

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

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KA 12-00683

PRESENT: SMITH, 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

ANDREW HAYHURST, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 16, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of 3½ years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and sentencing him to a determinate term of incarceration of seven years. Defendant failed to preserve for our review his contention that the sentence should be vacated because he was sentenced without a complete and accurate updated presentence investigation report (*see People v Gianni*, 94 AD3d 1477, 1478, *lv denied* 19 NY3d 973; *People v Carey*, 86 AD3d 925, 925, *lv denied* 17 NY3d 814; *People v Ruff*, 50 AD3d 1167, 1168). In any event, defendant's contention is without merit. We agree with defendant, however, that the sentence is unduly harsh and severe under the circumstances of this case, and we therefore modify the sentence as a matter of discretion in the interest of justice to a determinate term of imprisonment of 3½ years (*see generally* CPL 470.15 [6] [b]).

Entered: July 19, 2013

Frances E. Cafarell  
Clerk of the Court