

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

947

KA 21-00399

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERIK J. WARREN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sanford A. Church, J.), rendered December 12, 2019. The judgment convicted defendant, upon his plea of guilty, of reckless assault of a child.

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 reckless assault of a child (Penal Law § 120.02). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Martin*, 213 AD3d 1299, 1299-1300 [4th Dept 2023]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Defendant did not preserve his contention regarding the order of protection issued at sentencing (*see People v Nieves*, 2 NY3d 310, 315-317 [2004]; *see generally People v Smart*, 169 AD3d 1525, 1526 [4th Dept 2019]; *People v Foster*, 87 AD3d 299, 301 [2d Dept 2011], *lv denied* 18 NY3d 858 [2011]), 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 [3]; see also People v Storms*, 147 AD3d 1341, 1341 [4th Dept 2017]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court