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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 193 SSM 25
The People &c.,
Respondent,
v.
Shannon M. Kolupa,
Appellant.

Submitted by Esther Cohen Lee, for appellant.
Submitted by Steven G. Cox, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed.
Defendant failed to preserve his argument that the
People introduced insufficient evidence to corroborate the child
victim's testimony. At the close of the People's case, the trial
court denied defendant's motion to dismiss and defendant

proceeded to present his own evidence. He did not thereafter renew the motion to dismiss at the close of his proof or specifically argue that there was not sufficient corroboration of the victim's statements. As a result, this issue is not reviewable (see e.g. People v Lane, 7 NY3d 888, 889 [2006]; People v Payne, 3 NY3d 266, 273 [2004]; People v Hines, 97 NY2d 56, 61-62 [2001]). Defendant's remaining contention is without merit.

People v Kolupa

No. SSM 25

SMITH, J. (concurring):

Today's decision correctly applies People v Hines (97 NY2d 56, 61-62 [2001]). I have expressed my unhappiness with Hines before (People v Payne, 3 NY3d 266, 273 [2004] [R. S. Smith, J. concurring]), but this case, in which the Appellate Division did not mention preservation, defendant does not argue

the issue, and the Appellate Division's decision on the merits seems clearly correct, is not the right one for further examination of the Hines rule.

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On review of submissions pursuant to section 500.11 of the Rules, order affirmed, in a memorandum. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur, Judge Smith in a separate concurring opinion.

Decided September 22, 2009