant leave to amend its responses to the notice to admit. Pursuant to CPLR 3123 (a), "a party may serve upon any other party a written request for admission by the latter of the . . . truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial . . ." The statute further provides that "the court, at any time, may allow a party to amend or withdraw any admission on such terms as may be just" (CPLR 3123 [b]). Here, "[i]n view of the underlying purpose of the notice to admit—to eliminate from dispute those matters about which there can be no controversy' . . . —we discern no abuse of discretion in [the court's determination]" (*Webb v Tire & Brake Distrib., Inc.*, 13 AD3d 835, 838). "A notice to admit which goes to the heart of the matters at issue is improper . . . Also, the purpose of a notice to admit is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial" (*DeSilva v Rosenberg*, 236 AD2d 508, 508-509; see *Sagiv v Gamache*, 26

AD3d 368, 369; *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 324). Here, we agree with the court that plaintiff sought admissions to matters that were at the heart of the controversy, and that plaintiff was using the notice to admit in place of other discovery devices. Further, "plaintiff could not have reasonably believed that the admissions which [he] sought . . . would not be in 'substantial dispute at the trial' as they were identical to certain allegations in [the] complaint and were denied by [defendant] in its answer" (*Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770, 772; see also *Cazenovia Coll. v Patterson*, 45 AD2d 501, 504).

We reject the further contention of plaintiff that the court erred in denying his motion for summary judgment without prejudice to renew upon the completion of discovery. "Where, as here, 'the facts essential to opposing [plaintiff's] motion may exist but cannot be stated without conducting discovery of employees of [plaintiff] and others, the court [properly denied] the motion pursuant to CPLR 3212 (f)' " (*Brown v Krueger*, 13 AD3d 1182, 1182-1183).

We have considered plaintiff's remaining contention and conclude that it is without merit.

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

588

CA 11-01869

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

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JEREMY S. GNADE, PLAINTIFF-RESPONDENT,

V

ORDER

SUNBURST OPTICS, INC., DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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WHITEMAN, OSTERMAN & HANNA LLP, ALBANY (WILLIAM S. NOLAN OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (LAURENCE F. SOVIK OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered June 29, 2011 in a breach of contract action. The order, among other things, granted in part plaintiff's motion for partial summary judgment on his first cause of action.

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

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

589

CA 11-01870

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

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JEREMY S. GNADE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SUNBURST OPTICS, INC., DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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WHITEMAN, OSTERMAN & HANNA LLP, ALBANY (WILLIAM S. NOLAN OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (LAURENCE F. SOVIK OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered July 8, 2011 in a breach of contract action. The judgment awarded plaintiff the sum of \$107,627 plus interest, against defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the amount of the award to \$34,156, plus interest commencing April 15, 2010 and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, defendant's alleged breach of contract. According to plaintiff, defendant breached section 3.5 of the "Buy-Sell Agreement" (hereafter, Agreement), which entitled plaintiff, as a shareholder of defendant, to periodic cash distributions from the corporation sufficient to satisfy his federal and state tax liability on corporate income. Supreme Court granted in part plaintiff's motion for partial summary judgment on the cause of action alleging a breach of the Agreement and determined that plaintiff was entitled to judgment in the amount of \$107,627, plus interest. Defendant appeals from a judgment awarding plaintiff that amount.

We agree with defendant that the amount awarded to plaintiff must be reduced. Section 3.5 of the Agreement, titled "Distributions to Pay Federal and State Income Taxes," provides that, "[s]o long as [defendant] is an S-Corporation for federal income tax purposes, [it] shall declare and pay cash distributions to the [s]hareholders (a) on or within [15] days prior to each April 15, June 15, September 15 and January 15, in an amount in each instance equal to one[ ]fourth of the federal and state income tax liabilities on [defendant's] income incurred for the immediately preceding fiscal year, and (b) on or

within [15] days prior to April 15 of each year, in an amount, if any, sufficient to pay each [s]hareholder's federal and state income tax liability on [defendant's] income for the immediately preceding fiscal year, less the amount of the four previous distributions paid to the [s]hareholders pursuant to clause (a) above. For purposes of these computations, each [s]hareholder shall be presumed to be subject to the highest federal and applicable state income tax rates imposed on individuals who are not married." The "immediately preceding fiscal year" at issue here is 2009.

