

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

1182

**KA 12-01678**

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND WHALEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DANA GARNER, DEFENDANT-APPELLANT.

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FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE 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 October 19, 2009. 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]). Contrary to defendant's contention, we conclude that his waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). To the extent that defendant challenges the factual sufficiency of the plea allocution, that challenge is encompassed by the valid waiver of the right to appeal (*see People v Topolski*, 106 AD3d 1532, 1533, *lv denied* 21 NY3d 1020). Although defendant's contention that the plea was not knowingly, voluntarily and intelligently entered survives the valid waiver of the right to appeal (*see People v Theall*, 109 AD3d 1107, 1107-1108), we conclude based upon the record before us that his contention lacks merit (*see generally People v Seeber*, 4 NY3d 780, 781-782).

Entered: November 15, 2013

Frances E. Cafarell  
Clerk of the Court