

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

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KA 06-01216

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MATTHEW GARDNER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 10, 2006. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the second degree, sexual abuse in the third degree and endangering the welfare 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 a jury verdict of, inter alia, criminal sexual act in the second degree (Penal Law § 130.45 [1]). We reject the contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to cross-examine the victim with respect to a prior inconsistent statement she made (*see People v Rodriguez*, 48 AD3d 312, *lv denied* 10 NY3d 939), and we conclude on the record before us that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). To the extent that defendant's contention is based on matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Keith*, 23 AD3d 1133, 1134-1135, *lv denied* 6 NY3d 815).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court