

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

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**KA 08-00379**

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, GREEN, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARK D. SANDS, DEFENDANT-APPELLANT.

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JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered January 7, 2008. The judgment convicted defendant, upon a jury verdict, of use of a child in a sexual performance, promoting an obscene sexual performance by a child, sexual abuse in the third degree, endangering the welfare of a child, unlawfully dealing with a child in the first degree and criminal possession of a weapon in the fourth degree.

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, use of a child in a sexual performance (Penal Law § 263.05). County Court properly refused to suppress the oral and written statements that defendant made to a police investigator. The record of the suppression hearing supports the court's determination that defendant knowingly, voluntarily and intelligently waived his *Miranda* rights before he made those statements (see *People v Shaw*, 66 AD3d 1417, lv denied 14 NY3d 773). Defendant failed to preserve for our review his contention that his statements were elicited after he requested counsel, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see *People v Rumrill*, 40 AD3d 1273, 1274, lv denied 9 NY3d 926). "To the extent that defendant preserved for our review his contention that the conviction is not supported by legally sufficient evidence, we conclude that his contention lacks merit" (*People v Barnard*, 295 AD2d 999, lv denied 98 NY2d 708). Finally, the sentence is not unduly harsh or severe.

Entered: February 10, 2011

Patricia L. Morgan  
Clerk of the Court