

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

1048

KA 12-01955

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRADLEE E. BURNS, DEFENDANT-APPELLANT.

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NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (LEAH RENE NOWOTARSKI 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 August 17, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted assault 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 assault in the second degree (Penal Law §§ 110.00, 120.05 [1]). Although "[d]efendant's challenge to the amount of restitution is not foreclosed by his waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement" (*People v Tessitore*, 101 AD3d 1621, 1622, *lv denied* 20 NY3d 1104 [internal quotation marks omitted]; see *People v Miller*, 87 AD3d 1303, 1304, *lv denied* 18 NY3d 926), that contention is unpreserved for our review inasmuch as defendant did not object during the restitution hearing or otherwise alert County Court of his objection (see CPL 470.05 [2]; see also *People v Horne*, 97 NY2d 404, 414 n 3). In any event, we conclude that the People established the amount of restitution by a preponderance of the evidence, and there is no basis to disturb the restitution award (see *People v Lucieer*, 107 AD3d 1611, 1613; see generally CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221).

Entered: November 8, 2013

Frances E. Cafarell  
Clerk of the Court