

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

1517

KA 09-01367

PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRY JENKINS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 27, 2009. The judgment convicted defendant, upon a nonjury verdict, of predatory sexual assault against a child, sexual abuse in the second 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 nonjury verdict of, *inter alia*, predatory sexual assault against a child (Penal Law § 130.96). Defendant contends that the People unconstitutionally burdened his right to go to trial by charging him with both predatory sexual assault against a child and rape in the first degree (§ 130.35 [4]) and then seeking dismissal of the rape count based on his rejection of the plea offer with respect to that count, which has a less severe sentencing range than the predatory sexual assault count. That contention is not preserved for our review (*see* CPL 470.05 [2]). In any event, it is without merit, and we thus conclude that defense counsel's failure to object to the dismissal of the rape count on that ground did not constitute ineffective assistance of counsel (*see generally* *People v Caban*, 5 NY3d 143, 152).

Finally, the sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court