

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

956

KA 13-02023

PRESENT: SMITH, J.P., FAHEY, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GREGORY L. RUSSELL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 4, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [2]), defendant contends that Supreme Court erred in issuing an order of protection in favor of two witnesses (see CPL 530.13 [4] [a]), i.e., the mother of defendant's children and their daughter. As a preliminary matter, we agree with defendant that his waiver of the right to appeal does not preclude us from considering his contention inasmuch as the order of protection was "not a part of the plea agreement" (*People v Lilley*, 81 AD3d 1448, 1448, lv denied 17 NY3d 860), and is not a part of his sentence (see *People v Nieves*, 2 NY3d 310, 316; *People v Tate*, 83 AD3d 1467, 1467). We note, however, that defendant failed to preserve his contention for our review by not objecting at sentencing to the issuance of the order of protection in favor of those two witnesses (see CPL 470.05 [2]; *Nieves*, 2 NY3d at 315-317; *People v Collins*, 117 AD3d 1535, 1535; *People v Loffler*, 111 AD3d 1059, 1060-1061; *People v Sweeney*, 106 AD3d 841, 842). In any event, we conclude that the contention lacks merit (see CPL 530.13 [4] [a]; *People v Wilson*, 115 AD3d 1229, 1229, lv denied 23 NY3d 969).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court