In support of his motion, plaintiff submitted an affidavit and the supporting calculations of a certified public accountant, which established that plaintiff's 2009 taxable income as a shareholder of defendant was \$188,163 and that his total federal and state tax liability for his shareholder income was \$82,628. Thus, under the plain language of the Agreement, plaintiff was entitled to a sum that satisfied his tax liability in the amount of \$82,628. It is undisputed that defendant paid plaintiff \$48,472 of that amount. Thus, plaintiff should have been awarded a sum of \$34,156, plus interest, and we therefore modify the judgment accordingly. We have reviewed defendant's remaining contentions and conclude that they are without merit.

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

591

CA 10-02246

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

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AUGUSTIN MUGABO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.

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AUGUSTIN MUGABO, PLAINTIFF-APPELLANT PRO SE.

DAVID RODRIGUEZ, ACTING CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 1, 2010. The order denied the pro se motion of plaintiff for leave to renew and reargue his prior summary judgment motion and his opposition to defendant's cross motion for summary judgment.

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

Memorandum: Plaintiff appeals from an order denying his pro se motion for leave to renew and reargue his prior motion for summary judgment on the amended complaint and his opposition to defendant's cross motion for summary judgment dismissing the amended complaint. As plaintiff conceded during oral argument on his motion for leave to renew and reargue, he offered no new facts in support thereof. Instead, plaintiff merely argued that Supreme Court had misapprehended the law and therefore reached the wrong conclusion with respect to the prior motion and cross motion. Thus, plaintiff's motion for leave to renew and reargue was actually only a motion for leave to reargue, and it is well settled that no appeal lies from an order denying such a motion (*see Hill v Milan*, 89 AD3d 1458, 1458; *Hilliard v Highland Hosp.*, 88 AD3d 1291, 1292-1293; *Schaner v Mercy Hosp. of Buffalo*, 16 AD3d 1095, 1096). The appeal therefore must be dismissed.

Entered: April 27, 2012

Frances E. Cafarell  
Clerk of the Court

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

597

TP 11-02206

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

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IN THE MATTER OF G&S MANAGEMENT, INC.  
AND GUIDO SCIRRI, PETITIONERS,

V

MEMORANDUM AND ORDER

BARBARA J. FIALA AND NEW YORK STATE DEPARTMENT  
OF MOTOR VEHICLES, RESPONDENTS.

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GARY D. BOREK, LLC, BUFFALO (GARY D. BOREK OF COUNSEL), FOR  
PETITIONERS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI  
OF COUNSEL), FOR RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Tracey A. Bannister, J.], entered September 16, 2011) to review a determination of respondents. The determination, inter alia, suspended petitioners' used car dealer registration and imposed monetary penalties.

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

Memorandum: Petitioners, operators of a used car dealership, commenced this CPLR article 78 proceeding seeking to annul the determination that they violated Vehicle and Traffic Law §§ 417 and 415 (9) (d), as well as 15 NYCRR 78.11 (a) (15) (i), as made applicable by 15 NYCRR 78.11 (b). We reject petitioners' contention that the determination is not supported by substantial evidence (see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). At the vehicle safety hearing before the Administrative Law Judge (ALJ), respondents presented the testimony of an investigator and the complainant concerning the major rear seal oil leak and serious brake and steering defects in the vehicle at the time it was delivered to the complainant. Thus, the vehicle "was in no condition to render satisfactory service upon the public highway" as required by Vehicle and Traffic Law § 417, and petitioners' inspection of the vehicle was patently inadequate to detect those obvious problems (*Matter of Port City Ford-Mercury v Adduci*, 145 AD2d 941). The finding of the ALJ with respect to the violation of that statute therefore is supported by substantial evidence and has a rational basis (see *id.*). Further, petitioners conceded that the complainant was overcharged for the cost of vehicle registration fees, and the

complainant testified at the hearing that petitioners did not provide her with a copy of the Retail Certificate of Sale, i.e., form MV-50, at the time of sale and delivery. We therefore conclude that the determination that they violated Vehicle and Traffic Law § 415 (9) (d) and 15 NYCRR 78.11 (a) (15) (i) is supported by substantial evidence.

We reject petitioners' further contention that, because the vehicle safety hearing was not commenced within the 12 months of the filing of the complaint, dismissal of the charges is required (see 15 NYCRR 127.2 [b] [1]). The time period contained in the regulation is directory rather than mandatory, and a violation thereof does not require dismissal of the charges or annulment of the determination (see *Matter of Dickinson v Daines*, 15 NY3d 571, 575-576).

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